On Benefit Sharing and the Compensatory Approach to Economic Development Takings

1 Introduction

In this article, I address the compensatory approach to the legitimacy of so-called economic development takings, which involve a commercial entity, often privately owned, benefiting from the State's power to compulsorily acquire property. The first question I discuss has to do with the status of the development project when calculating compensation. Should the award to the owner reflect the commercial value of the development potential, or should this value be disregarded under a so-called "no-scheme" rule?[1]

I start in Section 2 by considering the US debate on the legitimacy of economic development takings. I note, in particular, how some authors have argued that the legitimacy issue can be dealt with using a compensation mechanism that ensures benefit sharing.[2] The broad aim of my article is to shed some light on this suggestion, through a comparative case study.

In Section 3, I present the no-scheme principle, and I note that it is the main obstacle to benefit sharing in practice. The principle is found in many jurisdictions, including the US. However, here I focus on recent case law from the UK, which I use to formulate a normative stance regarding the relationship between the idea of benefit sharing and the no-scheme principle.[3] In particular, I argue that recent developments in the UK illustrate

[1] A no-scheme rule is a rule that is meant to ensure that compensation is calculated without taking into account changes in the property's value that are due to the expropriation, or the scheme underlying it. This terminology is established in the UK, see, e.g., Compulsory Purchase and Compensation: Disregarding the Scheme (Discussion Paper, Law Commission 2001).

[2] See generally Thomas W Merrill, "The Economics of Public Use" (1986) 72 Cornell Law Review 61; Lee Anne Fennell, "Taking Eminent Domain Apart" (2004) 2004 Michigan State Law Review 957; James E Krier and Christopher Serkin, "Public Ruses" (2004) 2004 Michigan State Law Review 859; 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; Benjamin A Householder, "Kelo Compensation: The Future of Economic Development Takings" (2007) 82 Chicago-Kent Law Review 1029.

[3] I believe my comparative approach is justified, as the core idea of the no-scheme principle seems to be largely the same across different jurisdictions. In fact, I am not aware of a single jurisdiction that does not include some rule corresponding to (aspects

that the principle can be interpreted and implemented in a way that does not necessarily block benefit sharing, at least not in economic development cases.

Section 4 starts off the second part of my article, which is devoted to a case study of compensation procedures in Norway, particularly in the context of expropriation of waterfalls for hydropower development. This case study serves two main purposes. First, it is meant to shed light on some concrete issues that may arise when the tension between the no-scheme principle and the need for benefit sharing manifests in concrete cases. Second, and more broadly, the case study sheds some light on the feasibility of achieving fairness *in practice*, according to the normative stance I endorse. My conclusion is somewhat pessimistic. In particular, I believe the case study illustrates inherent weaknesses of the compensatory approach to legitimacy, clearly felt as long as an overarching objective is to achieve meaningful benefit sharing with owners.

Finally, in Section 6, I offer a conclusion. Here I summarize my findings, and argue that we should devote more attention to proposals that move beyond compensatory viewpoints and attempt to formulate institutional *alternatives* to expropriation.

2 The Compensatory Approach to Economic Development Takings

Arguably, the primary distinguishing feature of economic development takings is that they give (private) takers the opportunity to profit commercially at the expense of owners and their communities.[4] This can even be the primary aim of such projects, with the public benefiting only indirectly through potential economic and social ripple effects. Property owners facing condemnation in such circumstances might expect to take a share in the profit resulting from the use of their land. In practice, however, this is rarely achieved through compensation.[5] Instead, a no-scheme rule typically kicks

of) the no-scheme principle. In addition to the jurisdictions discussed in this article, I mention that no-scheme rules are also found in civil law jurisdictions like Germany and the Netherlands, 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, 5,21.

[4]For a small sample of US scholarship on this, see Gregory S Alexander, "Eminent Domain and Secondary Rent-Seeking" (2005) 1(3) New York University Journal of Law & Liberty 958; Laura S Underkuffer, "Kelo's moral failure" (2006) 15(2) William & Mary Bill of Rights Journal 377; Ilya Somin, "Controlling the Grasping Hand: Economic Development Takings after Kelo" English (2007) 15(1) Supreme Court Economic Review 183; Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo" (2009) 93 Minnesota Law Review 2100.

[5]See, e.g., Fennell (n 2) 965-966.

in, resulting in compensation awards that are based on the pre-project value of the property that is being taken.[6]

The policy reasons usually given for no-scheme rules are based on the idea that the public should not have to pay extra due to its own special want of property. After all, one of the main purposes of using the power of eminent domain is to ensure that the public does not have to pay extortionate prices for land when important projects need to be carried out. However, when the expropriation project itself has a commercial flavour, there appears to be a shortage of good policy reasons for excluding its commercial value from consideration when compensation is calculated.

This is especially clear when, as in the US, compensation tends to be based on the market value of the land taken. Why should the taker's prospect of carrying out economic development with a profit be disregarded from the assessment of market value? In fair and friendly transactions among rational agents, one would expect benefit sharing in cases like this. Yet for economic development backed up by eminent domain, no-scheme rules ensure that all the profit goes to the developer. In light of this, some authors have argued that failures of compensation is at the heart of the legitimacy issue, and that worries over the public use restriction in the US Constitution is largely a response to concerns about the "uncompensated increment" of such takings.[7]

I mention that two further problems of compensation have also been identified, that are not related to the notion of benefit sharing. First, the problem of "subjective premium" has been raised, pointing to the fact that property owners often value their own land higher than the market value, for personal reasons.[8] For instance, if a home is condemned, the homeowner will typically suffer costs not covered by market value, such as the cost of moving, including both the immediate "objective" logistic costs as well as more subtle costs, such as the cost of having to familiarize oneself with a new local community. Second, the problem of "autonomy" is also natural to discuss, since an exercise of eminent domain deprives the landowner of her right to decide how to manage her property.[9] However, I think it is doubtful

[6]See, e.g., Robert H Freilich, "Condemnation Blight: Analysis and Suggested Solutions" in *Current Condemnation Law: Takings, Compensation and Benefits* (American Bar Association 2006) 81.

[7]See Fennell (n 2) 962.

[8]ibid, 963.

[9]See ibid, 966-967. For a general personhood building theory of property law, see Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press 1993). For a general economic theory of the subjective value of independence, see Matthias Benz and Bruno S Frey, "Being Independent Is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy" (2008) 75(298) Economica 362. For an even broader, non-individualistic and non-utilitarian, theory of property, based on notions such as *human flourishing* and *social obligation*, see the work of Alexander and others, e.g., Gregory S Alexander and others, "A Statement of Progressive Property" (2009) 94(4) Cornell Law Review 743.

whether compensation can ever be an effective remedy in this regard.

Here I will only consider the challenge of achieving fair benefit sharing. However, I note that achieving fairness in relation to other aspects of value often seem even harder. Hence, setting up a framework for benefit sharing is merely a first step towards a successful compensatory approach to economic development takings. But it is clearly a very significant step, and it has received quite some attention in recent scholarship.

In my opinion, the most interesting suggestion so far is due to Lehavi and Licht.[10] They propose that a new kind of institution should be introduced, called a *Special Purpose Development Corporation* (SPDC). The idea is that owners affected by eminent domain will be given a choice between standard pre-project market value and shares in the SPDC. This company will exist only to implement a specific step in the implementation of the development project, the transaction of the land-rights. The SPDC may choose either to offer their rights on an auction or else negotiate a deal with a designated developer.[11] Hence, the idea is to ensure that the owners are paid a value that reflects the post-project value of the land, but in such a way that the holdout problem is avoided. In particular, the SPDC will have a single task, namely to sell the land for the highest possible price within a given time frame.[12] After the sale is completed, the SPDC will divide the proceeds as dividends and be wound up.[13]

Other suggestions have taken a more static approach to compensation reform, such as proposing to give owners a fixed premium in cases of economic development, or developing mechanisms of self-assessment to ensure that compensation is based on the true value the owner attributes to his own land. A range of such proposals have been made: Merrill proposes 150 % of market value for takings that are deemed to be "suspect", including takings for which the public use requirement raises doubts.[14] Krier and Serkin propose a system that provide compensation for a property's special suitability to its owner, or a system where compensation is based on the court's assessment of post-project value.[15] Fennell proposes a system of self-evaluation of property for takings purposes with tax-breaks given to those who value their property close to market value (to avoid overestimation).[16] Bell and Parchomovsky also propose self-evaluation, but rely on a different mechanism to prevent overestimation; tax liability is based on the self-reported value and no property can be sold by its owner for less than his reported

[10]Lehavi and Licht (n 2).
[11]ibid 1735.
[12]ibid, 1741.
[13]ibid, 1741.
[14]Merrill (n 2) 90-93.
[15]Krier and Serkin (n 2) 865-873.
[16]Fennell (n 2) 995-996.

value.[17]

Compared to such proposals, I think Lehavi and Licht's suggestion is more subtle. However, I think it is appropriate to distinguish between the particularities of their institutional proposal and the conceptual premise that underlies it. In this way, one may address the latter without being sidetracked by objections based on purely practical challenges.

To this end, I assume that the core idea of the SPDC proposal is to regard takings for economic development as a form of compulsory incorporation, a pooling of resources useful in overcoming market failures.[18] Indeed, just as regular corporations are formed to package assets for effective management, so is eminent domain used to assemble property rights in order to facilitate efficient organization of development. In the words of Lehavi and Licht:

> The exercise of eminent domain powers thus resembles an incorporation by the government of all landowners with a view to brining all the critical assets under hierarchical governance. Establishing a corporation for this purpose and transferring land parcels to it thus would be merely a procedural manifestation of the substantive economic reality that already takes place in eminent domain cases.

As soon as we look at the rationale behind economic development takings in this way, any remnants of good policy reasons for ensuring that the developer gets all the profit disappear. The justification for eminent domain in economic development cases only extends to the necessary pooling of resources, it provides no reason to deprive owners of the commercial potential inherent in their land.[19]

This perspective is clear, and in my view very attractive. On the practical side, however, it seems very difficult to come up with a reliable pricing mechanism that truly does justice to the idea. Merely setting up an SPDC seems insufficient, since it provides no guarantee that there will be an *actual*, well-functioning, market for its rights.

In particular, the fact that some development proposal has commercial potential does not by itself ensure that a market will form. Rather, it seems that most cases of eminent domain for economic development arise from land use planning that set up *de facto* development monopolies, by specifying a form of development that is desired by a specific developer. Indeed, the designated developer often takes active part in the planning process, in some cases to the point of being the primary author of the plans.

It seems largely unrealistic to think that other potential developers will be interested in competing for rights that are packaged to facilitate a specific

[17] Bell and Parchomovsky (n 2) 890-900.
[18] Lehavi and Licht (n 2) 1732-1733.
[19] ibid, 1735-1736.

development project undertaken by a specific party.[20] Hence, to work in practice, it seems that the SPDC proposal needs to be accompanied by significant reforms in land use planning procedures. Alternatively, one has to fall back on some discretionary mechanism where appraisers are asked to determine what the price *should be*, or *would have been* if there was a market, taking into account the commercial value of the project in question.

I believe this latter approach is basically unavoidable, at least until one is able to formulate a much more comprehensive account of how to restructure planning to provide better benefit sharing and increased participation rights for affected owners and competing developers. I briefly return to this particular challenge towards the end of my article, but for now I focus on the conceptual premise, namely that the owners should be paid based on their entitlement to a share of the incorporated value of their property rights for the purpose of development. This, in particular, is the crucial idea. Moreover, it seems to directly confront the no-scheme idea.

The next section is devoted to discussing the resulting tension in more depth. I will argue that, contrary to appearances, it is in fact possible to justify benefit sharing in economic development cases in a way that is consistent with (one interpretation of) the no-scheme principle. To do this, I look to the UK, where recent case law on the no-scheme rule seems to suggest an interpretation that remains quite open – in principle, at least – to benefit sharing in cases involving commercial development.

3 The No-Scheme Principle

The no-scheme principle is easy enough to comprehend when it is presented in general terms, as the idea that the effect of the expropriation scheme should not be allowed to influence the compensation award. But difficult questions arise as soon as the idea is to be applied in concrete cases. What the principle asks of the valuers, in particular, is quite demanding. They are forced to consider a counterfactual world where the expropriation scheme is not present, and they must calculate the value of the property based on the workings of such an imaginary world. But what exactly should this world be taken to look like?

It might be tempting to consider this as a "question of fact for the arbitrator in each case", as expressed by the Privy Council in *Fraser*, a

[20] For an example, consider the infamous case of *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (1981), where around 1300 homes were condemned at the request of General Motors, who wished to set up a new car assembly plant where the homes had been. Although this was a taking for profit it seems hard to imagine that any other developer would be interested in bargaining for the right to purchase the entire site in question, taking into account its scale and how it had been laid out especially so that it would suit plans formulated by General Motors.

Canadian case from 1917.[21] However, as the history of the no-scheme rule has shown, this point of view is not tenable.[22] The problem is that the nature of the no-scheme world cannot be determined without making a vast range of assumptions, many of which appear to depend on how one understands the law. The challenges that arise were discussed in great detail by Lord Nicholls in the recent case of *Waters*.[23] He described the task as "daunting", noting also that some of the more recent statutory provisions "defy ready comprehension".[24]

In *Waters*, the Lords made a particular point out of resolving a tension that was identified between the principle relied on in the *Pointe Gourde* case from 1947 and the reasoning adopted in the so-called *Indian* case from 1939.[25]

In the *Indian* case, the scheme was given a very narrow interpretation, with Lord Romer interpreting the scope as follows.[26]

> The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value.

Importantly, this did not entail that the purchaser's demand for the property was to be disregarded, since, as Lord Romer puts it:[27]

> [...] The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it [...]

In *Pointe Gourde*, a different stance appeared to have been adopted.[28] The case concerned a quarry that was expropriated for the construction of a US naval base in Trinidad. The quarry had value to the owner as a business, and the valuer had found that if the quarry had not been forcibly acquired, it could also have supplied the US navel base on a voluntary basis,

[21] *Fraser v City of Fraserville* [1917] AC 187, 194.

[22] For a history of the rule in UK law, clearly illustrating the difficulty in interpreting it and applying it to concrete cases, I point to Appendix D of Towards a Compulsory Purchase Code: (1) Compensation (Report no. 286, Law Commission 2003). See also Compulsory Purchase and Compensation: Disregarding the Scheme (n 1).

[23] *Waters and other v Welsh National Assembly* [2004] UKHL 19.

[24] ibid, 19.

[25] *Vyricherla Narayana Gajapatiraju v Revenue Divisional officer, Vizagapatam* [1939] AC 302; *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* [1947] UKPC 71.

[26] *Vyricherla Narayana Gajapatiraju v Revenue Divisional officer, Vizagapatam* (n 25) 319.

[27] ibid, 316-317.

[28] *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* (n 25).

thereby increasing its profits. However, the value of this potential fell to be disregarded, with Lord MacDermott describing the no-scheme rule as follows:[29]

> It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value, which is entirely due to the scheme underlying the acquisition.

Seemingly, this is at odds with the position taken by Lord Romer in the *Indian* case. In particular, it seems clear that in the absence of a compulsory purchase order, the US military would in fact have been "quite willing" to pay for the quarry's services.

In *Waters*, both Lord Nicholls and Lord Scott addressed the tension between the two decisions in great detail. They then offered a reconciliatory interpretation, which narrows the no-scheme rule compared to how it has sometimes been understood following *Pointe Gourde*.[30] Moreover, the Lords noted the need for reform and legislation, with Lord Scott describing the current state of the law as "highly unsatisfactory".[31]

To explain how a seemingly simple principle could become so troubling in practice, I think it is important to start by noting that after the introduction of extensive planning legislation in the 20th century, development of property tends to be contingent on governmental licenses and plans. Moreover, the power to expropriate is often granted as a result of comprehensive regulation of the property-use in an area, often following public plans that encompass more than the particular project that will benefit from compulsory purchase. As a result, it has become increasingly difficult to ascertain what is meant by the "scheme" in compensation cases. Does it include the whole planning history leading to expropriation, does it only refer to the power to expropriate, or is it something in between?

A fine balancing act is made when attempting to answer this question. Under a wide interpretation of the scheme, forcing the valuer to entertain many counterfactual assumptions, the property owner might come to feel that he is not compensated for his true loss, but rather an imaginary one. Indeed, the no-scheme world that the valuer must consider can end up being far removed from the actual one, forcing him to go back many years, perhaps decades, to establish what would have been the status of the property in question if the sequence of planning steps eventually leading to expropriation had not taken place.

This can leave the property owner in an unpredictable and very weak position. Taken to extremes, the no-scheme principle can then also come to

[29] *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* (n 25) 572.

[30] Andrew Baum and others, *Statutory Valuations* (4th edn, Routledge 2014) 242-244.

[31] *Waters and other v Welsh National Assembly* (n 23) 164.

run amiss with respect to human rights law and constitutional provisions protecting private property. On the other hand, if the scheme is interpreted too narrowly, one runs the risk of endangering important public schemes by compelling the public to pay extortionate amounts. In many cases, it is undoubtedly true that the value of property is increased by public investments and plans for the area in which the property is found. Moreover, one may ask if it is right to pay compensation based on increases in value that result from investments and plans that would not have materialised unless the power to expropriate had been anticipated. This, it may be argued, would be a form of double payment that should be avoided.

It is also important to keep in mind that the no-scheme principle embodies two distinct purposes that can branch out and give rise to quite distinct rules.[32] First, the principle has an important *positive* dimension, which serves to enhance compensation payments. Property owners are not only to be compensated for the direct loss of their property, but also for the possible depreciation of their property's value following the decision to permit a scheme which requires expropriation. Seemingly, this is easy to justify: It seems intuitively unreasonable if the deleterious effects of a threat of compulsion is permitted to result in reduced compensation payments.

However, under the extensive planning regimes common today, it is not clear where to draw the line. When is the regulation leading up to the scheme a reflection of public control over property use, and when should it be regarded as a measure specifically aimed at compelling private owners to give up their property? As we will see when we consider the role of the no-scheme principle in Norwegian law, this question can easily become highly controversial. Moreover, it is a question that may be linked with the more general question of whether or not the State should be liable to pay compensation for regulation that adversely affects the potential for future development.[33] In jurisdictions that do not usually recognize any right to such compensation, such as Norway and the UK, it is easily argued that the positive aspect of the no-scheme principle must be limited correspondingly. Why should a depreciation of value following regulation imply compensation when the property is eventually expropriated, but not otherwise?

In addition to its positive dimension, the no-scheme principle also has an important *negative* dimension, expressed in *Pointe Gourde* as the principle that an *increase* in value should be disregarded when it is "entirely due to the scheme".[34] The negative dimension has attracted more interest and controversy than the positive dimension, especially in the UK. The rules pertaining to this aspect of the principle were also at the center of attention

[32] See Towards a Compulsory Purchase Code: (1) Compensation (n 22) 69-70.

[33] In some jurisdictions, one will sometimes regard this as a taking in its own right, known as a *regulatory taking* in the US.

[34] *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* (n 25).

in *Waters*.

It is not surprising that the negative aspect of the no-scheme principle more often results in complaints, as property owners stand to loose whenever it is applied. However, on a traditional understanding of the public purpose of expropriation, the negative aspect of the rule is also seemingly easy to justify. In *Waters*, Lord Nicholls describes the most important policy reasons as follows:[35]

> When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to increase the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power. For the same reason there should also be disregarded the "special want" of an acquiring authority for a particular site which arises from the authority having been authorised to acquire it.

This appears like a reasonable justification. Notice, however, that Lord Nicholls avoids using the word "scheme". Rather, he speaks of what the owner could reasonably have obtained in the *absence of the power* to acquire the land compulsory. In this way, he seems to prescribe a rather narrow interpretation of the negative dimension of the no-scheme rule.[36] It is the power to expropriate that should not give rise to an increased value, nothing at all is said at this stage about the scheme that benefits from it.

It would appear, therefore, that there is nothing in principle that prevents the property from being compensated on the basis of its value in a scheme that differs from the scheme underlying expropriation only in that it has not been granted a power to expropriate. Indeed, this seems rather crucial for the remainder of Lord Nicholls' arguments, wherein he reconciles the principle adopted in the *Indian* case with that of *Pointe Gourde*.

It would lead me too far astray to go into all the subtle details about the interpretation of the no-scheme rule in UK law and the possible implications of *Waters*. Rather, I would like to focus on the application of the principle when the scheme in question is a commercial enterprise. The UK Supreme Court touched on this issue in the recent case of *Bocardo*.[37] The case was decided under dissent, suggesting that the clarifications offered in *Waters* have not been as conclusive as hoped.

In *Bocardo*, a reservoir of petroleum extended beneath the appellant's estate. Moreover, the petroleum could not be extracted without carrying

[35] *Waters and other v Welsh National Assembly* (n 23) 18.

[36] See also the commentary offered in Stephen Crow, "Compulsory purchase for economic development: An international perspective" [2007] Journal of Planning & Environmental Law 1102.

[37] *Star Energy Weald Basin Ltd & Anor v Bocardo SA* (2010) 5 WLR 654 (UKSC).

out works beneath the appellant's land. The first question that arose was whether or not extraction of the petroleum amounted to an infringement of property rights. This was answered in the affirmative. The second question that arose was how to compensate the owner. The Supreme Court, following some deliberation, found that the general rules applied, meaning that the case should be decided on the basis of an application of the no-scheme principle.

However, opinions differed as to the correct interpretation of this principle, and as to how the facts should be held against the law. The crucial point of disagreement arose with respect to whether or not the special suitability, or *key value*, of the appellant's land, *pre-existed* the petroleum scheme.

In *Waters*, the House of Lords had cited and expressed support for the following passage, taken from Mann LJ's judgement in *Batchelor*.[38]

> If a premium value is "entirely due to the scheme underlying the acquisition" then it must be disregarded. If it was pre-existent to the acquisition it must in my judgement be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence.

Relying on this distinction between the potentialities that are "pre-existing" and those that are due to the scheme, the minority in *Bocardo*, led by Lord Clarke, made the following observation.[39]

> Anyone who had obtained a licence to search, bore for and get the petroleum under Bocardo's land would have had precisely the same need to obtain a wayleave to obtain access to it if it was not to commit a trespass. So it was not the respondents' scheme that gave the relevant strata beneath Bocardo's land its peculiar and unusual value. It was the geographical position that its land occupies above the apex of the reservoir, coupled with the fact that it was only by drilling through Bocardo's land that any licence holder could obtain access to that part of the reservoir that gives it its key value.

This view was rejected by the majority, led by Lord Brown, who interpreted the no-scheme rule quite differently:[40]

> To my mind it is impossible to characterise the key value in the ancillary right being granted here as "pre-existent" to the

[38] *Batchelor v Kent County Council* (1989) 59 P & CR 357, 361. Cited by Lord Nicholls at *Waters and other v Welsh National Assembly* (n 23) 65.

[39] *Star Energy Weald Basin Ltd & Anor v Bocardo SA* (n 37) 42.

[40] ibid, 83.

> scheme. There is, of course, always the chance that a statutory body with compulsory purchase powers may need to acquire land or rights over land to accomplish a statutory purpose for which these powers have been accorded to them. But that does not mean that upon the materialisation of such a scheme, the "key" value of the land or rights which now are required is to be regarded as "pre-existent".

The case was resolved in keeping with this view, but the dissent shows that difficult, unresolved, questions can easily arise when the no-scheme principle is applied to an expropriation scheme that realises a commercial potential inherent in the land that is taken. Is it permissible for government to grant the value of this potential to the taker – by granting him the necessary licenses – without subsequently recognizing the potential as having been taken from the owner?

This issue does not *not* primarily depend on the scope of the scheme as such. In *Bocardo*, it was obvious that the scheme was the entire project aimed at extracting petroleum from the reserve, including the necessary works beneath the appellant's estate. But even so, it was still unclear whether the special value of the appellant's land could be said to have been *caused* by the scheme. The deeper question that arises in these kinds of situations seems to be almost ontological: When should we attribute a given value to an act of government, and when should we attribute it to nature, by regarding it as a fruit of the land? Or in more practical legal terms: When is a given property value that is unlocked by a development scheme part of the original owner's bundle of rights?

To answer this question, it is tempting to look for a causal link between scheme and value, to answer whether or not the value was pre-existent. But as *Bocardo* illustrates, it is not obvious what should be taken as good evidence for such a link. It seems that one's perspective on this will tend to depend also on one's point of view on the much more general question of what values one recognize as inherent in property rights.

Lord Clarke remarked that the State, following nationalisation in 1934, could have given the right to extract the petroleum to *someone else*.[41] He was certainly correct. Hence, I also agree with him that "the key value was not created by the 1934 Act or the grant of the petroleum licence to Star".[42] But whose value was it, and was it a commercially realisable value? Here Lord Clarke appears to assume that the value must belong to the property owner and that this owner would also have been able to make a profit from it in the absence of the expropriation scheme. This, I believe, is a leap that requires further justification. Just because some property appears to have

[41] *Star Energy Weald Basin Ltd & Anor v Bocardo SA* (n 37) 163.
[42] See ibid, 163.

pre-existent value does not mean that the owner of the property is entitled to that value, or that it can ever be translated into a financial profit.

On the one hand, it is easy to agree with Lord Clarke that compulsory acquisition of a wayleave is no precondition for an extraction scheme. The project could well have been carried out by a developer who was willing to pay surface owners for the special suitability of their land. But on the other hand, it does not seem obvious that the owner is meant to be able to demand such payment under the regulatory system currently in place. Hence, even in the absence of a causal link between scheme and value, one might be entitled to conclude that the special value falls to be disregarded because it has already effectively been removed from the owner's bundle (or was never part of it in the first place).

In the case of *Bocardo*, I think this perspective would have been particularly helpful to Lord Brown, who argued that the value of the strata was not pre-existent. As it stands, his argument seems rather strained. After all, it was the physical conditions that gave the land its value, not the abstract fact that a development license had been granted. However, by looking at his argument in more depth, it is tempting to rephrase his conclusion by saying that he regarded the special suitability of the strata as having no commercial value under the prevailing regulatory regime.

In the end, I am agnostic about the correct way to judge *Bocardo*. Basically, I think the main question in that case was whether parliament had intended to give petroleum developers a right to extract substrata resources without sharing the profits with surface owners whose property had key value in relation to the extraction process. As no clear answer was available, conflict resulted. Moreover, the question itself became obfuscated. It seems to me, in particular, that the focus on causality and the notion of "pre-existence" was not very helpful. Rather, I think attention should have been explicitly directed at the issue of benefit sharing.

In general, the first question to ask when attempting to answer whether the value of some development potential should be compensated is whether this potential is supposed to be realisable for the property owner given the regulatory framework in place for the relevant kind of development. If this is unclear or the evidence suggests that owner realisation is not intended, the question becomes whether or not a claim can still be made on the basis of constitutional or human rights law. This question should then be openly addressed as a question of whether or not owners can demand benefit sharing.

If, on the other hand, courts engage with the question of benefit sharing surreptitiously, without being explicit about it, the lack of democratic accountability can become a worry. Indeed, I think it is important to emphasize the political sensitivity of the range of complex rules found in compensation law. Moreover, the underlying political question should not be obfuscated to the extent that it can only be engaged with in a meaningful

way by legal professionals.

If this happens, most people will likely remain ignorant of the political significance of work done by the courts. Worryingly, those who stand to gain the most from this will be those who are in a good position to lobby and argue on technical points to gradually shape the law of benefit sharing according to their own interests. I think a conceptual shift might be needed to prevent this mechanism from becoming precarious to the legitimacy of compensation law in general, and the no-scheme rule in particular.

In addition, I think the questions touched on in *Bocardo* become much more pressing in cases when the main development potential as such is subject to expropriation, such as when natural resources are expropriated. In such cases, I believe one is right to ask if it is at all permissible to deny benefit sharing with the owner. In particular, it seems hard to imagine a defensible public interest in bestowing the entire commercial benefit on the expropriating party, particularly when this party is a powerful commercial actor. It is telling that this is never the explicitly stated aim of such takings, only a (sometimes unacknowledged) side-effect. Hence, constitutional and human rights limitations on the takings power can become relevant here.

However, I note that benefit sharing in these cases might not be prevented by the no-scheme principle, as that principle is now understood in the UK. In light of *Waters* and *Bocardo*, it seems possible to get around no-scheme rules by arguing that commercial development potentials pre-exist particular development schemes. If so, such values should be allowed to influence compensation payments. If this stance is accepted, the compensatory approach to the legitimacy of economic development takings is off to a good start, as benefit sharing is shown to be possible even within the no-scheme framework.

The question remains, however, how far this gets us in practice. I address this question in subsequent sections, by looking to Norwegian law. Here the main issues have crystallized further, particularly in relation to expropriation of waterfalls for hydropower development.

4 Norwegian Compensation Law

The owner's right to compensation following expropriation is enshrined in simple terms in Section 105 of the Norwegian Constitution.[43] The rule is simply that *full compensation* is to be paid in all cases when the public interest necessitates compulsory acquisition of property. For more than 150 years, this was the sole legislative basis for compensation rules in Norway. The methods used to calculate full compensation in different scenarios developed entirely through case law. However, in 1973, legislation was introduced

[43]The Constitution of the Kingdom of Norway 1814, s 105.

to make the system more predictable and – to some extent – in order to ensure that compensation payments were reduced.

In the following, I start by presenting the traditional system for calculating compensation, which is based on a judicial process that relies heavily on the discretion of lay people. Then I present the legislation currently in place, which is based on the notion that compensation should only be paid based on "foreseeable" uses of property. This sets the stage for Section 5, where I discuss expropriation of waterfalls, for which compensation practices deviate from what is otherwise the norm, particularly in relation to the no-scheme principle.

4.1 Appraisal Courts and "Full Compensation"

According to a long legal tradition in Norway, the discretionary aspects of property valuation is regulated by a special procedure, with a significant reliance on so called *unwilling appraisers*. These are members of the public who have no special connection to the case at hand or the parties involved in it. They may be chosen specifically for their suitability in judging the value of the contested property, either because they are resident in the local area or because they have special expertise.[44]

The appraisal procedure has a long history, and the rules regulating it today are found in the Appraisal Act 1917.[45] Appraisal cases are organised similarly to civil disputes, and the procedure is administered by the regular district courts.[46] In appraisal disputes, these courts usually sit as a panel consisting of one professional judge and four appraisers, who have no special juridical qualifications.

Their role in the procedure is on par with the judge, and the panel decides jointly both the legal and the technical questions, usually on the basis of technical reports commissioned by the parties. These reports are presented during the main hearing and may be challenged by the parties, in more or less the same way as the district court hears evidence in a regular civil dispute.[47]

There is a possibility for appeal to the appraisal court of appeal, which is the regional court of appeal sitting as an appraisal court in accordance with the rules of the Appraisal Act 1917. The right to an appeal hearing is not absolute, it depends on the importance of the case, according to rules that correspond to those in place for regular civil disputes.[48] The procedure closely corresponds to the procedure followed in appraisal disputes at the

[44] See Appraisal Act 1917, s 11.

[45] Act no 1 of 1 June 1917 relating to Appraisal Disputes and Expropriation Cases.

[46] Appraisal Act 1917, s 5.

[47] See particularly ibid, s 22, with further references to the Civil Dispute Act 2005 (Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes).

[48] See Appraisal Act 1917, s 32.

district level.[49] However, the decision made by the appraisal Court of Appeal is final as far the appraisal assessment is concerned. An appeal to the Supreme Court can only be accepted on legal grounds (including procedural complaints).

As a consequence of this, the appraisal courts have been very important in interpreting and developing the law relating to compensation in Norway. Their importance was particularly great when the meaning of "full compensation" was not further clarified in statute. At the same time, the practical viewpoint enforced by the procedural form meant that legal questions often remained in the background in appraisal cases. Even today, legal issues only tend to come to the forefront if the Supreme Court decides to hear a case as a matter of principle.

A typical example of the traditional form of legal reasoning in compensation cases, from the time before legislation was introduced, can be found in the writings of the prominent legal scholar Frede Castberg. He specifically addressed the no-scheme principle and his reasoning in this regard was based directly on a reading of the Constitution. Moreover, he relied on the principle of *equality*, which was at that time considered particularly crucial in constitutional law. The following quote serves to sum up Castberg's position:[50]

> The owner is entitled to full compensation. The expropriation should not leave him worse off economically than other owners. Hence if the public has knowledge that an industrial undertaking is being planned, that a railway will be built etc, and this affects the value of property generally in a district, then the increased value of the property that will be expropriated must be taken into account. If not, the owners of such property will be worse off than other owners from the same district. On the other hand, if the expectation of the scheme underlying expropriation leads to a general depreciation of value, then it is this new value – not the original value – that is relevant for calculating compensation. The crucial question is what the actual value is, when expropriation takes place.

As Castberg bases his analysis on the exact wording of the Constitution, he does not engage in reasoning based on (social) fairness considerations. However, it is not correct to think that his reasoning is particularly "owner-friendly". Indeed, Castberg explicitly states that depreciation of value due to an expropriation scheme should not be disregarded. Moreover, and despite appearances, the intention is not to reject the no-scheme principle altogether.

[49] See Appraisal Act 1917, s 38.

[50] Frede Castberg, *Norges Statsforfatning, Bind 2* (3rd edn, Universitetsforlaget 1964) 268.

In particular, Castberg denies that owners of expropriated property should ever be able to claim compensation based on the special want of the acquiring party:[51]

> The situation is different if the property has increased value due to the expectation that it will be expropriated. The owner can not demand that this increase is compensated since that would be the same as giving him a special advantage compared to those from whom no property is expropriated.

Hence, Castberg accepts a narrow version of the no-scheme principle, similar in spirit to that presented by Lord Romer in the *Indian* case. Castberg's view appears to have been shared by many academics of his day, and it was also largely reflected in case law from the Supreme Court.

At the same time, the very nature of the system for deciding appraisal disputes gave the local appraisers great freedom in adapting the principles in a way that suited the circumstances of concrete cases. To some extent, this would also involve making an assessment of what was regarded as a fair and just outcome. Hence, while the theory of the time seemed to leave little room for such arguments, case law was much more multi-faceted.

Importantly, fairness was seen as a concrete issue that had to be addressed on a case-by-case basis, not on the basis of general rules. The Supreme Court largely sanctioned this approach, by respecting the discretion of the appraisal courts. The way in which the no-scheme principle was applied serves as a nice illustration of this. On the one hand, the theoretical views of Castberg were widely accepted, but at the same time they were regarded as no more than guidelines that had to be adapted to the circumstances.

In fact, it was not unheard of for the lay appraisers to disagree with the judge about how this should be done. This happened, for instance, in the case of *Tuddal*, where land was expropriated for the construction of a power grid.[52] Crucially, the expropriating party also acquired the right to use a private road. According to the juridical judge in the appraisal court of appeal, compensation should be awarded solely on the basis of what the owners stood to lose. In his view, this meant compensation based on the increased cost of maintaining the road due to increased use.

However, the lay appraisers found this result unreasonable and awarded compensation also for the special value the use of the road would have for the acquiring party. The Supreme Court found fault with the reasons given by the law appraisers, but agreed that such compensation was possible in principle. In reaching this conclusion, they reasoned that the owners were in

[51] Castberg (n 50) 268.

[52] *Hovedstyret for Norges Vassdrags- og Elektrisitetsvesen v A/S Tuddal* Rt-1956-109.

effect compensated for the loss of a good bargaining position, an approach held to be appropriate under the "full compensation" principle.[53]

The bargaining rule used to justify the decision in *Tuddal* is no longer considered good law. But the decision illustrates a broader point, namely that the Supreme Court was prepared to defer greatly to the judgement of the appraisal court. It was for this court to decide whether or not the lost opportunity to profit from negotiating with the expropriating party should be compensated.

This aspect of the decision is particularly noteworthy in light of the dissenting opinion of the juridical judge. Also, it seems to contradict the dominant legal theorizing of the day, which did not seem to support the idea that a premium should be paid. Hence, the *Tuddal* decision tells us that the Supreme Court went far in defending the discretion of the lay people, as a *systemic* feature. The Court tested with great caution whether it was truly outside the permissible legal boundary, but concluded that it should simply be regarded as an exercise of the lay judgement that the system presupposed.

This impression of the case is accentuated when considering other cases dealing with similar issues. Across the board, I note a strong tendency to defend the role of the lay people in the appraisal process. A particularly clear expression of this can be found in *Marmor*, also from 1956, where the Supreme Court overturned a decision made by the appraisal court of appeal on the grounds that the court had been too reliant on general principles.[54]

The case involved expropriation of a private railway track, for the construction of a public railway. It was clear that the track which was being expropriated did not have market value in general. Moreover, the expropriating party argued – on the basis of a no-scheme principle – that the value of these tracks to the public railway should not be taken into account when calculating compensation. The appraisal court of appeal agreed, pointing to the standard teaching of the day.

The Supreme Court, on the other hand, struck down the decision because it felt that a standardized approach to the case was inappropriate given the circumstances.[55] To justify this conclusion, the presiding judge paid particular attention to the wider *context* of expropriation, and the manner in which expropriation was used to benefit certain interests.

Importantly, he also noted how expropriation had come to replace voluntary agreement as the standard means of acquisition for this type of development. Therefore, the practice of using expropriation effectively prevented a market from developing, a market that might otherwise have appeared naturally. He said:[56]

[53] *Tuddal* (n 52) 111.
[54] *A/S Den Ankerske Marmorforretning v Norges Statsbaner* Rt-1956-493.
[55] ibid, 498-499.
[56] ibid, 499.

> I also point to the fact that the case concerns an area of activity where the expropriating party has a *de facto* monopoly which makes it impossible for anyone else to make use of the property for the same purpose. This in itself makes it questionable to simply assume that the lack of financial value for other purchasers provides the appropriate basis for calculating compensation. When considering this question, it is also appropriate to take into account that we have lately seen a great increase in the use of expropriation to undertake projects such as this. Compulsion is becoming the primary mode for acquisition of property – replacing voluntary sale following friendly negotiations.

In my opinion, the importance of this decision is not primarily that it seems to endorse a narrow interpretation of the no-scheme principle. In fact, I think it is erroneous to read the judgement as expressing support for any particular interpretation. Rather, I take the judgement to be an expression of scepticism towards uncritical obedience to *any* set of general rules for calculating compensation, particularly if these limit the room for lay discretion. Moreover, I note that the contextual factors that the Supreme Court highlights are particularly relevant in the context of economic development takings.

The days of *Tuddal* and *Marmor* are gone. In particular, there has been a shift of attention towards ensuring predictability in compensation disputes. This development has led to legislation that limits the freedom of the appraisal courts. The key notion that has been introduced is that of "forseeability", whereby owners are only entitled to compensation for uses of their property that are regarded as likely and natural, according to an increasingly long list of rules that pertain to various case types.

4.2 The Foreseeability Test

Following World War II, the social democratic *Labour Party* gained a secure grip on political power in Norway. As a result, many reforms were carried out that would reshape Norwegian society. One of the most important reforms introduced extensive planning legislation to ensure that land use was placed more firmly under public control.[57] As a result, this period also saw expropriation being used more extensively to further public projects, such as hydropower development for the supply of electricity.[58] As a result of these changes, many felt that a more uniform approach to compensation

[57] See generally Ø Thomassen, "Herlege Tider: Norsk Fysisk Planlegging 1930–1965" (PhD Thesis, 1997); T Kleven, *Fra Gjenreisning til Samfunnsplanlegging: Norsk Kommuneplanlegging 1965–2005* (Tapir Akademiske Forlag 2011).

[58] See generally 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).

was needed. In addition, it became an explicitly stated political goal to bring compensation payments down.[59]

In 1965, the so called *Husaas committee* was appointed by the King and charged with the task of assessing the compensation rules currently in place.[60] The committee was also ordered to make a concrete suggestion regarding the need for additional principles of compensation, and to consider if these should be given in the form of a special compensation act. Initially there was some doubt as to the extent to which is was at all permissible to give rules regulating compensation, as the constitution itself addressed the matter.

However, the committee noted that some rules had already been introduced for specific case types, for instance in relation to expropriation for hydropower development.[61] In addition, legal scholars of the day were generally of the opinion that compensation rules could be given, on the understanding that the courts would simply deviate from them in so far as they seemed to go against the Constitution.[62]

Following this initial clarification, the Husaas committee formulated an overarching principle that has since become crucial, namely that owners are only entitled to compensation based on a "foreseeable" use of their property. The committee argued that this was an interpretation of "full compensation" that was already largely entrenched in case law, which should now be explicitly encoded in statute.[63]

The forseeability test was taken to also imply the no-scheme principle. In particular, it was assumed that the assessment of foreseeability would be made independently of the scheme underlying expropriation.[64] Hence, it was no longer only the special want of the expropriating party that should not be taken into account – the entire scheme should be disregarded.[65]

This view was rejected by the government. Interestingly, it was considered too owner-friendly, as it was felt that it did not sufficiently limit the possibility for compensation based on non-actual property uses. As a result, the Ministry of Justice proposed an Act to parliament that deviated quite significantly from the proposals of the Husaas committee.

Instead of encoding what was perceived to be mostly existing principles, the Ministry pushed through a more aggressive reform whereby compensa-

[59] Ot.prp.nr.56 (1970-1971) 19-20.

[60] Appointed by the King in Council on 6 August 1965.

[61] See, e.g., Watercourse Regulation Act 1917, s 16.

[62] Report Regarding Appraisal Procedures and Compensation following Expropriation, "NUT (Norwegian Governmental Reports)" (1969) 136-137.

[63] ibid, 134.

[64] ibid, 142. Since this assumption was made quite generally, it also corresponds to a broader view on the no-scheme principle than that endorsed by Castberg, see Castberg (n 50) 268.

[65] Report Regarding Appraisal Procedures and Compensation following Expropriation (n 62) 142.

tion would normally be based on the value of the *current use* of the property.[66] The main argument in favour of this was that the public should not have to pay a financial premium to owners based on possible future uses that would not be permitted unless the public was willing to grant their permission.[67]

The Ministry set up two exceptions to the current use rule, based on fairness and constitutional considerations. The first, which received by far the most attention, was based on a desire to ensure some degree of equality between owners.[68] This exception stipulated that the appraisal courts should be free to deviate from the current use rule in so far as it felt that it was reasonable to do so in order to prevent affected owners from being overly disadvantaged compared to other owners, not affected by expropriation.[69]

The second exception received far less attention, but in my opinion it is the more interesting of the two. This exception was motivated by a desire to ensure equality between the taker and the owner, particularly in so far as the taker could not be regarded merely as an embodiment of public values. Importantly, the rule sought to address precisely the situation that arises when the taker benefits commercially from the expropriation. In the words of the Ministry:[70]

> The second modification we make has to do with the relationship between the property owner and the expropriating party. If the use of the property that the expropriation presupposes gives the property a value that is significantly higher than the value suggested by current use, this will entail a transfer of value from the property owner to the acquiring party. In some cases this might be unreasonable. As an example of when this can become an issue, we mention an agricultural property that is expropriation for the purposes of industrial production. In such a case it might be natural that the owner receives a certain share in the increased value that the new use of the property will lead to.[...]
>
> To establish a flexible system, the Ministry has concluded that it is practical that the King gives rules concerning the cases where an enhanced compensation payment, based on these principles,

[66] Ot.prp.nr.56 (1970-1971) (n 59) 19-20.

[67] ibid, 17-20.

[68] ibid, 19.

[69] This principle was eventually encoded in section 5, no 1-3 of the Expropriation Compensation Act 1973. It would prove highly controversial, since it was only formulated as rule that "could" be used to increase the compensation. In *Kløfta*, the Supreme Court eventually deviated from this and overruled the Act by making clear that additional compensation was *obligatory* in a range of cases when the intention had clearly been that the rule should be used sparingly. In this way, and possibly inadvertently, the Supreme Court ended up defending owners' interest by *limiting* the power of the appraisal courts.

[70] Ot.prp.nr.56 (1970-1971) (n 59) 19.

> might be appropriate. This should not be decided by individual assessment, but governed by rules for special case types. Hence, the proposed Act states that the King can pass regulation concerning this matter.

This quote went right to the heart of the benefit sharing problem in economic development takings, and it proposed a possible remedy. However, the Ministry took the view that this remedy should *not* be administered by the appraisal courts, but should be left in the hands of the executive. Hence, there was reason to worry that the suggestion would not work well in practice.

Indeed, this particular aspect of the 1973 Act was largely overlooked and forgotten and no rules such as those proposed by the Ministry were ever introduced. In general, procedural and contextual aspects seem to have been overlooked by those pushing for the 1973 Act. Since the appraisal courts were regarded as compensating owners too generously, their freedom of discretion was seen as a weakness rather than a strength.

I think this is regrettable. If the new Act had been more temperate in its approach, by encouraging the appraisal courts to take a broader view on fairness, it might have been a success. Instead, it caused an outcry, with attention shifting away from practical matters towards doctrinal issues. The primary such issue, and the most serious one, concerned the question of whether the Act as such was in breach of the Constitution. This question was considered by the Supreme Court in the case of *Kløfta* in 1976.[71]

Here the 1973 Act would be significantly reinterpreted to make it appear less offensive to the constitutional standard of full compensation. Essentially, it was held that the appraisal courts sometimes *had to* deviate from the current use rule, provided certain conditions were met. At the same time, however, the Supreme Court largely accepted the rationale behind the Act and agreed that appraisal practice needed to be adjusted accordingly. Moreover, in implementing the adjustment in practice, the Court arguably also contributed to further undermining the appraisal courts.

Not only were these courts now constrained by an Act that seemed to go against the Constitution, they were also ordered from above to openly deviate from its exact wording. However, they were told only to do so in a select group of cases meeting certain pre-defined criteria. In essence, the Supreme Court itself assumed greater control over how compensation law was to be applied, no longer merely in broad strokes, but increasingly also by developing special rules for specific case types.[72]

[71] *Johnsrud and others v Ullensaker kommune* Rt-1976-1 (Kløfta).

[72] The clearest indication of this shift is found in recent case law wherein the Supreme Court has provided a myriad of detailed rules and directions regarding how appraisal courts should decide on the thorny issue of whether to consider public plans binding for the compensation award or to disregard them under a no-scheme rule. See generally

Following the decision in *Kløfta*, the Expropriation Compensation Act 1984 was introduced, which is still in force today. This Act reverted back to the "foreseeability" test proposed by the Husaas committee. In general, compensation is to based either on the value of use or the value of sale of the property, whichever is highest.[73] The Act regulates in further detail how the assessment is to be carried out, also by explicitly introducing disregard rules that encode various aspects of the no-scheme principle.[74]

The guiding idea is that the value of the property is calculated based on a use of the property that is foreseeable and natural given the surrounding conditions. In relation to the value of sale, there is an additional requirement, namely that the use must be one that an "average" buyer would be likely to make of the property. Hence, the value of sale should be set as a general market value, not a value arising from selling the property to a specially interested party.

The extent to which the foreseeability requirement entails that the use in question has to be in accordance with current land use plans is particularly thorny. In general, the Norwegian system stands out because plans are usually *not* disregarded, even in situations when they are closely related to, or directly authorise, the expropriation scheme.[75] Importantly, this approach is usually to the *disadvantage* of the owner, since the no-scheme principle still applies in a way that prevents benefit sharing through compensation. In practice, when land use plans are not disregarded, the compensation award tends to be based on current use assessments, just like the 1973 Act established as the general rule. Hence, in Norwegian law there is a clear asymmetry between the negative and positive aspect of the no-scheme principle. In general, the positive aspect – leading to increased compensation – is applied narrowly, while the negative aspect – leading to reduced compensation – is applied broadly.

It is not surprising, then, that tensions and disputes often arise in relation to the foreseeability test, or else in relation to one of the disregard rules that encode aspects of the no-scheme principle. Moreover, following *Kløfta*, there has been a growing expectation that hard cases should be resolved by crisp rules. Appraisal courts are no longer considered free to assess cases directly against the Constitution. Rather, an ethos has taken hold where the need to curb the freedom of appraisers, in the interest of ensuring predictability and centralized control, is usually emphasized.

As a result, difficult cases now routinely end up in the Supreme Court who often censor the appraisal courts. More and more specific rules for special case types are produced. This is particularly marked in relation to the

Arealplaner og Ekspropriasjonserstatning, "NOU (Norwegian Governmental Reports)" (2003) 7-9.

[73]Expropriation Compensation Act 1984, s 4.

[74]ibid, s 5-6.

[75]Arealplaner og Ekspropriasjonserstatning (n 72) 7-9.

question of how to deal with land use plans that give rise to expropriation. Currently, it is thought that an exception to the main rule applies to certain kinds of roads and public buildings, so that a plan designating a property to one of these uses should be disregarded for compensation purposes.[76] This is consistent with the no-scheme principle, since the uses in question tend to presuppose expropriation, so that the plans themselves must be said to be part of the expropriation scheme.

But where should the line be drawn? The Supreme Court now largely takes it upon itself to shape the law in this area, down to a questionable level of detail. The two most recent decisions stipulate that a plan for a sports hall is to be disregarded, while a plan for a public footpath is not. The distinction between the two seems rather arbitrary, however, particularly as this now becomes a precedent, so that it will tend to apply to footpaths and sports halls in general.

In my opinion, this illustrates how the development of compensation law towards greater reliance on static rules in place of concrete assessment. It also threatens to undermine the idea behind the special procedure used to decide appraisal disputes, which has a long history in Norwegian law.[77] Moreover, I think it underestimates the extent to which compensation rules, when applied to concrete cases, must and should be interpreted based on the context of the case.

In the following section, I will turn to waterfalls and hydropower. Interestingly, the compensation practices here often deviate significantly from those observed in relation to other kinds of development. In particular, a more traditional approach continues to dominate these cases, since the rules enacted through legislation do not readily apply. However, I show that while the traditional method of compensating waterfalls is based on benefit sharing, it has become highly standardized and artificial over time. Today, it is perceived as deeply unjust by owners who may be deprived of extremely valuable natural resources and paid only a fraction of their true value.[78]

This points to the inherent difficulty of attempting to ensure reasonable benefit sharing through compensation. Looking at compensation rules as they are applied to waterfalls today further underscores this, as the courts now grapple with the disintegration of the traditional method, and the question of what should replace it.

[76] In practice, this means that the appraisal court is free to compensate the owner on the basis that some other use would have been foreseeable in the absence of the expropriation, e.g., housing uses.

[77] One might ask if it has status of constitutional customary law, especially since it concerns the mechanism by which a constitutional rule is meant to be upheld.

[78] See generally 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.

5 Compensation for Waterfalls

Following the introduction of a general expropriation authority covering waterfalls in the early 20th century, the question of how to value waterfalls came before the appraisal courts. The regulatory regime that was established made private commercial development difficult or impossible, and this in turn meant that the commercial market for waterfalls all but disappeared. Hence, a strict application of the no-scheme rule could lead to no compensation being paid at all. In practice, a waterfall would usually have little or no value to anyone except the acquiring authority, since no alternative development scheme could be regarded as foreseeable.

The appraisal courts did not follow this point of view to its logical conclusion. Instead, they introduced a theoretical formula for calculating waterfall compensation. In effect, this method served to create an artificial market for waterfalls, controlled by the appraisal courts. Moreover, it was decided that additional benefit sharing should be ensured by a rule stipulating that the expropriating party should always pay a 20 % premium in hydropower cases.[79] Hence, the traditional method for compensating waterfalls in Norway is based on ideas that are very similar to those that are now considered in the US debate on economic development takings, cf, section 2. Moreover, these rules have been in place for almost 100 years in Norway, giving us a good basis for assessing how well they work in practice.

In the next subsection I present the traditional method in more detail, before I present more recent developments, whereby the liberalization of the energy sector has caused a revision of established compensation practices.

5.1 A Case Study of Compensatory Benefit Sharing: The Natural Horsepower Method

Initially, the artificial market created to compensate waterfall owners was modelled on the actual market that had existed prior to the regulatory reforms of the early 1900s.[80] The key notion used to determine the price of a waterfall on this market was that of a *natural horsepower*, a gross measure of electric effect.[81] The lack of a national grid at this time meant that the value of a hydropower plant was largely determined by the stable effect that

[79] See Watercourse Regulation Act 1917, s 16.

[80] It should be noted that these reforms did not dismantle the actual market for waterfalls overnight, but they gave State and municipality companies so many advantages over other actors, as well as owners, that the market was no longer sustained except through the compensation practices of the appraisal courts. The waterfall "market" would slide further and further into the legal sphere, away from the physical and commercial reality of hydropower development. The "market price" for waterfalls increasingly came to mean simply the prices paid in recent appraisal disputes.

[81] A horsepower is an old-fashioned unit of effect which is still sometimes used, e.g., in relation to cars. In the context of electricity, it has been largely replaced by *Watts*.

the plant could deliver, not the total amount of electricity that could be produced.

The notion of natural horsepower was originally introduced to simplify calculations, as a gross estimate of the stable effect that the plant could deliver. The value of the waterfall itself was then determined by fixing a price per natural horsepower. This price was set on the basis of prices paid for other waterfalls, with some adjustments typically carried out to take into account the level of cost and benefits associated with the hydropower project in question.

The use made of the natural horsepower method to calculate compensation for waterfalls had no legislative basis, but arose as a result of the appraisal courts' efforts to calculate market prices. After the actual market based on the natural horsepower method disappeared, the method stuck and was applied customarily.[82]

In the standard account of the natural horsepower method, it is often said that the number of natural horsepower in a waterfall is a measure of gross effect, giving us the amount of "raw" power in the waterfall.[83] This is not accurate, as the natural horsepower "of the waterfall" actually depends crucially on what kind of development project the expropriating party proposes.

Hence, it is far more accurate to speak of the natural horespower of the development scheme benefiting from expropriation. Moreover, the natural horsepower of a development project is a measure of gross stable effect, so it also depends crucially on the nature of the proposed watercourse regulation.[84] Today, however, many hydropower plants, particularly smaller ones, involve little or no regulation. Instead, such run-of-river scheme operate by harnessing energy from whatever water is present in the river at any given time. For these projects, the natural horsepower can be zero or close to zero, depending on what formula is used when performing the necessary calculations.[85]

This means, moreover, that the natural horsepower of a development scheme often has little or no bearing on the amount of energy that will actually be harnessed from the hydropower plant. Moreover, the annual income of a hydroelectric plant no longer has anything whatsoever to do

[82]See generally the description of the history of the method given by the Supreme Court in *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

[83]See Ingolf Vislie, "Ekspropriasjon og Skjønn i Vassdrag" in *Vassdrags- og energirett* (2nd edn, Universitetsforlaget 2002).

[84]Regulation of a watercourse can involve building a reservoir and/or installations that transfer water from one river to another. Then, if there is excess water, for instance due to flooding, water can be stored in the dam for later use. When there is no drought, the stored water can be released. In this way, it becomes possible to even out the water-flow over the year.

[85]See generally Sontum and Sofienlund (n 78).

with its natural horsepower.[86] The income is solely a function of the price paid per kilowatthour and the total number of kilowatthours harnessed over the year (kWh/year). Today, energy producers gets paid for the amount of energy they can deliver, *not* the effect they can maintain in their station over a long duration of time.

Talking of natural horsepower therefore serves to give a skewed picture of the potential of a waterfall, especially for run-of-river projects. Within the ranks of the specialized water authorities, the inadequacies of the notion has long been common knowledge. The first statement I can find to this effect – made by the director of the water authorities – dates all the way back to 1956, from an internal newsletter published by the water directorate.[87] Here it is made clear that compensation practices generally fail to reflect actual values of waterfalls and it is more than suggested that the system operates by exploiting owners' lack of knowledge regarding the true value of the natural resources that they own.

While the idea of compensating the owner of waterfalls by a price per natural horsepower is flawed at the theoretical level, there are even more serious concerns that arise when one begins to consider the way in which the unit price has been determined *in practice*. The traditional approach in this regard has had a particularly dramatic effect on the level of compensation payments.

In case law based on the traditional method, it is often said that the price set per natural horsepower is set according to "market price" for waterfalls. But for the most part, what this means is that the court looks to prices awarded in earlier compensation cases. This gives rise to a price level that is entirely artificial. More than anything else, the prices paid reflect the power balance between buyer and seller in the courtroom. This has become very clear after the adoption of new, genuinely market-based, methods in recent years.[88]

Moreover, while the price-level was determined by the courts, some voluntary agreements were also made on the basis of the same method. These could then in turn be used to back up the claim that this was a genuine market-based valuation principle. In this way, it became possible to legitimize an increasing imbalance of power between owners and purchasers. In the end, this imbalance became extreme.

For instance, in 2002 a waterfall belonging to local landowners in the rural community of Måren, located in south-western Norway, was sold for

[86] See Sontum and Sofienlund (n 78).

[87] See Olaf Rogstad, "Verdien av Rå Vannkraft" [1956] (4) Fossekallen.

[88] 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 – Uleberg-dommen" (2008) 2008 Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund, and Stein Erik Stinessen, "Er naturhestekraftmetoden rettshistorie?" (2012) 2012(1) Tidsskrift for eiendomsrett 21.

the sum of kr 45 000 (roughly £ 4500), based on traditional calculations.[89] The waterfall has now been exploited in a small-scale hydro-power plant belonging to the large energy company BKK, with annual energy output of 21 GWh.[90] For comparison, I mention that in the case of *Sauda*, where a more realistic market-based method was used, the owners received a compensation which totalled about 1 kr/kWh annual production.[91]

Applied to the Måren case, this would take the compensation from kr 45 000 to kr 21 000 000. That is, the price would have been almost 500 times higher.[92]

The case of Måren illustrates an important point, namely that when the traditional method was used, and described as the "market value" of waterfalls by the courts, this became a self-fulfilling prophecy. The prices paid in voluntary transactions were influenced by the practice adopted by the courts far more than the other way around.

This points to a more general mechanism. In particular, when expropriation is widely used for some particular purpose, prices for property that can be used for this purpose can be kept artificially low by developers choosing to make use of expropriation rather than entering into friendly negotiations.

Instead of competing for a deal with owners, developers can compete to be the first to acquire an expropriation license from the State. In this way, even if the system prescribed "market-value" compensation, an artificial price level can be established and maintained through the use of expropriation.[93]

In my opinion, preventing such a mechanism from undermining the fairness of the compensation regime is a main challenge associated with regulatory systems that presuppose extensive use of expropriation for economic development. Failure to address this appropriately can create financial incentives for developers to favour expropriation over friendly negotiations or

[89] Source: Private correspondence.

[90] http://www.bkk.no/om_oss/anlegg-utbygging/Kraftverk_og_vassdrag/andre-vassdrag/article29899.ece

[91] LG-2007-176723.

[92] In fact, the Måren waterfalls were cheaper to exploit, so in reality, one would expect that the new method applied to Måren would yield even greater compensation per kWh. I also remark that the value awarded in *Sauda* was market-value, not value of use. It was assumed, in particular, that the owners would have to cooperate with a "professional" energy company to develop hydropower. This, in effect, halved the compensation awarded, since the Court's decision was based on the premise that the professional company was willing to pay about 50% of the profit as rent to the owners.

[93] I mention that in a setting where the owners are politically powerful and can exert undue influence on the compensation process, the effect can be reversed, so that the "market based" approach leads to inflated compensation levels, including elements of holdout value. The general point is that the market approach can be turned to the advantage of the most resourceful and powerful groups, particularly in situations when expropriation is widely used for a particular kind of development. In such cases, a market-based approach is not as politically neutral and "objective" as its proponents tend to argue.

cooperation with owners. In this way, a vicious circle can form, making it hard to break out of the "expropriation loop".

5.2 New Methods for Compensating Waterfalls

In the 1990s, the Norwegian energy sector was liberalized, and the traditional method for compensating owners came under increasing pressure. It was argued to be unjust and illogical by engineers and smaller companies working on developing small-scale hydropower. Eventually, legal professionals followed suit and came to the realization that established compensation rules based on market value should be applied.[94]

Indeed, a new market for waterfalls had begun to develop at this point, following increased interest in small-scale hydropower, also from new companies specializing in cooperation with local owners. For transactions of rights to waterfalls taking place on this market, the traditional method of valuation was not used. In fact, waterfalls were rarely sold at all, but rather leased to the development company for an annual fee. Typically, this fee was calculated by fixing a percentage of the energy produced during the year, and compensating the owners of the waterfall by multiplying this with the market price for electricity obtained throughout the year, possibly after deducting production specific taxes, but with no deduction of other costs. In effect, owners would get a fee corresponding to a set percentage of annual gross income in the hydro-power plant.[95] Today, such a fee usually entitles the owners to 10-20% of the gross income, depending on the cost of the project.

Since leasehold agreements tie compensation to the fate of the hydropower project, several questions arise when attempting to estimate a present-day value of a waterfall on this market. The valuers first have to determine what the most likely project looks like. Then they have to determine what the annual production will be. After this, they must assess the cost of constructing the plant, something that will in turn make it possible to estimate the level of rent likely to be paid to the waterfall owners. Then, since this rent is set as a percentage of the income from sale of electricity and energy certificates, the need arises to stipulate future prices, usually for as long as 40 years (the usual length of a leasehold). Finally, a present-day value can be calculated based on future cash flows.

The appraisal courts began to use such a model around 2005. The first case of this kind to reach the Supreme Court was *Uleberg*. In the appraisal court of appeal, the lay appraisers overruled the juridical judge and awarded compensation based on the new method. The Supreme Court ordered a retrial on a technicality, but it also commented that it supported the adoption

[94]Larsen, Lund, and Stinessen, "Erstatning for erverv av fallrettigheter" (n 88).

[95]See Larsen, Lund, and Stinessen, "Erstatning for erverv av fallrettigheter" (n 88); Sontum and Sofienlund (n 78).

of the new method in cases when *alternative* small-scale development was deemed a *foreseeable* use of the waterfall in the absence of the expropriation scheme.[96] Since *Uleberg*, the new method has been used in several cases before the appraisal courts.[97]

It is interesting to note that it was the lay appraisers that pushed for a new method initially, sometimes in opposition to the juridical judge. I believe this shows that the old system of lay judgement in appraisal disputes still plays a role in Norway. Moreover, I also think it demonstrates that the system has positive qualities that should be preserved in the future. However, that is not to say that the new method is without problems.

Unsurprisingly, it tends to lead to a rather protracted process of valuation, mostly dominated by experts. Moreover, given all the uncertain elements of the calculation, it is typical that the opposing parties produce expert witnesses that diverge significantly in their valuations. While this can be problematic, the fundamental *legal* challenge arises with respect to the no-scheme rule. In particular, what hydropower scheme should the compensation be based on? Several questions arise, as listed below.

- (1) Is it foreseeable that the waterfall could be used in a hydropower project in the absence of a power to expropriate?
- (2) If the answer to question (1) is yes, what would such a scheme have looked like?
- (3) Is it foreseeable that the scheme from (2) would obtain the necessary licenses?
- (4) Does the no-scheme rule imply that no project similar or identical to that benefiting from expropriation can be regarded as foreseeable for the purpose of compensation?
- (5) Is the fact that the scheme underlying expropriation obtained a development license to be regarded as evidence that alternative (inferior) schemes would not have received such a license?
- (6) How should compensation be calculated if it is determined that no (alternative) hydropower scheme would have been foreseeable?

In some cases, for instance when the project benefiting from expropriation is not commercially viable but is carried out for public purposes with the help of special state funding, the answer to question (1) might be no.

[96] *Uleberg* (n 82).

[97] See generally Larsen, Lund, and Stinessen, "Erstatning for erverv av fallrettigheter" (n 88); Larsen, Lund, and Stinessen, "Fallerstatning – Uleberg-dommen" (n 88); Larsen, Lund, and Stinessen, "Er naturhestekraftmetoden rettshistorie?" (n 88), a series of Norwegian papers discussing the new method.

However, in most cases, the question will be answered in the affirmative, since the scheme benefiting from expropriation already serves as an indication that the waterfall can be commercially harnessed for energy. However, here the no-scheme rule comes into play and creates severe difficulty once we reach question (2). For what kind of scheme can be assumed foreseeable all the while we are obliged to disregard the scheme underlying expropriation?

In most cases so far, the owners have claimed that compensation should be based on the value of a small-scale hydropower scheme. Since such a scheme is likely to be clearly distinct from the expropriation scheme (which tends to be large-scale), one might think that the no-scheme rule will not come into play. This, however, is not necessarily the case. It appears, in particular, that the answer to question (3), asking about the likelihood of obtaining licenses, will still depend on how one views the no-scheme rule. It seems, in particular, that anyone who answers question (5) in the affirmative, will be inclined to say that the alternative project could not expect to obtain a development licence.

This is so, such a person might argue, precisely *because* licenses were granted to the expropriating party. This line of reasoning has been consistently advocated by the large energy companies, ever since the new method emerged.[98] Is their argument at odds with the no-scheme rule? It would seem so, but remember the earlier discussion on the no-scheme rule in Norwegian law, where I noted that the rule has tended to be applied much more narrowly along its positive dimension.

Following up on this, it can be argued that while the expropriation scheme is to be disregarded for the purpose of compensation valuation, the land use regulation underlying the scheme – or at least the rationale behind this regulation – is nevertheless to be taken into account. If this point of view is adopted, then the conclusion can easily become that alternative development is to be regarded as unforeseeable. This points to the danger that simply abandoning the no-scheme rule might not achieve fairness for owners at all, but create new ways for powerful takers to limit compensation payments.

Indeed, the line of reasoning described above was given a stamp of approval in the recent Supreme Court case of *Otra II*.[99] Here the Court concluded that the development plans of the expropriating party were so superior that alternative development was unforeseeable. Hence, the no-scheme

[98] See, e.g., *BKK Produksjon AS v Austgulen and others* Rt-2011-1683; *Otra Kraft DA, Otteraaen Brugseierforening v Bjørnarå and others* Rt-2010-1056; *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612. The argument is often sugar-coated by pointing to the reasons underlying the decision to grant a license – typically energy efficiency – rather than by focusing on the formal license itself. In this way, one arrives at an interpretation of the no-scheme rule whereby the scheme can perhaps be said to have been disregarded even though one still takes into account reasons why it should be preferred over other schemes.

[99] *Otra II* (n 98).

principle was not applied very widely along its positive dimension. In particular, the principle did not prevent the conclusion that the superiority of the expropriation scheme meant that alternatives would have been unforeseeable.

After concluding in this way, the Court needed to answer question (6) by coming up with some alternative way of compensating the owners. To do so, the Court was again faced with considering the implications of the expropriation scheme. One possibility would be to simply ignore the no-scheme principle completely. Indeed, as the superiority of the expropriation scheme was used to rule out alternatives, it seemed natural to use it also as the basis for valuation. This is what the appraisal court of appeal had done, and the Supreme Court sanctioned the approach.

But at this point, the adherence to a "market-value" approach spelled doom for the waterfall owners. The presiding judge, in particular, reasoned as follows:[100]

> Based on the arguments presented to the Supreme Court, I find it safe to assume that there does not today exist any market for the sale and leasing of waterfalls for which alternative development is not foreseeable, but where the waterfalls can be used in more complex hydropower schemes. The appellants have not been able to produce documents or prices to document the existence of such a market.

The implicit assumption is that in order to value the waterfall according to its potential for hydropower production, a market needs to be identified. It was *not* considered sufficient that the scheme for which expropriation took place was itself a commercial project. It is very hard to imagine how a market of the kind asked for here could ever develop. After all, alternative buyers (the existence of whom had been documented) were all excluded from consideration because their development schemes were held to be unforeseeable. Hence, if there was to be a market, it would have to be one that emerged entirely due to the benevolence of the expropriating party.

Taken to its logical conclusion, the line of reasoning in *Otra II* leads to an offensive result: The commercial value of the property taken should not be compensated *because* the optimal commercial use is the use that the expropriating party aims to make of it. Unsurprisingly, the Supreme Court shunned away from explicitly endorsing this conclusion. Instead, it sanctioned compensation based on benefit sharing, using the natural horsepower method.

Leaving aside questions about the Court's application of the foreseeability test and the no-scheme principle, was it appropriate to prescribe the traditional method? In light of the evidence that has emerged regarding

[100] *Otra II* (n 98).

its shortcomings, this seems highly questionable. But was there a better alternative?

Towards an answer, let us follow Lord Nicholls in avoiding talk of schemes and reason instead on the basis of what would have happened in the absence of a power to expropriate. In cases such as *Otra II*, it seems likely that a scheme corresponding closely to that underlying expropriation would still be implemented. This scheme, however, would then have to be carried out on the basis of *actual* cooperation and benefit sharing with owners.

If we think like this, focus shifts from theoretical benefit sharing imposed through compensation, towards trying to the determine – under the foreseeability test – what would have been the actual benefit sharing in a joint enterprise. This subtle change of perspective could make a dramatic difference, as it would place us in a position to reject the natural horsepower method, legal tradition notwithstanding. Instead, we could now anchor the compensation assessment in a concrete, albeit counterfactual, scenario.

In *Otra II*, this line of thought was not considered in any depth, but mentioned briefly and rejected.[101] However, in the Supreme Court case of *Kløvtveit* – in circumstances similar to that of *Otra II* – such an argument succeeded.[102] Here too, alternative development was not foreseeable, but unlike in *Otra II*, the lay appraisers in the court of appeal decided to compensate the owners based on the premise that it was foreseeable that they would have cooperated with the expropriating party in the absence of the expropriation scheme.

That is, the appraisal court of appeal held that the waterfalls would have been exploited in exactly the same way, except through cooperation, not expropriation.[103] Crucially, this also meant that the court was free to replace the natural horsepower method by what they thought the parties would actually have done to set up a cooperation project. Here the appraisal court found that a leasehold model would have been likely, since this was the model generally used on the waterfall market.

I think the approach of *Kløvtveit* is far superior to that of *Otra II*. For commercial projects, it seems that in the absence of a power to expropriate, any rational buyer would look to cooperate with the owners.[104] Hence, the foreseeability test itself may be applied, an approach that will naturally lead to the rejection of the natural horsepower method in favour of more realistic forms of benefit sharing.

[101] Although this may in part have been due to the fact that the point was not raised before the court of appeal.

[102] *Kløvtveit* (n 98).

[103] Hence, the court effectively adopted a compensation approach based on the same conceptual premise as that of Lehavi and Licht's SPDC proposal, as discussed in Section 2.

[104] This would not necessarily be a safe assumption to make for non-commercial projects. Such projects may fail to provide the necessary incentives for cooperation, even though they should nevertheless be carried out in the public interest.

I mention that *Kløvtveit* was discussed in *Otra II*. But the presiding judge chose to focus on what he regarded as the "practical problems" associated with the prospect of cooperation and a compensation award calculated on this premise. The cooperation model was not the center of attention in the case, however, so one can only hope that *Kløvtveit*, rather than *Otra II*, will become the influential precedent for future cases.

However, the eventual outcome of *Kløvtveit* serves as a warning that the solution offered here is very frail. In particular, the expropriating party in *Kløvtveit* successfully argued that the following sinister question had to be put to the appraisal court: If the owners had decided to cooperate with the expropriating party, when exactly would this joint endeavour have applied for a development licence? It was held that the no-scheme rule applied here, so that the actual time-line of the expropriation project fell to be disregarded. But could it then still be regarded as foreseeable that a joint application for development would have been successful, at a later point in time? As it turned out, the answer to this question, based on a concrete assessment, was that a licence would probably not have been granted. Hence, the cooperation project fell to be disregarded as unforeseeable after all. The case therefore conclude just as the *Otra II*, with compensation awarded according to the natural horsepower method.

Indeed, every single case where the Supreme Court has commented that the traditional method may be abandoned when alternative developments are foreseeable, have been decided on the basis that alternatives are *not* foreseeable. In my opinion, this serves to illustrate the frailty and instability of a system that attempts to ensure benefit sharing through complicated counterfactual assessments of what *would have happened* if an expropriation scheme had not existed.

The pitfalls are many, and the room for creative arguments by resourceful parties is very great. So great, in fact, that the goal of achieving meaningful benefit sharing in hydropower cases seems rather remote in many, if not most, concrete cases. In the end, the new methods that have been introduced might amount to little more than slight variations of an inherently flawed idea of attempting to ensure fairness through compensation.

6 Conclusion and Future Work

In this article, I have explored the possibility of enhancing the legitimacy of economic development takings by establishing compensation practices that ensure better benefit sharing with owners. I started with a brief presentation of the US debate, where this suggestion has received theoretical attention. I noted that from a practical point of view, one of the major obstacle to benefit sharing through compensation appears to be the no-scheme principle, whereby changes in value due to the expropriation scheme are not supposed

to influence compensation awards.

Following up on this, I took a closer look at the no-scheme principle, based on recent case law from the UK. I argued that the principle – as it is understood there – does not necessarily stand in the way of benefit sharing, at least not as long as the commercial potential of the land that is taken can be said to pre-exist the development scheme that unlocks it. I argued that despite appearances, this question is not primarily a question of fact, but a much deeper question of what meaning property is taken to have within society and within the regulatory framework set up to regulate (commercial) land use.

I argued that while this is a politically sensitive question that should normally be left to political decision-makers, some situations might call for a more principled approach in light of constitutional and human rights perspectives. I argued that such a situation arises when the regulatory system presupposes commercial exploitation of a development potential, but acts in such a way that the potential is taken from the land owners and handed over to some external commercial entity. Here, the lack of legitimate reasons for denying benefit sharing is acute, suggesting a critical look at established compensation practices.

Following up on this, I went on to consider Norwegian expropriation law. I first gave a general overview, focusing on the no-scheme principle, before I turned to the case of waterfall expropriation, for which the principle has never been understood as a hindrance to benefit sharing. I noted, however, how the traditional approach to waterfall expropriations has gradually become more and more unsatisfactory, causing great tension and a recent revision of established compensation practices. I analysed these developments and concluded that although it is now recognized – in principle – that the loss of a hydropower potential should be compensated, this is hard to implement in practice. This, I argued, points towards the inherent inadequacy of a system that attempts to ensure benefit sharing through compensation rather than actual participation.

I think my conclusion points towards interesting avenues for future work. First, I note that my analysis can serve as an argument in favour of looking at alternatives to expropriation in cases involving economic development. This is a perspective that has already emerged in the US debate, particularly through the work of Heller and Hills, who have proposed a novel institution for collective action – the *land assembly district* – that they think can obviate the need for expropriation in many cases when economic development is desired by the public.[105]

I think this kind of work points to the future in the debate on economic development takings. Second, I would like to briefly mention that Norway

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

has an entire legal framework in place that can shed further light also on this proposal. I am referring here to the system of so-called *land consolidation courts*, special tribunals that are empowered to organize development projects involving fragmented property rights.[106] Importantly, the legal framework leaves room for *compelling* owners to cooperate and participate, in some cases also with external commercial actors. At the same time, it is a fundamental principle of land consolidation that measures can only be ordered if they are beneficial to all the owners and properties involved.[107]

In relation to hydropower development, the framework is already being put to use in an increasing number of cases.[108] Moreover, there are forces in the Norwegian government that are pushing for land consolidation as an alternative to expropriation more generally.[109] In my opinion, this points towards the future, as it promises to provide a highly flexible approach for dealing with property and economic development using varying degrees of compulsion. Moreover, it provides an interesting case study against which to judge other proposals, such as that put forth by Heller and Hills. A further study of this, however, must be left for a another article.

[106]Land Consolidation Act 1979.

[107]See generally Øyvind Ravnå, *Perspektiver på Jordskifte* (Gyldendahl 2008).

[108]Sæmund Stokstad, "Bruksordning ved Jordskifte i Samband med Utbygging av Småskalakraftverk" (Master Thesis, 2011).

[109]A new Act on land consolidation will take effect from 2016, and in this Act any party who is authorised to expropriate property is also authorised – as an alternative or complementary measure – to initialise and act as a party to a land consolidation dispute that seeks to organize the development project.