On the legitimacy of economic development takings

Thesis submitted to the School of Law at Durham University for the degree of Doctor of Philosophy

by

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Autumn 2014

c. 90 000 Words

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1 Introduction and Summary of Main Themes

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

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

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

So is property as a unifying concept lost to the law? It certainly seems hard to pin it down. In the words of Kevin Gray, when a close scrutiny of property law gets under way, property itself seems

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

2 Abraham Bell, Private Takings, p. 583.

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

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

In this thesis, I will study takings of a special kind, namely those that are sanctioned by a government in pursuit of public interests. In legal language, especially in the US, such acts of government takings are often referred to as takings *simpliciter*, while talk of other kinds of "takings" require further qualification, e.g., in case of "takings" based on contract, tax or occupation.

The US terminology brings the issue of legitimacy to the forefront in an illustrative manner, so I will adopt it throughout this thesis. It reminds us that under the rule of law, taking is not the same as theft, but not necessarily that far removed from it either. The default assumption is that the takings that take place under the rule of law are legitimate. If they are not, we may call them by a different name, but not before. At the same time, it falls to the legal order to spell out in further detail what restrictions may be placed on the power to take.

Restrictions appear implicit in the very notion of taking. The idea that someone might find

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

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

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

occasion to resist an act of taking, and may or may not have good grounds for doing so, appears fundamental to our pre-legal intuitions. But how should we approach the question of legitimacy of takings from the point of view of legal reasoning, and what conceptual categories can we benefit from when doing so? This is the key question that is addressed in this thesis, for the special case of so-called *economic development takings*.

Such takings occur when government sanctions the taking of property to stimulate economic growth. The canonical example is *Kelo v City of New London*, which brought the category of economic development takings into focus in the US, resulting in great controversy and a surge of academic work on legitimacy of takings.[6]

The *Kelo* case concerned a house that was taken by the government in order to accommodate private enterprise, namely the construction of new research facilities for Pfizer, the multi-national pharmaceutical company. The home-owner, Suzanne Kelo, protested the taking on the basis that it served no public use and was therefore illegitimate under the Fifth Amendment of the US Constitution. The Supreme Court eventually rejected her arguments, but this decision created a backlash that appears to be unique in the history of US jurisprudence.

In their mutual condemnation of the *Kelo* decision, commentators from very different ideological backgrounds came together in a shared scepticism towards the legitimacy of economic development takings.[7] Interestingly, their scepticism lacked a clear foundation in US law at the time, as the *Kelo* decision itself did not appear particularly controversial in light of established eminent domain doctrines in the US. Hence, when the response was overwhelmingly negative, from both sides of the political spectrum, it seems that people were responding to a deeper notion of what counts as a legitimate act of taking.

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

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

If the law is about delivering justice to the people, widely shared intuitions about legitimacy deserve attention from legal scholars. In the US, legitimacy intuitions pertaining to economic development takings have received plenty of it after *Kelo*. In the context of US law, it is now hard to deny that *Kelo* belongs to a separate category of takings that raises special legal questions.[8] Because this change in the narrative was largely the result of a popular movement, there is reason to think that economic development takings is a powerful conceptual category, also outside of the US.

Moreover, as soon cases like *Kelo* are portrayed as being primarily about bestowing a benefit on powerful commercial interests, it seems natural to expect that people will have a tendency to judge the issue of fairness similarly, irrespectively of differences in the surrounding legal framework. Two questions arise. First, when is it appropriate to deride economic development takings in this way? Second, if it is appropriate, should the law recognise a justiciable basis for the courts to intervene, to strike down illegitimate takings?

Both of these questions will be addressed in this thesis. To address them effectively, it should be acknowledged from the start that there is at least a *risk* that takings for economic development can be improperly influenced by commercial interests. The risk of such capture, moreover, is clearly higher in economic development situations than in cases when takings take place to benefit a concretely identified public interest, such as the building of a new school or a public road. Hence, it seems intuitively reasonable to single out economic development takings for special attention at the political and normative level. However, should the categorisation also be recognised as a basis for justiciable restrictions on the use of eminent domain?

This is not obvious. For instance, it seems that many European jurisdictions implicitly reject

[8] See, e.g., Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183.

such a perspective, because the state is regarded as having a "wide margin of appreciation" when it comes to deciding on legitimate takings purposes.[9] This points to the first main theme of this thesis: an analysis of economic development takings as a conceptual category for legal reasoning.

1.1 Economic Development Takings as a Conceptual Category

This thesis will argue that the category of economic development takings should be recognised already at the theoretical level. However, this claim will be made relative to a theory of property that is broader than typical approaches to property in legal scholarship. Specifically, the theory of property that will form the backbone of this thesis will encompass more than just the entitlements of owners.

The theoretical framework is discussed in more depth in Chapter 2 of this thesis. There it will be argued that a social function understanding of property should be adopted, with an emphasis on *human flourishing* as a normative foundation for property. In short, property should be protected because it can help people flourish. Moreover, property is meant to serve this function not only for the owners themselves, but also for the other members of their communities.

This ambitious take on property must necessarily also give rise to a broader assessment of legitimacy when the state interferes. This, in turn, is what inspires my initial discussion on economic development takings in the first chapter. There I will present the basic definition of the notion and discuss the *Kelo* case in some more detail. Specifically, I will argue that Justice O'Connor's strongly worded dissent – finding that the taking should be struck down – embodies a social function perspective on property.

Chapter 3 follows up on this by studying the legitimacy of economic development takings in

[9] See *James and others v United Kingdom* (1986) Series A no 98.

more depth. Several approaches to this issue are considered, culminating in a recommendation for a perspective based on institutional fairness that I trace to recent developments at the ECtHR. Specifically, the Court in Strasbourg has begun to look more actively at the systemic reasons why violations of human rights occur, in order to address structural weaknesses at the institutional level in the signatory states. This approach is arguably the one that fits best with the sort of analysis carried out by Justice O'Connor in *Kelo*, more so than the approach usually induced by the public use restriction in the US Constitution.

Importantly, the institutional perspective appears to be a sensible middle ground between procedural and substantive approaches to legitimacy, directing us to focus on decision-making processes and structural aspects without giving up on substantive fairness assessments. To strike a fair balance, in particular, is not just about reaching an appropriate outcome, but also about how that outcome came about, and how often dubious outcomes are likely to result from the way the system is organised. This way of thinking about legitimacy brings me to the second focus point of the thesis.

1.2 A Democratic Deficit in Takings Law?

To make the theoretical work on legitimacy more concrete, Chapter 3 provides a proposal for a legitimacy test that can be applied to economic development takings. This test consists of a list of indicators that can suggest eminent domain abuse. The first six points are due to Kevin Gray, while the final three are additions I propose on the basis of the work done in this thesis.[10] I call the resulting list the Gray test, a heuristic for inquiring into the legitimacy of an economic development taking.

Arguably, the most important indicator is also the least precise, namely the one pertaining to

[10] For Gray's original points see Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011).

the *democratic merit* of the taking (one of my additions). By itself, such a broad indicator might not offer much guidance. However, the idea is that when taken together with the other points, this indicator will induce an overall assessment of the other points against the decision-making process as a whole, not only the final outcome. Hence, this addition is specifically aimed at emphasising the institutional fairness perspective. If a taking fails the legitimacy test on this point, moreover, it might indicate an existing weakness or a pernicious deterioration of the decision-making framework more generally.

Admittedly, asking courts to test for legitimacy is an incomplete response to the worry that illegitimate practices surrounding economic development takings signify a democratic deficit in takings law. Moreover, some US scholars have argued that increased judicial scrutiny is neither a necessary nor a sufficient response to concerns about the institutional legitimacy of takings such as *Kelo*.[11] Instead, these authors point out that the traditional takings procedure does not in any case seem particularly suited for bringing about this kind of economic development.

This observation has been accompanied by proposals for structural takings law reform, most notably the work of Heller and Hills.[12] This work proposes that a new type of institution, a so-called Land Assembly District, can replace the traditional takings procedure in cases where property rights are fragmented and the potential takers have commercial incentives. The basic idea is that the owners themselves should be allowed to decide whether or not development takes place, by some sort of collective choice mechanism (possibly as simple as a majority vote). In this way, the holdout problem can be solved (individual owners cannot threaten to block development to inflate the value of their properties). At the same time, however, the local community's right to self-governance is recognised and respected.

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11 See generally Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704; Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465.

12 See Heller and Hills (n 11).

The proposal for Land Assembly Districts is linked to more general ideas about self-governance and sustainable resource management, particularly the theories developed by Elinor Ostrom and others.[13] On the basis of a large body of empirical work, these scholars have formulated and refined a range of design principles for institutions that can promote good self-governance at the local level.[14]

At the end of Chapter 3, I argue that this work can be used to address the legitimacy of takings in a principled way, to arrive at refinements or alternatives to the proposal made by Heller and Hills. Specifically, it seems that alternatives to expropriation based on self-governance can be a powerful way to address the worry that economic development takings might otherwise be associated with a democratic deficit. At the same time, the context-dependence of solutions along these lines make sweeping reform proposals unlikely to succeed. Rather, it is important that the institutions that are used are appropriately matched to local conditions.[15]

For instance, a setting where property is evenly distributed among members of the local community might suggest a very different type of institution compared to a setting where the relevant property rights are all in the hands of a small number of absentee landlords. In short, the idea of using self-governance structures in place of eminent domain necessitates a more concrete approach, a move away from property theory towards property practice. This sets the stage for the second part of the thesis, consisting of a case study of takings for Norwegian hydropower development.

This first key objective of this case study is to apply the theory developed in the first part to analyse the legitimacy of takings for hydropower. The second objective is to study a concrete institutional alternative to expropriation in more depth, namely the system of *land consolidation*

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[13] See Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge University Press).

[14] See M Cox, G Arnold and SV Tomas, 'A Review of Design Principles for Community-based Natural Resource Management' (2010) 15(4) Ecology And Society 38.

[15] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 13) 92.

courts. In Norway, these courts are empowered to set up self-governance organisations for local resource management and economic development, if necessary against the will of individual owners.

1.3 Putting The Theory to the Test

In Norwegian law, the story of legitimacy more or less begins and ends with the issue of compensation.[16] If an owner has grievances about the act of taking as such, not the amount of money they receive, takings law has very little to offer. In fact, it does not appear to offer anything that does not already follow from general administrative law. The owner can argue that the decision to take was in breach of procedural rules, or grossly unreasonably, but the chance of succeeding is slim.[17]

In cases involving hydropower development, the position of local owners is also affected by a number of additional variables that pertain specifically to the licensing framework in place to ensure government control over the use of water resources. Chapter 4 presents this framework in some detail, before discussing administrative practices and commercial practices characterising the hydropower sector today. A first important observation is that the hydropower sector in Norway was liberalised in the early 1990s.[18] This means that the hydropower companies that expropriate are now commercial enterprises, not public utilities.

A second important observation is that the property rights that the energy companies tend to take from local owners are not merely ancillary rights that are needed in order to develop water resources. Rather, the relevant water resources themselves are also taken. In Norway, the right to harness the power of water is a property right, typically owned by members of the rural community in which the resource is found.[19]

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16 See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

17 See **dyrkolbotn15b**

18 The crucial legislative reform was the Energy Act 1990.

19 See Water Resources Act 2000 s 13.

Hence, the hydroelectric companies in Norway are traditionally dependent on taking natural resources from local communities in order to exist and make money for their shareholders. Since deregulation, however, local owners have begun to resist such takings. This has been motivated by the fact that owners can now undertake their own hydropower projects as a commercial pursuit; unlike the situation before liberalisation, owner-led development projects can now demand access to the electricity grid as producers on equal terms with established energy companies.[20] Unsurprisingly, this has led to heightened tensions between takers and owners, tensions that the water authorities are now forced to grapple with on a regular basis.

Chapter 4 sets the stage for studying these tensions in more depth. The chapter argues that despite their improved position following liberalisation, local owners remain marginalised under the regulatory framework. Specifically, despite political support for locally organised small-scale development, the large energy companies have continued to enjoy a privileged position in their dealings with the water authorities. Lately, the political narrative appears to be changing, with large-scale development becoming the preferred mode of exploitation also among politicians.

Building on these observations, Chapter 5 goes on to discuss expropriation of waterfalls in more depth. Specifically, the chapter tracks the position of owners under the law and administrative practice. The key finding is that expropriation is usually an *automatic consequence* of a large-scale development license.[21] That is, commercial companies that succeed in obtaining large-scale development licenses will almost always be granted the right to expropriate. This rights will be granted, moreover, without any assessment taking place as to the appropriateness of depriving local owners of their resources.

Moreover, the owners' position during the licensing assessment stage is extraordinarily weak.[22]

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[20] See, e.g., *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

[21] In some cases, this follows explicitly from the water resource legislation, while in other cases it follows from administrative practice. For further details, see below in Chapter 5, Section 5.3.

[22] See especially the discussion in Chapter 5, Sections 5.6 and 5.7.

The fact that expropriation tends to follow automatically from a license to develop has led the water authorities to regard the licensing question and the associated procedures as exhaustive in all cases. No distinction is made between cases involving expropriation and cases that do not. This has a dramatic effect on the level of protection available to local owners. According to written testimony during a recent Supreme Court case on legitimacy, the water authorities do not even recognise a duty to inform local owners of pending applications that will involve expropriation.[23]

In relation to the compensation issue, the owners' position initially improved after liberalisation, as the lower courts began to compensate local owners on the basis of what they lost from being unable to carry out their own development project.[24] This led to a dramatic increase in compensation payments compared to earlier practice.[25] However, a recent decision from the Supreme Court appears to largely reverse this development, since a large-scale license may now itself be considered proof that alternative development by owners was always unforeseeable.[26]

In light of this and other data discussed in Chapter 5, my conclusion is that today's typical takings for hydropower do not appear to pass the Gray test. However, Norwegian law also offers a promising institutional path towards the restoration of legitimacy in economic development contexts. Specifically, the institution of land consolidation, as understood in Norway, could serve such a function. Moreover, it already does so in the context of hydropower development, when local owners wish to undertake development themselves but disagree about how it should be done. This brings me to the fourth key theme of this thesis.

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23 See Chapter 5, Section 5.7. The case in question was *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393.

24 See *Uleberg* (n 20).

25 See especially the discussion in Chapter 5, Section 5.5.1.

26 See *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612.

1.4 A Judicial Framework for Compulsory Participation

The final key theme of this thesis, presented in Chapter 6, consists of an assessment of land consolidation and its potential function as an alternative to takings when compulsion appears warranted to ensure economic development. This is an especially fruitful topic because land consolidation is presently being used in this way to facilitate hydropower development. The large energy companies never use it, but local owners often do.[27] In these cases, the consolidation courts have proved themselves highly effective in making self-governance work.

The land consolidation alternative can make a great difference, because it strives to ensure legitimacy through participation. The potential democratic deficit associated with compelled economic development is dealt with by efforts to raise owners to take active part in the management of their property in the public interest. At the same time, the procedure can be reasonably effective, since participation is compulsory and the judge may intervene to settle conflicts. In Chapter 6, I discuss possible objections to the procedure, but conclude that the continued development of the land consolidation institution provides the best way forward for addressing problems associated with economic development takings in Norway.

If the integrity of the procedure can be secured, adopting it to organise larger scale development involving external actors seems like a very promising approach to legitimacy more generally. Moreover, while the system is designed to work in a setting of egalitarian property rights, it is interesting to also consider the possibility key features of the procedure might also inspire solutions to the takings problem in other jurisdictions.

It might well be, for instance, that a land consolidation approach coupled with a human flourishing understanding of property can be a good way of including non-owners in the process. Possibly,

[27] In 2009, land consolidation had facilitated a total of 164 small-scale hydropower projects with a total annual energy output of about 2 TWh per year (enough electricity to supply a city of about 250 000 people), see **gevinst09**

a modification of the framework in settings where many property dependants do not have property rights, is to enlarge the set of legal persons with legal standing before the court. This might give rise to increased complexity of the procedure and new risks of abuse by local elites, but it seems like an interesting idea to explore in future work. In short, the consolidation alternative seems like a good starting point for an approach to legitimacy that truly takes into account a wider notion of what property is, and what it can and should be in a democracy where everyone is equal before the law.

Part I

Towards a Theory of Economic Development Takings

2 Property, Protection and Privilege

It's nice to own land.[1]

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

2.1 Introduction

This chapter will present a template for analysing economic development takings, based on legal theory.[3] It will be argued that the category of economic development takings is relevant to legal reasoning about certain situations when private property is taken by the state. Clearly, the category makes intuitive sense; it targets situations when property is, quite literally, taken for economic

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

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

3 I will not provide an extensive presentation of concepts or theoretical approaches developed in other fields, such as political science, sociology, economy, or psychology. However, all these fields engage in interesting ways with the notion of takings and property, and I will quote some sources from these fields as appropriate for my argument based on legal theory. See generally Thomas J Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (Cambridge University Press 2011); Janice Nadler and Shari Seidman Diamond, 'Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity' (2008) 5(4) Journal of Empirical Legal Studies 713; Claudio J Katz, 'Private Property versus Markets: Democratic and Communitarian Critiques of Capitalism' (1997) 91(2) The American Political Science Review 277; Bruce G Carruthers and Laura Ariovich, 'The Sociology of Property Rights' English (2004) 30 Annual Review of Sociology 23.

development. In most cases considered in this thesis, economic development is even the explicitly stated aim used to justify the exercise of eminent domain.

However, the legal relevance of the category of economic development takings cannot be taken for granted. Indeed, a superficial look at typically approaches to takings in the law would seem to indicate that the nature of the project benefiting from a taking is not usually a major issue when assessing the legitimacy of interference.[4]

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

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

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

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

6 In fact, many states have now introduced legislation that *does* contain such rules, following the backlash of the controversial decision in *Kelo v City of New London* 545 US 469 (2005). However, such rules were introduced only after the category of economic development takings first came to prominence in legal discourse. See generally Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust Journal 799; Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100; Harvey M Jacobs and Ellen M Bassett, 'All Sound, No Fury? The Impacts of State-Based Kelo Laws' (2011) 63(2) Planning & Environmental Law 3.

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

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

To make clear why such takings are special, this chapter abandons the traditional entitlements-based perspective on property in favour of a perspective that emphasises the ideal function of property as a guarantor of social justice and a building block of democracy and participatory decision-making, particularly at the local level. This will allow us to shift attention away from the effect that a takings has on individual owners, towards the question of whether the purpose of the taking, and its broader societal effect, merits interfering with private property.

Moreover, I will argue that private property is important because it gives owners a right to take part in decision-making processes concerning economic development, a right that also typically gives owners a duty to participate, not only on their own behalf, but also on behalf of broader community interests. This highlights that property rights can empower local communities in their

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

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

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

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

I do so in Section **??**, by building on the human flourishing account of the purpose of property. I argue that the human flourishing theory provides us with a possible path towards answers to the normative questions that arise from the social function perspective. In Section **??**, I apply the theoretical framework developed in preceding sections to a preliminary investigation of economic development takings, to bring out the overarching question of legitimacy, which will occupy a central place in this thesis.

2.2 Donald Trump in Scotland

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

To realise his plans, Trump purchased the Menie estate in 2006, with the intention of turning it into a large resort with a five-star hotel, 950 timeshare flats, and two 18-hole golf-courses.[10] The local authorities were divided on the issue of whether to grant planning permission, which was first denied by Aberdeenshire Council.[11] One of the reasons for rejecting the plans was that the proposed site for the development had previously been declared to be of special scientific interest under conservation legislation.[12] The frailty and richness of the sand dune ecosystem, it was argued, suggested that the land should be left unspoilt for future generations. Several members of the local population actively campaigned against the plans, with some also refusing to sell property that Trump wanted to include in his development project.[13]

Trump was not deterred, and in the end he was able to convince Scottish ministers that he should be given the go-ahead on the prospect of boosting the economy by creating some 6000 new

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

[10] See Haroon Siddique, 'Trump triumphs in battle for Scottish golf resort' (*The Guardian*, 3rd November 2008) ⟨http://www.theguardian.com/world/2008/nov/03/donaldtrump-scotland⟩ accessed 26th August 2015.

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

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

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

jobs.[14] Activists continued to fight the development, launching the "Tripping up Trump" campaign to back up local residents who refused to sell their properties.[15] One of these, the farmer and quarry worker Michael Forbes, expressed his opposition in particularly clear terms, declaring at one point that Trump could "shove his money up his arse".[16] Trump, on his part, had described Forbes as a "village idiot" that lived in a "slum".[17] Moreover, he had suggested that Forbes was keeping his property in a state of disrepair on purpose, to coerce Trump to pay more for the land, to remove the blight.[18] Forbes was offended. He proudly declared that he would never consider selling, as the issue had become personal.[19]

At the height of the tensions, Trump asked the local council to consider issuing compulsory purchase orders (CPOs) that would allow him to take property from Forbes and other recalcitrant locals against their will.[20] These plans were met with widespread outrage. The media coverage

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14 See Severin Carrell, ''World's best golf course' approved - complete with 23-acre eyesore' *The Guardian* (London, 4th November 2008) ⟨http://www.theguardian.com/world/2008/nov/04/donald-trump-scottish-golf-course⟩ accessed 16th April 2015. Trump's plans attracted significant public attention, and his interaction with Scottish decision-makers came under critical scrutiny by commentators, see, e.g., Simon Jenkins, 'Scotland's gullible politicians are the victims of a colossal Trump try-on' (*The Guardian*, 13th June 2008) ⟨http://www.theguardian.com/commentisfree/2008/jun/13/donaldtrump.scotland⟩ accessed 16th April 2015. For a more general assessment from the point of view of conservation interests in the UK, see Arts Koen and Gina Maffrey, 'Trump's golf course – Society's nature. The death and resurrection of nature conservation' (2013) 34(1) ECOS 49.

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

16 See (n 13).

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

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

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

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

was wide, mostly negative, and an award-winning documentary was made which painted Trump's activities in Balmedie in a highly negative light.[21] The controversy also found its way into UK property scholarship. Kevin Gray, in particular, a leading expert in property law, expressed his opposition by making clear that he thought the proposed taking would be an act of "predation".[22]

In fact, the case prompted Gray to formulate a number of key features that could be used to identify situations where compulsory purchase would be likely to represent an abuse of power. Gray noted, moreover, that Trump's proposed takings would fall in line with a general tendency in the UK towards using compulsory purchase to benefit private enterprise, even in the absence of a clear and direct benefit to the public. In light of this, it seemed realistic that CPOs might be used in Balmedie.[23] It would not be hard to argue that the public would benefit indirectly in terms of job-creation and increased tax revenues. Moreover, Scottish ministers had already gone far in expressing their support for the plans.

But then, in a surprise move, Trump announced he would not seek CPOs, claiming also, to the consternation of local residents, that it had never been his intention to do so.[24] Instead, Trump decided to pursue a different strategy, namely that of containment. He erected large fences, planted trees and created artificial sand dunes, all serving to prevent the properties he did not control from becoming a nuisance to his golfing guests. One local owner, Susan Monroe, was fenced in by a wall of sand some 8 meters high. "I used to be able to see all the way to the other side of Aberdeen",

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

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

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

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

she said, "but now I just look into that mound of sand".[25] She also lamented the lack of support from the Scottish government, expressing surprise that nothing could be done to stop Trump.

There was little left to do. As soon as the decision was made to build around them, the neighbouring property owners found themselves marginalized. Trump, on his part, was declared a valuable job-creator whose activities would boost the economy in the region. He even received an honorary doctorate at Robert Gordon University, a move that prompted the previous vice-chancellor, Dr David Kennedy, to hand his own honorific back in protest.[26]

In the end, then, it was not by taking the land of others that Trump triumphed in Scotland. Rather, he succeeded by exercising "despotic dominion" over his own.[27] This proved highly effective. After he fenced them in, his neighbours were hard to see and hard to hear. The Balmedie controversy went quiet, the golfers came, Trump got his way. As he declared during the grand opening: "Nothing will ever be built around this course because I own all the land around it. [...] It's nice to own land."[28]

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The tale of Trump coming to Scotland serves to illustrate the kind of scenario that I will be looking at in this thesis. In addition, it puts my work into perspective. For a while, it looked like Balmedie was about to become a canonical case of an economic development taking. But in the end, it became an illustration of something more subtle, namely that what it means to protect property depends on value judgements regarding opposing property interests. In particular, while Trump achieved his ends in Scotland by relying on his own property rights, he did so by undermining the

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25 See Booth (n 1).

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

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

28 See Booth (n 1).

property rights of others, even if he did not formally condemn those rights.

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

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

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

Regardless of who we support, in the case of Balmedie, we are forced to recognise that protection implies interference and vice versa. This shows the conceptual inadequacy of the idea that property protection is all about weighing private and public interests against each other, to strike a balance

between the state's power to do good and owners' right to do as they please. In reality, matters can be more subtle, involving a number of additional dimensions. Importantly, how we assess concrete situations where property is under threat depends crucially on what we perceive as the "normal" state of property, the alignment of rights and responsibilities that we deem worthy of protection. Our stance in this regard clearly depends on our values. But values themselves are in turn influenced by the context of assessment within which they arise. An additional challenge is that our assessments are often influenced by our *perception* of the relevant context, rather than by facts.

For example, property activists in the US tend to regard the value of autonomy as a fundamental aspect of property. But this must be understood in light of the idea that US society is founded on an egalitarian distribution of property, where ownership is meant to empower ordinary people by facilitating self-sufficiency and self-governance.[29] Hence, the autonomy inherent in property ownership is not thought of as being bestowed on the few, but on the many. Protecting autonomy of owners against state interference is not about protecting the privileges of the rich and powerful, but is embraced as a way to protect *against* abuse by the privileged classes.[30]

This, however, is only an *idea* of property protection. It might not correspond to the reality surrounding the rules that have been moulded in its image. Indeed, it has been noted that despite the great pathos of the egalitarian property idea, egalitarianism has actually played a marginal role to the development of US property law.[31] More worryingly still, research indicates that land ownership in the US, which is hard to track due to the idiosyncrasies of the land registration

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29 See, e.g., James W Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press 2007) 173; Carol M Rose, 'Property as the keystone right?' (1996) 71(3) Notre Dame Law Review 329.

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

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

system, is not actually all that egalitarian.[32] In this way, we are confronted with the danger of a dissociation of values, reality and the law.

In Scotland, a similar story unfolds. Here, the traditional concern is that land rights are mainly held by the elites.[33] As a result, Scottish property activists tend to focus on values such as equality and fairness, calling also on the state to regulate and implement measures to achieve more egalitarian control over the land. Indeed, reforms have been passed that sanction interference in established property rights on behalf of local communities.[34] At the same time, cases like Balmedie illustrate that the Scottish government, now with enhanced powers of land administration, may well choose to align themselves with the large landowners. Moreover, research indicates that recent reforms in Scottish planning law, which serve to enhance the power of the central government, have the effect of undermining local communities and their capacity for self-governance.[35] Again, the danger of a disconnect between influential property narratives and reality is brought into focus.

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

I think the example of Balmedie suggests a possible first step. It illustrates, in particular, the

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

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

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

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

need for a framework that will allow us to recognise that opposing the use of compulsory purchase for economic development is perfectly consistent with supporting strict property regulation to prevent the establishment of golf resorts in fragile coastal communities. Both of these positions, moreover, should be viewed as efforts to protect property. To the classical debate about the limits of the state's authority over property, such a dual position can be hard to make sense of. But in my opinion, this only points to the vacuity of the conventional narrative.

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

2.3 Theories of Property

What is property? In common law jurisdictions, the standard answer is that property is a collection of individual rights, or more abstractly, a means of protecting *entitlements*.[36] Being an owner, it is often said, amounts to being entitled to one or more among a bundle of "sticks", streams of protected benefits associated with, and thereby serving to legally define, the property in question.[37] This point of view was first developed by legal realists in response to the natural law tradition,

[36] The idea that property rules are a form of entitlement protection was developed to great effect in the seminal article Guido Calabresi and ADouglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) Harvard Law Review 1089.

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

which conceptualised property in terms of the owner's dominion over the owned thing, particularly his right to exclude others from accessing it.[38] In civil law jurisdictions, rooted in Roman law, a dominion perspective is still often taken as the theoretical foundation of property, although it is of course recognised that the owner's dominion is never absolute in practice.[39]

In modern society, the extent to which an owner may freely enjoy his property is highly sensitive to government's willingness to protect, as well as its desire to regulate. To dominion theorists, this sensitivity is typically thought of as giving rise to various restrictions on property, but for bundle theorists it is often thought of as *constitutive* of property itself.[40]

The bundle of rights theory has long historical roots in common law. Arguably, it was distilled from the traditional estates system for real property, which was turned into a theoretical foundation for thinking about property in the abstract.[41] However, during the 18th and 19th century, natural law and dominion theorising was also influential in common law. This is evidenced, for instance, by the works of William Blackstone and James Kent.[42] Towards the end of the 19th century, it became increasingly hard to reconcile such an approach to property with the reality of increasing state regulation. Hence, the bundle metaphor that gained prominence in the early 1900s can be seen as a return to a more modest perspective.[43]

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

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

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

40 Chang and Smih (n 39) 7.

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

42 See generally Blackstone, *Commentaries on the Laws of England, Volume 2: A Facsimile of the First Edition of 1765–1769* (n 27); James Kent, *Commentaries on American law* (1st edn, Commentaries on American Law, vol 2, O Halsted 1827).

43 See Klein and Robinson (n 38) 195.

people, not things.[44] This underscores an important point about property in the real world, namely that the content of rights in property are necessarily relative to a social context as well as the totality of the legal order. For instance, when relying on a bundle metaphor it becomes easy to explain that a farmer's property rights protects him against trespassing tourists, but not against the neighbour who has an established right of way.[45]

By contrast, the dominion theory suggests viewing such situations as exceptions to the general rule of ownership, which implies a right to exclusion at its core. In the case of property, exceptions no doubt make up the norm. But in civil law jurisdictions one lives happily with this. It takes the grandeur away from the dominion concept, but it retains a nice and simple structure to property law. In the civil law world, it is common to say that what the owner holds is the *remainder*, namely what is left after deducting all positive rights that restrict his dominion.[46] Moreover, while there may be many limitations and additional benefits attached to property, they are all in principle carved out of one initial right, namely that of the owner. In this way, the civil law system can be more easy to navigate.

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

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[44] See Merrill and Smith, 'What Happened to Property in Law and Economics?' (n 37) 357-358 ("By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a "thing".").

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

[46] Chang and Smih (n 39) 25.

their relevant rights and duties in relation to property.[47]

In addition, some scholars point out that the bundle theory does not adequately reflect the sense in which property is a right to a *thing*, serving to create an attachment that is not easily reducible to a set of interpersonal legal relationships.[48] In the US, where the bundle theory has traditionally been dominant, this critique seems to be gaining ground.[49]

In this thesis, the efficiency and clarity of different property concepts will not be a primary concern, nor will personal attachments to things in themselves play a particularly important role.[50] Hence, I will remain largely agnostic about this aspect of the debate between dominion and bundle theorists. In particular, the differences between civil and common law traditions in this regard do not cause special problems for my analysis of economic development takings. In this regard, it is more important how different ways of looking at property can influence how we assess when interference is legitimate under constitutional and human rights law. Hence, I now turn to the question of whether or not there are any significant differences between dominion and bundle theories in this regard.

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47 Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101(4) Columbia Law Review 773, 793 ("The unique advantage of in rem rights – the strategy of exclusion – is that they conserve on information costs relative to in personam rights in situations where the number of potential claimants to resources is large, and the resource in question can be defined at relatively low cost."); Merrill and Smith, 'What Happened to Property in Law and Economics?' (n 37) 389 ("The right to exclude allows the owner to control, plan, and invest, and permits this to happen with a minimum of information costs to others."). See also RC Ellickson, 'Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith' (2011) 8(3) 215 (arguing that Merrill and Smith's analysis nicely complements and improves upon the bundle theory).

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

49 See generally Klein and Robinson (n 38).

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

2.3.1 Takings under Bundle and Dominion Accounts of Property

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

For the theorists that developed the bundle of sticks metaphor in the late 19th and early 20th century, this aspect was undoubtedly very important. By providing a highly flexible concept of property, they helped the state gain conceptual authority to control and regulate.[51] The early bundle theorists not only developed a theory to fit the law as they saw it, they also contributed to change.

In takings law, the bundle narrative has been particularly important in relation to the contentious issue of so-called regulatory takings.[52] Such takings occur when government regulates the use of property so severely that it may be classified as a taking in relation to the law of eminent domain.[53] In the US, the question of when regulation amounts to a regulatory taking is highly controversial.[54] The stakes are high because takings have to be compensated in accordance with the fifth amendment of the US constitution.[55] At the same time, the law is unclear, and the limited amount of statutory law on the issue means that cases tend to be adjudicated against the

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51 Klein and Robinson (n 38) 195.

52 See generally **alterman12** (a comparative study of regulatory takings in thirteen countries).

53 See William A Fischel, *Regulatory Takings: Law, Economics, and Politics* (Harvard University Press 1995) 1. Regulatory takings proper arise when the (contested) right to compensation is inferred from a takings clause, such as in the US. However, the overarching question is how to deal with changes in property values caused by regulation, a question of universal importance across jurisdictions that may also be addressed by the legislator as a separate issue, see R Alterman (ed), *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (Amercian Bar Association 2010) 3-10.

54 See generally Fischel, *Regulatory Takings: Law, Economics, and Politics* (n 53).

55 See Fifth Amendment to the US Constitution 1791.

constitution, often the relevant state constitution in the first instance.[56]

If property is thought of as a malleable bundle of entitlements that exists only because it is recognised by the law, it becomes natural to argue that when government regulates the use of property, it does not deprive anyone of property rights. It merely restructures the bundle. In the case of *Andrus v Allard*, the Supreme Court adopted such an argument when it declared that "where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety".[57]

Hence, with regards to the issue of regulatory takings, the bundle theory was actively used by those who favour a less restrictive approach to interference with private property rights. However, it is wrong to conclude that the bundle theory *necessarily* implies a less restrictive stance on takings. Epstein, for instance, argues that as every stick in the property bundle represents a property right, government should not be permitted to remove any of them without paying compensation.[58]

More generally, Epstein does not believe that the bundle theory is responsible for what he regards as a weakening of property rights in the US during the 20th century. Instead, he thinks this weakening resulted from a tendency among modern property scholars to adopt a "top-down" approach to property. According to Epstein, too many scholars view property rights as vested in, and arising from, the power of the state, not the possessions of individuals.[59]

Epstein successfully shows that as a rhetorical device, the bundle of rights theory may be turned on its head compared to how it was used in *Andrus v Allard*. Moreover, his arguments illustrate

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56 See Alterman (n 53) 31-32. Indeed, the federal doctrine on regulatory takings appears to be marked by deference to state courts. See Fischel, *Regulatory Takings: Law, Economics, and Politics* (n 53) 66.

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

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

59 Epstein, 'Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property' (n 58) 227-228 ("In my view, the nub of the difficulty with modern property law does not stem from the bundle-of-rights conception, but from the top-down view of property that treats all property as being granted by the state and therefore subject to whatever terms and conditions the state wishes to impose on its grantees").

that the bundle theory itself does not appear to dictate any particular position on the degree of protection that private property should enjoy against state interference.[60]

In the civil law world, the relationship between property theorising and property values is similarly hard to pin down at the conceptual level. Again, the issue of regulatory takings illustrates this. In some civil law countries, like Germany and the Netherlands, the owner's right to compensation for burdensome land use regulation is strong, while in other civil law countries, such as France and Greece, it is very weak.[61] In particular, the exclusive dominion understanding of property does not appear to commit one to any particular kind of policy on this point.

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

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

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

61 See generally Alterman (n 53).

In terms of descriptive content, both theories appear oversimplified. They provide a manner of speech, but they do not really get us very far towards uncovering the reality of property rights in modern society. In particular, they do not provide a functional account of what role property plays in relation to the social, economic and political structures within which it resides.[62]

In terms of normative content, on the other hand, both the bundle theory and the dominion theory appear rather bland. They simply do not offer much clear guidance as to what norms and values the institution of property is meant to promote. They give neat ways of presenting what property looks like, but do not tell us *why* it should be protected.[63]

2.3.2 Broader Theories

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

- *Utilitarian* theories, focusing on property's role in helping to maximize utility or welfare with respect to individual preferences and desires.[64]
- *Libertarian* theories, focusing on property's role in furthering individual autonomy and liberty, as well as the importance of protecting property against state interference, particularly attempts at redistribution.[65]

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62 A similar point is made in Gregory S Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge University Press 2012) 2-6.

63 For a similar criticism, see A Bell and G Parchomovsky, 'A theory of property' (2005) 90(3) Cornell Law Review 531, 535-536 (proposing an instrumental theory of property, with both descriptive and normative implications, based on the idea that property exists to protect the value of stable ownership).

64 Alexander and Peñalver, *Community and Property* (n 8) Chapter 1.

65 Alexander and Peñalver, *Community and Property* (n 8) Chapter 2.

- *Hegelian* theories, focusing on the importance of property to the development of personhood and self-realisation, particularly the expression and embodiment of free will through control and attachment to one's possessions.[66]

- *Kantian* theories, focusing on how property arises to protect freedom and autonomy in a coordinated fashion so that *everyone* may potentially enjoy it, through the development of the state.[67]

- *Human flourishing* theories, focusing on property's role in facilitating participation in a community, particularly as a template allowing the individual to develop as a moral agent in a world of normative plurality.[68]

It it beyond the scope of this thesis to give a detailed presentation and assessment of all these theoretical branches. Suffice it to say that the utilitarian approach has been by far the most influential.[69] The basic tenet of this paradigm is that means-end analysis on the basis of exogenous preferences and utility measures provide a sound foundation on which to reason about law and policy.

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

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66 Alexander and Peñalver, *Community and Property* (n 8) Chapter 3.

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

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

69 See Alexander and Peñalver, *An Introduction to Property Theory* (n 62) 11 (noting also that there are many varieties of utilitarianism, including some law-and-economics theories for which the appropriateness of that label is contentious).

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

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

To arrive at a suitable foundation in this regard, I will rely on the so-called *social function theory* of property.[70] This theory is often thought of as a normative theory as well, in some sense a precursor to more overtly normative theories such as the human flourishing theory. However, I will argue that the social function theory has a descriptive core that can serve as a common ground for debate among scholars that do not necessarily share the same normative outlook. Crucially, the descriptive core of the social function theory also point towards a descriptive argument in favour of studying economic development takings.

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

2.4 The Social Function of Property

As an empirical observation, the fact that property has social functions is beyond doubt. For instance, it is clear that ownership of property gives rise to social obligations, not just rights. Hardly anyone would protest that in practical life, what an owner will do with their property is as much constrained by the expectations of others as it is by law. Moreover, the law of nuisance and rules relating to adverse possession both serve as simple examples that such expectations can also have a bearing on the legal status of property and its owners.[71]

Still, many property scholars have surprisingly little regard for social functions when they theorise about ownership. According to Alexander, the classical theories of property convey the impression that "property owners are rights-holders first and foremost; obligations are, with some few exceptions, assigned to non-owners".[72] Theorists who emphasise property's social function attempt to redress this conceptual imbalance. As Alexander explains, "social obligation theorists do not reverse this equation so much as they balance it. Of course property owners are rights-holders, but they are also duty-holders, and often more than minimally so".[73]

I remark that what Alexander and others sometimes refer to as the social obligation theory of property is covered by the social function theory as I understand it. However, the social function theory is broader in that it asks us to consider the legal relevance of social dependencies rooted in property more generally, not just obligations. Specifically, the social function theory as it is used in

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71 See Jeremy Waldron, 'What is Private Property?' (1985) 5(3) Oxford Journal of Legal Studies 313, 314 (invoking social obligations as well as the notion of nuisance to explain what ownership is, at the conceptual level); Peter M Gerhart, *Property Law and Social Morality* (Cambridge University Press 2013) 197-198 (proposing an abstract distinction between trespass and nuisance in US law based on the concept of duty, which, it is argued, is always symmetric in nuisance cases but not in case of trespass); Eduardo Moises Peñalver and Sonia K Katyal, 'Property Outlaws' (2007) 155(5) University of Pennsylvania Law Review 1095, 1169-1172 (analysing adverse possession on the basis of a social functions understanding of property). See also *JA Pye (Oxford) Ltd v United Kingdom* ECHR 2007 5559 (the ECtHR deciding to regard a UK case of adverse possession in bad faith as legitimate under the ECHR).

72 Gregory S Alexander, 'Pluralism and Property' (2011) 80 Fordham Law Review 1017, 1023.

73 Alexander, 'Pluralism and Property' (n 72) 1023.

this thesis should be understood as a cross-jurisdictional reference point for a set of abstract ideas about property that includes the ideas of theorists such as Alexander, who also argue specifically for a social obligation norm in US property law.[74] As I discuss in the next subsection, the idea that property serves important social functions is not new. Moreover, it often plays an important implicit role in shaping how property is understood in the law, also in Europe.

2.4.1 Historical Roots and European Influence

The first expression of the social function theory has been attributed to León Duguit, a French jurist active early in the 20th century.[75] In a series of lectures he gave in Buenos Aires in 1911, Duguit challenged the classic liberal idea of property rights by pointing to their context dependence, adopting a line of argument strikingly similar to how recent scholars have criticized utilitarian discourses about property.[76] In particular, Duguit also pointed to the notion of obligation, stressing the fact that individual autonomy only makes sense in a social context where people are dependent on each other as members of communities. Hence, depending on the social circumstances of the owner, their property could entail as many obligations as entitlements. This, according to Duguit, was not only the inescapable reality of property ownership, it was also a normatively sound arrangement that should inspire the law, more so than individualistic, 'liberal', visions of property as entitlement protection.[77]

Similar thoughts have been influential in Europe, particularly during the rebuilding period after

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74 For a similar understanding of the social function theory, see Foster and Bonilla (n 8).

75 See generally Foster and Bonilla (n 8).

76 See Foster and Bonilla (n 8) 1004-1008. For more details about Duguit's work and the contemporaries that inspired him, see generally Mirow, 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (n 70).

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

the Second World War. For instance, the constitution of Germany – her *Basic Law* – contains a property clause stating explicitly that property entails obligations as well as rights.[78] As argued by Alexander, this has had a significant effect on German property jurisprudence, creating a clear and interesting contrast with US law.[79]

A social perspective on property was also influential during the debate among the European states that first drafted the property clause in Article 1 of the First Protocol to the European Convention of Human Rights (P1(1) of the ECHR).[80] The article was eventually formulated as follows:

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

I will return to this clause in more depth in Section **??** of Chapter 2. Here I note how it emphasises both the private right to peaceful enjoyment of possessions and the state's right to interfere with property in the general/public interest. Moreover, it does not explicitly introduce an absolute compensation requirement in case of expropriation by the state, setting it apart from many

78 See Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p 944), art 14.

79 See Gregory S Alexander, 'Property as a Fundamental Constitutional Right? The German Example' (2003) 88 Cornell Law Review 733, 738 ("The German Constitutional Court has adopted an approach that is both purposive and contextual, while the U.S. Supreme Court has not").

80 See Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (2010) 59(04) International & Comparative Law Quarterly 1055, 1063-1065. Allen argues that the liberal conception of property has since gained ground in Europe, as reflected in jurisprudential developments at the ECtHR.

other property clauses, including that contained in the fifth amendment of the US constitution. Arguably, this reflects a recognition of the social aspects of property.[81]

However, it also fits within a traditional narrative of private property, where social responsibilities attaching to property are regarded as arising from state objectives and policies, not ownership as such. Indeed, the chosen formulation in P1(1) appears to suggest that social aspects are external to private property, vested in the regulatory power of the state.

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

Despite the conventional formulation used in P1(1), such a perspective does in fact appear to play a role at the ECtHR. A series of cases involving hunting rights provide an example of this.[82] In these cases, the Court in Strasbourg has explicitly granted stronger property protection to owners who oppose hunting on ethical grounds, compared to owners who want to retain exclusive hunting rights for themselves.

For the former group of owners, it has been held that the state may not compulsorily transfer hunting rights to hunting associations for collective management.[83] For the latter group of owners, by contrast, the Court held in *Chabauty v France* that such transfers must be tolerated.[84]

For owners opposing hunting on ethical grounds, an interference with their hunting right is an interference with their moral duty to act in accordance with their beliefs. The belief that hunting

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81 See generally Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (n 80).

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

83 See *Chassagnou and Others v France* (n 82); *Hermann v Germany* (n 82).

84 See *Chabauty v France* (n 82).

is unethical gives the owners a personal obligation to prevent their hunting rights from being used. If owners are deprived of their opportunity to fulfil this obligation, it changes the social function of their property because it severs the link between the owners' value system and the use that is made of their property.

In *Chassagnou and others v France*, the Court regarded this as a particularly severe interference in property, which could not be upheld despite the fact that it had been carried out in the public interest to secure sustainable management of hunting rights. The Court concluded that "compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol No. 1".[85]

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

The hunting cases also demonstrate that even when the legal system does not explicitly recognise the value of a social function inherent in property, such a function can still come to play a role when the Court assesses the legitimacy of interference against P1(1). This is reassuring since, as I argue in the next section, the law of property invariably involves prioritising between different social functions, also in situations when this might not be acknowledged by policy makers and judges.

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[85] See *Chassagnou and Others v France* (n 82) para 85.

2.4.2 The Impossibility of a Socially Neutral Property Regime

Property both reflects and shapes relations of power among members of a society.[86] Moreover, it does not act uniformly in this way – the effect depends on the circumstances. Consider, for instance, a fairly typical scenario leading to depopulation of rural areas: first, impoverished farmers and other locals sell homes to holiday dwellers, causing house prices to soar. As a result, local people with agrarian-related incomes cannot afford local homes, causing even more people to sell their land to the urban middle class. In this way, a causal cycle is established, the social consequences of which can be vicious, particularly to the low-income people who are displaced.[87] My theoretical contention is the following: setting out to regulate property in a situation like this – when property rights pull in different directions depending on your vantage point – requires a principled stance on whose property, and which of property's functions, one is aiming to prioritise. Should the law emphasise the property rights of local people who face displacement, or should it protect the property rights of outsiders wishing to invest in holiday homes?

Some may shy away from this way of posing the question, by arguing that it would be better to rely on neutral rules that treat all owners the same way. In the gentrification scenario, such an appeal to neutrality could be the first step in an argument against regulating the property market to prevent the displacement of local people. But would that truly be a socially neutral approach to residential property? Presumably, it would threaten the property interests of local

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86 This aspect of property's social function was stressed in a recent "statement of purpose" made by leading property scholars in support of the social function theory, see Alexander and others (n 8). For a sociological perspective on this, see Carruthers and Ariovich (n 3) 23 ("The right to control, govern, and exploit things entails the power to influence, govern, and exploit people").

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

owners, particularly those not wishing to sell their properties.[88] Hence, if *their* property rights are to be protected, regulation should be put in place.

Importantly, both sides of a conflict like this are in a position to adopt a property narrative to argue for their interests. Hence, it is also inappropriate to insist that the law of property is neutral on the issue of property's social functions. Moreover, a traditional narrative of property might fail to make sense of the ensuing tension. Consider, for instance, the conflict between Donald Trump and the Balmedie locals, as discussed in Section **??**.

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

The answer seems unclear under classically liberal property theories. A traditionally minded observer might even come to accuse the locals of having an unprincipled attitude towards private property. From the social function approach, a completely different picture emerges. The locals sought to protect property, but not just any property. The property they wanted to protect was the property which served the social function of sustaining the existing community. The property they wanted to protect was the property that *meant* something to them.[89]

Trump and his supporters might well have entertained similar feelings about their property rights, and the development they wanted to carry out. Hence, in conflicts such as these the law will invariably have to take a stand regarding which property interests it wishes to promote. The

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[88] Such a threat can be more or less direct. For instance, the disappearing community can undermine the social functions of existing property, while rising property values can give rise to rising property taxes that make continued ownership unaffordable.

[89] This is more than merely observing that they wanted to protect *their* property. In their desire to regulate the use of Trump's property, the locals also wanted to protect certain social functions inherent in that property, against Trump's own actions.

social function theory asks us to be upfront about this, so that policy making and adjudication in hard cases can proceed on the basis of substantive arguments about social functions rather than unconvincing appeals to neutrality and deference.

While the law is forced to prioritise in case of conflict, social functions can also work together in a way that promotes certain property uses and decision-making structures for property management. This can even alleviate the pressure for top-down government regulation, with desirably consequences for both owners and the public interest.

Again, this function of property is highly dependent on context. Small business owners, by virtue of being members of the local community, might be socially discouraged from becoming a nuisance to their neighbours, with no need for state interventions through detailed legislation or planning.[90] However, if local owners go out of business and a non-local commercial owner replaces them, the regulatory effect of property can change dramatically.

Indeed, if we imagine that the new owner hopes to raze the local community in order to build a new shopping center, we are at once reminded of the stark contrasts that can arise between various social functions of property. The property rights of small shop owners can be the lifeblood of a community, while the exact same rights in the hands of a large enterprise can give rise to its destruction.

Mechanisms like these can have important ramifications, not only for property, but also for the regulatory regime surrounding its use. For instance, it seems clear that if a non-local, commercially aggressive, owner is to be deterred from becoming a nuisance to neighbours, new and much stricter forms of regulation might have to be put in place.[91] The social responsibility that was previously anchored in the community must now be protected more forcefully by the state. In turn, this can

[90] See, e.g., **282-283** ellickson91.

[91] It has been argued that this mechanism explains the advent of zoning and land use planning in the US, particularly the Supreme Court's willingness to accept it even though it limited the freedom of property owners. See **shoked01**

cause the institution of property to weaken further, as the government assumes greater power to interfere.[92] A feedback effect might result, as increased regulation in turn threatens to make property ownership too burdensome or expensive for low-income, or even average-income, community members.[93] Hence, the most resourceful actors, those who are able to meet or influence the government's demands and/or protect themselves against interference, gain more and more property values, while the government gains more and more regulatory power.

The social function theory tells us that mechanisms such as this should be taken seriously as potential consequences of changes in the property regime. Moreover, by prioritising between social functions of property, the law indirectly serves a regulatory function, since different property functions correspond to different kinds of concrete property uses. Hence, direct regulation of land use can potentially be replaced by a more appropriate forms of property, e.g., by promoting property ownership among marginalised groups. At the same time, it should be recognised that government interference can undermine some of property's social functions, e.g., by leading to concentration of proprietary power in the hands of the most resourceful, thereby creating a demand for yet more forceful mechanisms of government control.

The broader point at stake here can also be brought out in relation to the famous "tragedy of the commons".[94] In his seminal article, Hardin describes how individually rational users of a

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92 For an early criticism of zoning in the US, pointing to the merits of a more flexible and highly decentralised approach based in large part on the law of nuisance, see Robert C Ellickson, 'Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls' (1973) 40(4) The University of Chicago Law Review 681.

93 In the US, the term "exclusionary zoning" is used to describe such a mechanism when zoning contributes to pushing low-income people out of suburban, and increasingly also urban, areas. Since the zoning framework in the US is quite decentralised, the process is often pushed forward by locally based affluent home-owners who capture the zoning power of local governments to enhance their property values, e.g., by preventing intrusive development projects that could otherwise attract low-income people by increasing the demand for cheap labour and the supply of cheap housing. Due to this dynamic, the feedback mechanism is amplified: the standard proposals for reform to deal with exclusionary zoning involve further inflating the power of the government or the markets to impose large-scale development projects against the will of local communities. See, e.g., **manging14** (referring favourably to the standard reform suggestion, but noting that it seems politically unrealistic to implement in the US). For a more subtle analysis, resulting in the proposal that home-value insurance should be introduced to make home-owners less likely to pursue exclusionary zoning, see **fischel05**

94 See Garrett Hardin, 'The Tragedy of the Commons' 162(3859) Science 1243.

commons can eventually cause the depletion of that resource. The problem arises, according to Hardin, because individuals have no proper incentive to refrain from over-exploitation; the damage will be distributed among all resource users, so it will not outweigh the benefit of individual over-use in the short term.

In response, it has been typical to regard either state management or subdivision with individual exclusion rights as the answer.[95] State management is supposed to physically prevent over-exploitation or to provide external incentives for the same, while individual exclusions right are supposed to make it more difficult for resource users to shift the cost of over-exploitation onto other individuals.

However, as Elinor Ostrom and others have shown, the traditional narrative overlooks the fact that commons tend to come with community structures that provide appropriate incentives through locally grounded institutions or social arrangements.[96] Moreover, as long as external forces do not threaten them, such arrangements can be more robust than either individual exclusion regimes or state control.

The ideas of Ostrom on common pool management focus on local institutions for collective decision-making, not property rights. As a complementary viewpoint, the idea that local institutions for resource management can be anchored in private property represents a potentially attractive way of thinking.[97] The social function theory of property already suggests pursuing this idea. Based on the social function approach, the descriptive fact that property structures shape decision-making processes at the local level is enough to conclude that local institutions for resource

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

96 See generally Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 95).

97 For a survey of how US property scholars have been influenced by Ostrom's ideas, including a discussion on the relationship between (private) property and local institutions for self-governance, see Carol Rose, 'Ostrom and the lawyers: The impact of Governing the Commons on the American legal academy' (2011) 5(1) International Journal of the Commons.

management should not be looked at in isolation from the law of property.

Moreover, by recognising property as an anchor for equity and decision-making at the local level, social obligations that inhere in private property may be recognised as existing independently of specific institutional arrangements. Hence, if local institutions are marred by corruption and malpractice, a social function theorist can take the normative stance that property ownership still carries with it duties to care for other property dependants in the community. This duty, moreover, would exist independently of the extent to which it is presently fulfilled through local practices and institutional arrangements.

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

2.4.3 The Descriptive Core of the Social Function Theory

Social function theorists have been criticised for making too far-reaching normative claims. Eric Claeys, in particular, argues forcefully against normative fundamentalism and what he regards as normative naivety among social function theorists.[98] Indeed, some social function theorists have gone very far in presenting the social function account of property as a normative theory, attaching specific political commitments to it along the way.

Hanoch Dagan, for instance, is a self-confessed liberal who argues for a social function understanding on the basis that it is morally superior. "A theory of property that excludes social responsibility is unjust", he writes, and goes on to argue that "erasing the social responsibility of

[98] Eric R Claeys, 'Virtues and Rights in American Property Law' (2009) 94(4) Cornell Law Review 889, 945. ("Judges might think they are doing what is equitable and prudent. In reality, however, maybe they are appealing to a perfectionist theory of politics to restructure the law, to redistribute property, and ultimately to dispense justice in a manner encouraging all parties to become dependent on them.")

ownership would undermine both the freedom-enhancing pluralism and the individuality-enhancing multiplicity that is crucial to the liberal ideal of justice".[99]

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

Dagan is not alone in proposing highly normative social function theories. Indeed, most contemporary scholars endorsing a social function view on property base themselves on highly value-laden assessments of property institutions.[100] By contrast, the discussion in this chapter so far has aimed to demonstrate that the theory has significant merit already as a *descriptive* theory. In my opinion, this is also demonstrated by much of the normatively oriented work that has been done in the social function tradition. However, it seems that their focus on abstract normative assertions threaten to overshadow what is arguably the most important insight, namely that considerations related to social functions *are* already important in many areas of property law, in many different jurisdictions.[101] Moreover, the social functions of property, and normative assertions about them,

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

100 See, e.g., Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) Cornell Law Review 745; Colin Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80(3) Fordham Law Review 1089; Nestor M Davidson, 'Sketches for a Hamilton Vernacular as a Social Function of Property' (2011) 80(3) Fordham Law Review 1053; Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94(4) Cornell Law Review 1009; Eduardo M Peñalver, 'Land Virtues' (2009) 94(4) Cornell Law Review 821.

101 See, e.g., Kevin Gray, 'Equitable Property' (1994) 47(2) Current Legal Problems 157; MC Mirow, 'Origins of the Social Function of Property in Chile' (2011) 80(3) Fordham Law Review 1183; Alexandre dos Santos Cunha, 'Social Function of Property in Brazilian Law' (2011) 80(3) Fordham Law Review 1171; Daniel Bonilla, 'Liberalism and Property in Colombia: Property as a Right and Property as a Social Function' (2011) 80(3) Fordham Law Review

often play a role behind the scenes, where they do unacknowledged work among policy makers and judges alike.

As Laura Underkuffler puts it:

> Property rules, as they now exist, are contingent rules, complex rules, and normatively charged rules. They are crafted and applied in response to the politics of power, security, stability, greed, and a myriad of other aspects of human life.[102]

Because it embraces this crucial insight, the core of the social function theory, rather than being "good, period" as Dagan suggests, is simply more accurate than other proposals, irrespective of one's ethical or political inclinations. The theory provides the foundation for a discussion where different values and norms can be presented in a way that is conducive to meaningful debate, on the basis of a minimal number of hidden assumptions and implied commitments. Thus, the first reason to accept the social function theory is epistemic, not deontic.

That is not to say that theories can ever be entirely value-neutral, nor that this should be a goal in itself. However, a good theory is one that can at least serve as a common ground for further discussion based on disagreement about values and priorities. Making room for normative divergences, moreover, can hopefully diminish the worry that a broader theoretical outlook is the first step towards unchecked state power and rule by "judicial philosopher-kings", as Claeys puts it.[103]

At the same time, the new descriptive dimensions uncovered by the social function view can

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102 Laura S Underkuffler, 'The Politics of Property and Need' (2010) 20 Cornell Journal of Law & Public Policy 363, 376.

103 See Claeys, 'Virtues and Rights in American Property Law' (n 98) 944. There is further evidence to suggest that this is a real worry. Specifically, in a recent article, Anna di Robilant discusses how the Italian fascists were happy to embrace a social function perspective on property, because it helped them make the case that property should be made to answer to one core collective value: the interests of the state. As a form of resistance, many Italian property scholars agreed that the social function view was in order, but emphasised the plurality of values associated with this vision, values that have little or nothing to do with the interests of a Fascist state. See Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?' (2013) 66(3) Vanderbilt Law Review 869.

also inspire novel normative perspectives, as explored in the next section.

2.5 Human Flourishing

Taking the social function theory seriously forces us to recognise that a person's relation to property can be partly constitutive of that person's social and personal capabilities, both in a political and an economic context.[104] Moreover, property influences people's preferences, as well as what paths lie open to them when they consider their life choices.[105] This effect is not limited to the owner, it comes into play for anyone who is socially or economically connected to property in some way, including a potentially large group of non-owners.[106]

Hence, there is great potential for making wide-reaching socio-normative claims on the basis of the social function perspective on the meaning and content of property. But which such claims *should* we be making? According to some, we should adjust our moral compass by looking to the overriding norm of *human flourishing* as a guiding principle of property law. In a recent article, Alexander goes as far as to declare that human flourishing is the "moral foundation of private property".[107]

Human flourishing has a good ring to it, but what does it mean? According to Alexander, several values are implicated, both public and private.[108] Importantly, Alexander stresses that

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104 I will explore some specific capabilities in more depth later on, when discussing economic and social rights, and the value of participation in democracy. For the notion of a capability more generally, proposed as a foundational concept for economic theory, see Amartya Sen, *Commodities and Capabilities* (North-Holland 1985). For a discussion on the import of this work to property theory, see Alexander, 'The Social-Obligation Norm in American Property Law' (n 100) 105.

105 See generally Alexander, 'The Social-Obligation Norm in American Property Law' (n 100).

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

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

108 See generally Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 107); Alexander, 'Pluralism and Property' (n 72).

human flourishing is *value pluralistic*.[109] There is not one core value that always guarantees a rewarding life. To flourish means to negotiate a range of different impulses, both internal and external. Importantly, these act together in a social context that influences their meaning and impact[110]

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

2.5.1 Property as an Anchor for Economic and Social Rights

The so-called "second generation" of human rights consists of basic economic, social and cultural (ESC) rights that complement and provide a humanitarian foundation for the better publicised civil and political rights.[111] This includes rights such as the right to housing, the right to food, and the right to work.[112] Economic and social rights of this kind often involve property. Specifically, they often involve interests in property that are not recognised as ownership, e.g., housing rights for squatters or rights to food and work for landless rural people.

If the notion of property is conceptualised in the traditional way, as an arrangement to protect individual entitlements, the relationship between private property and economic and social rights appears to be one filled with tension.[113] In particular, if economic and social rights require owners to give up some property entitlements, it becomes natural to portray property protection as standing in the way of social justice.

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109 Alexander, 'The Social-Obligation Norm in American Property Law' (n 100) 750-751.

110 Alexander, 'Pluralism and Property' (n 72) 1035-1052.

111 See generally Mashood Baderin and Robert McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (2007) 1-14 (arguing that the "second-generation" terminology is unfortunate since it can give rise to the misconception that ESC rights are second-class).

112 See International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI) [1966], art 6.

113 See Namita Wahi, 'The tension between property rights and social and economic rights: A case study of India' in *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Taylor and Francis 2014) 138.

However, the human flourishing theory can be used to tell a very different story, namely one where economic and social rights are anchored in the notion of property itself. Importantly, the human flourishing theory compels us to take into account the interests and needs of property dependants other than owners. As Colin Crawford puts it, the purpose of property should be to "secure the goal of human flourishing for all citizens within any state".[114] Consider, for instance, the right to housing. If the interests of a property owner come into conflict with the housing rights of a property dependant, the human flourishing theory encourages us to approach this as a tension *within* property, between different property functions.

With such a starting point, we should also acknowledge that the appropriate way to approach the rights of non-owners in relation to property might well depend on who the owner is and the choices they make in managing their property.[115] For instance, if owners live on their land and don't own much more than they need themselves, it becomes hard to maintain the criticism that their private property is somehow an affront to the housing rights of the landless. Moreover, from a practical point of view, squatting is unlikely to occur in these settings unless accompanied by more severe instances of trespass. Similarly, but possibly more controversially, the owner of an unoccupied building can discourage squatting by managing the property well. Arguably, this too can undercut potential criticism on the basis of housing rights, especially if the owner uses the building to engage in commercial activity that contributes to sustaining the local community.

On the other hand, if owners mismanage their properties, for instance because they seek to obtain demolition licenses or simply wish to await an expected rise in land values, squatters might take opportunity of this and feel encouraged to occupy the property. If private property is thought of merely as entitlement-protection, a property-protecting state might feel obliged to respond in a

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114 Crawford (n 100) 1089.

115 See, e.g., AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011) 43 (commenting on the principle of "scaling" of social obligations in German property law, whereby what can be demanded of owners depends on the context).

way that offends against the social and economic rights of the squatters. If this is considered an undesirable outcome, the government or its critics might in turn come to regard strong property protection as an obstacle that should be removed in order to protect housing rights, even though the real problem is that property does not function as it should within society. Hence, the result can be that property structures are damaged further, as the state pursues policies of interference and centralised management, without addressing how private property as such can promote human flourishing.

By contrast, the human flourishing narrative suggests that both owners and non-owners might appropriately be viewed as victims if the state fails to protect property's proper functions. This perspective might even suggest itself when owners and non-owners would otherwise appear to be adversaries. For a concrete example, I mention the case South African case of *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd.*[116]

The case dealt with squatting on a massive scale: some 400 people had initially taken up residence on land owned by Modderklip Farm, apparently under the belief that it belonged to the city of Johannesburg.[117] The owner attempted to have them evicted and obtained an eviction order, but the local authorities refused to implement it. Eventually, the settlement grew to 40 000 people and Modderklip Farm complained that its constitutional property rights had not been respected.[118]

The Supreme Court of Appeal concluded that Modderklip's property rights had indeed been violated, but noted that the housing rights of the squatters were also (in danger of) being violated;

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[116] See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (2005) 5 SA 3 (CC). For two commentaries focusing specifically on its implications for property law and theory, see Alexander and Peñnalver (n 106); AJ Van Der Walt, 'The state's duty to protect property owners v the state's duty to provide housing: thoughts on the Modderklip case' (2005) 21(1) South African Journal on Human Rights 144.

[117] See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (n 116) 4.

[118] See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (n 116) 8.

the squatters needed a place to go before they could be evicted.[119] Hence, the appropriate response was to order the state to pay compensation to Modderklip, for an ongoing violation of its property rights.

This result underscores that, *in practice*, the content of property rights is sensitive to the social function of property. Specifically, the rights of the squatters served to limit Modderklip's exercise of the right to exclusion. However, according to the Supreme Court of Appeal, this was then a violation of property rights. Hence, while the outcome in the case was consistent with a social function understanding of property, the rationale behind it builds on a narrative that takes the perceived tension between property and housing rights as its point of departure.[120]

The Constitutional Court, by contrast, chose to remain agnostic on the issue of the state's duties to protect property and housing rights, as well as the relation between these duties.[121] Rather, the Constitutional Court focused on the state's failure to "assist Modderklip" in dealing with the "burden imposed on it to provide accommodation to such a large number of occupiers".[122] This was a failure of governance, and the state was ordered to pay compensation, not for a violation of property, but as an appropriate form of assistance to Modderklip.[123]

This shift of perspective can arguably be understood as a reflection of the Court's willingness to regard the needs of the squatters as giving rise to a social obligation for Modderklip *qua* owners.

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119 See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (2004) 8 BCLR 821 (SCA) 21-26.

120 For a commentary that also takes as its starting point, Van Der Walt (n 116) 152-156. As van der Walt notes, the Supreme Court of Appeal took the traditional narrative in an interesting direction when it held that the failure of the state to protect the housing rights of the squatters was the *cause* of its failure to protect property. Hence, as van der Walt notes, the conflict between rights became more apparent than real, and the state was blamed for a failure to fulfil its duty to protect *both* rights. This is an improvement on a narrative focused on the question of which right to prioritise, but still arguably over-emphasises the role of the state as the primary duty-bearer in situations involving interactions in the world of private law.

121 See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (n 116) 25.

122 See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (n 116) 49.

123 For a more detailed presentation of the Court's decision, including references to the relevant governance provision of the South African constitution (guaranteeing access to court with suitable and efficient enforcement procedures), see Van Der Walt (n 116) 156-158.

Effectively, the circumstances of the case meant that Modderklip's ownership entailed an obligation to respect the housing needs of a community of 40 000 people. Plainly, the primary duty-bearer was the owner, not the state.

With such an approach, private property can be a potential source of justice for anyone, including squatters. The role of the state, meanwhile, becomes that of assisting those who are directly responsible for delivering justice on the ground, including owners such as Modderklip. In a detailed analysis of the case, Alexander and Peñalver also argue in this direction. They suggest, in particular, that *Modderklip* serves as an illustration of how property owners themselves can have responsibilities towards property dependants, obligations that endure as long as private property remains in place.[124] This normative turn makes property owners addressees of obligations arising from the economic, social and cultural rights of non-owners, not by direct horizontal application of these rights, but through the law of property.[125] In this way, the human flourishing theory points towards a novel way to address the economic and social rights of marginalised groups, for whom it often appears that neither private property nor state management is capable of delivering basic justice.[126]

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[124] Alexander and Peñnalver (n 106) 157 ("The courts' unwillingness to ratify Modderklip's desire to remove the squatters from its land illustrates the courts' willingness to take seriously the obligations of owners, not only as they concern owners' direct relationship with the state but also in relation to the needs of other citizens"). It should be noted, moreover, that Modderklip was eager to sell the land to the government. See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (n 116) 61.

[125] In this way, it arguably strengthens such rights, while potentially circumventing problems and objections associated with the idea of making such rights justiciable in disputes among private parties. For the question of horizontal application more generally, see Manisuli Ssenyonjo, 'Non-State Actors and Economic, Social, and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (2007). As the case of *Modderklip* demonstrates, embedding the duty of non-state actors in property will serve to ensure that the state is responsible for providing assistance in cases when the burdens of ownership become disproportionate. The duty of the state in these circumstances will be formally directed towards the owners, even if the beneficiaries of state action will be those property dependants with respect to whom the owners have obligations. This might prove conducive to more effective action also at the state level; presumably, the owners as a group would make a valuably ally for the landless squatters, in cases of failed governance.

[126] For instance, it has been noted that in India, the human right to water has at times been simultaneously frustrated both by a non-egalitarian distribution of riparian rights as well as a regulatory framework that grants the state almost limitless proprietary power over water resources. See Philippe Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (Oxford University Press 2009) 186. To address shortcomings of the current system for water management in India, Cullet recommends a conceptual approach that "leaves aside property rights altogether" (both private and public) and instead emphasises that water is a common heritage of humankind. A possible alternative, highlighted by the human flourishing theory, it to approach fairness by embracing a more progressive notion of

Moreover, it strengthens the institution of property, highlighting why it might be appropriate to grant it strong protection against interference by external forces. In particular, a human flourishing approach might serve as a bulwark against the idea that the ultimate expression of public interests can be found in the actions taken by the state. Instead, the theory directs attention to how these interests are expressed at their point of origin, by emphasising how values often associated with the public sphere, such as those pertaining to the economic and social rights of marginalised groups, are in fact legally relevant already at the level of interaction between private subjects.[127] As a consequence, the human flourishing account also bolsters the view that public interests and obligations can acquire some justiciable relevance even in the absence of explicit international treaties, legislation or equitable decision-making within (inter)national institutions.

Perhaps the most important structural aspect of this insight concerns the mechanisms used to resolve tensions between different property values. Importantly, it might not be necessary to introduce intermediaries between owners and other rights holders and property dependants. To introduce such intermediaries, whether they are state bodies, international institutions, NGOs, or commercial enterprises, carries with it the risk that the decision-making process can be captured by forces that either have ulterior motives or are simply too far removed from local conditions to deliver results on basic rights.[128] It might be better, therefore, if the necessary balancing of

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property, possibly in a manner that is mutually conducive to an emphasis on water as a common heritage, e.g., by using progressive property mechanisms to structure some uses of water, such as economic development, without granting anyone ownership of water as a substance. As discussed in Part II of this thesis, the traditional property regime for water resources in Norway arguably reflects a framework along these lines, applied in a context marked by egalitarian property with no scarcity of water for basic human needs. The appropriateness of proposing similarly spirited (but adjusted) property-based frameworks for different contexts is a matter for future work, but in my view, the human flourishing theory at least suggests that this might be worth exploring.

127 See Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 107) 1295-1296.

128 See, e.g., Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (n 126) (describing how non-state actors and developed countries increasingly seem to capture the agenda in international environmental law, specifically with respect to water, to the detriment of the developing world); Michael Levien, 'Regimes of Dispossession: From Steel Towns to Special Economic Zones' (2013) 44(2) Development and Change 381 (analysing state-led processes of rural dispossession in India, arguing that states now often act as land brokers for private enterprises); Lyla Mehta and others, 'Global environmental justice and the right to water: The case of peri-urban Cochabamba and Delhi' (2014) 54 Geoforum 158 (two case studies, from India and Bolivia respectively, demonstrating that elite bias and other democratic deficits at the state level have frustrated efforts to realise the water rights for marginalised

interests occurs at the local level, when appropriate also through the law of property.

Ideally, it should be possible to pursue key economic and social values without massively increasing the power of non-local actors and weakening the institution of property. At the same time, it should be possible to more effectively enforce social obligations on private property owners, particularly when they are locally based. Achieving this in practice requires mechanisms that enable negotiations between competing private property interests, to facilitate a balancing of those interests through participatory decision-making rather than top-down state management. This highlights the importance of another property value that the human flourishing theory emphasises, namely that of participation, discussed in the following section.

2.5.2 Property as an Anchor for Democracy

It is often argued that property is a crucial building block of democracy, as it both empowers and encourages owners to participate in the political process.[129] However, the notion of participation at work here often seems to be drawn up rather narrowly, as pertaining primarily to individual owners, and only to their engagement with the formal affairs of the polity.[130] By contrast, the human flourishing theory gives participation a broader meaning, involving also the value of being included in a community. Alexander writes:

> We can understand participation more broadly as an aspect of inclusion. In this sense participation means belonging or membership, in a robust respect. Whether or not one actively participates in the formal affairs of the polity, one nevertheless participates in

groups in peri-urban areas).

[129] See generally Rose, 'Property as the keystone right?' (n 29) (critically examining common arguments to support the claim that property is the most fundamental right, including the argument that it gives rise to, facilitates, and protects democracy). For an exposition of the converse link, explaining how property law is constrained and determined by the values and principles associated with democracy, see Joseph William Singer, 'Property as the Law of Democracy' (2014) 63 Duke Law Journal 1287.

[130] Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 107) 1275.

> the life of the community if one experiences a sense of belonging as a member of that community.[131]

Importantly, participation in a community can have a crucial influence also on people's preferences and desires.[132] Therefore, for anyone adhering to welfarism, rational choice theory, or some other utilitarian dogma, neglecting the importance of communities is not only normatively undesirable, it is also unjustified in an epistemic sense. In particular, it should be recognised as a descriptive fact that community is highly relevant to *any* normative theory that attempts to take into account the preferences and desires of individuals. But Alexander and Peñalver go further, by arguing that participation in a community should also be seen as an independent, irreducibly social, value, not merely as a determinant of individual preferences and a precondition for rational choice. They write:

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

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131 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 107) 1275.

132 For a more in depth discussion of this, see Alexander, 'The Social-Obligation Norm in American Property Law' (n 100) 140. Here, Alexander and Peñalver draw on the work of Amartya Sen and Martha Nussbaum, see generally Amartya Sen, *Resources, Values and Development* (Harvard University Press 1984); Sen, *Commodities and Capabilities* (n 104); Amartya Sen, *Development as freedom* (1st edn, Oxford University Press 1999); Martha C Nussbaum, *Women and human development: the capabilities approach* (Cambridge University Press 2000); Martha Nussbaum, 'Capabilities and Social Justice' (2002) 4(2) International Studies Review 123.

133 Alexander, 'The Social-Obligation Norm in American Property Law' (n 100) 140.

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

Protecting the function that property plays in this regard can at times require protecting it also against the actions of owners and their communities. This can happen, for example, in a community where people have come under pressure to sell their homes to a large commercial company that wishes to construct a shopping mall. If owners are offered generous financial compensations for their homes, or if they are threatened by eminent domain, economic incentives might trump the value of social inclusion and participation. As a consequence, the community might decide to sell.

Even so, in light of the value of community, it would be in order for planning authorities, maybe even the judiciary, to view such an agreement as an *attack on their property*. It is clear that by the sale of the land, the "just social relations" inhering in the community will come under pressure. Property rights that once contributed to sustaining these relations will be transformed into property rights that serve a very different purpose, namely that of aiding the concentration of power and wealth in the hands of the commercially powerful. Such a change in the social function of property might have to be regarded – objectively speaking – as a threat to participation, community and democracy. Therefore, it is arguable that our property institutions should protect against it, even if this implies limiting the freedom of owners and communities to do as they please.

In Norway, a range of such rules are in place to protect agricultural property, by limiting the owners' right to sell parcels of their land without local government consent, as well as by compelling

them to reside on their property and to make use of it for agricultural production.[134] When the law actively promotes egalitarian property in this way, the natural counterpart is to limit direct state interference. The danger otherwise is that the limited power of each individual property owner – appropriate in a community of property owners – is exploited by the state or other powerful stakeholders who might wish to usurp control over local resources and impose their will on local populations.

The broader issue at stake here is highlighted by recent developments in South Africa, where rules closely resembling those found for agricultural property in Norway have been proposed in a recent act on land reform.[135] In South Africa, however, these rules have been proposed alongside a new framework of state "custodianship" of agricultural land, corresponding to a formulation recently introduced in the mineral and petroleum legislation.[136] If the proposal passes, the proper functioning of agricultural property in South Africa would seem to depend quite strongly on the benevolence and capability of the state, which will significantly increase its own power to interfere with private property.[137] Importantly, the human flourishing perspective suggests that even when provisions to promote egalitarian ownership and community commitment are appropriate, provisions that inflate the state's authority might not be. As I believe the case study from Norway will show, strict property rules to protect and promote self-governing agrarian communities can work

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

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

136 See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (holding that introducing custodianship over mineral and petroleum is not expropriation, meaning that no compensation is payable to owners, not even when the rights taken may subsequently be transferred – in a different wrapping, under a new regulatory regime – to third parties). The decision was made under dissent on the basis of a rather dubious-looking conclusion to the effect that acquisition by the state – not merely "custodianship" — is required for a deprivation of property to count as expropriation. The academic community in South Africa appears to be divided on the issues raised by the case, see Walt (n 115) 428-451.

137 Hence, the proposed land reform arguably also demonstrates the appropriateness of Justice Froneman's dissent in *Agri*, see *Agri South Africa v Minister for Minerals and Energy* (n 136) 79-110 (warning against the precedent set by the majority, holding that state custodianship of the type in question amounted to expropriation, but finding that compensation was not required in the circumstances of the case, looking also to the value of social justice and the history of apartheid in South Africa).

well, but only as long as they are applied consistently and coupled with strong institutions of local democracy and strict limits on state power.[138]

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

In the next section, I will begin to apply the theory developed so far to economic development takings. Specifically, I will introduce this category of takings in more depth and present *Kelo* in further detail, drawing on the social function theory to carry out an assessment of the controversy that resulted.

2.6 Economic Development Takings

The notion of an economic development taking is in some sense self-explanatory: it targets situations when property is taken for economic development. However, the obvious follow-up question is a difficult one: what is meant by "economic development"? In the literature on economic development takings, no clear answer has been provided.[139] Rather, one tends to rely on an intuitive understanding to classify takings as being for economic development, where typical cases are those where the decision-makers themselves emphasise the value of economic development as a reason for authorising eminent domain.[140] At first sight, the lack of clarity about what the category covers might seem like a theoretical challenge, possibly even a weakness. However, I will argue that this is

[138] I discuss the role of agrarian property to the development of Norwegian democracy in more depth in Chapter 4.

[139] See, e.g., Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 5) 558-567 (Cohen proposes a ban on economic development takings, comments on the difficulty of defining the notion precisely, before proceeding to pursue his stated aim indirectly, through a ban on takings benefiting private parties, with exceptions for certain non-profit undertakings).

[140] See, e.g, Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 5); James W Ely, 'Post- Kelo Reform: Is the Glass Half Full or Half Empty?' (2009) 17(1) Supreme Court Economic Review 127 (both authors also discuss how economic development, or even commercial profit, can be an unacknowledged motive, for instance when property is taken on the pretext of combating "blight").

not so, since the ambiguity of the notion of economic development it in itself part of the reason why these takings merit special attention, based on an approach that emphasises contextual reasoning over definitional rigidity.[141]

Still, some scholars prefer not to use the notion, choosing instead to speak of "private takings" when they discuss the legitimacy issues that arise in cases such as *Kelo*.[142] However, there is a key difference between this notion and the notion of an economic development taking, which in my opinion speak in favour of the latter notion.

Specifically, the definition of a private taking is too shallow: it simply stipulates that such a taking occurs when the legal person taking title to the property in question is a private company or individual. Arguably, this categorisation is quite unhelpful when the aim is to get at underlying legitimacy issues. For instance, it might well be that a private organisation, say a tightly regulated charity, functionally mimics a quintessential "public" taker. A public body, on the other hand, can well be functionally equivalent to a private enterprise, particularly if there is a lack of political oversight and democratic accountability. Moreover, imagine a case involving a publicly owned limited liability company. According to the simple definition of a private taking, a taking by such a company would not meet the definition. This would be the conclusion even if the company's interests are completely or predominantly of a private-law nature, directed at maximising profit for the shareholders, not at providing a public service.[143]

By contrast, the notion of an economic development taking points to the purpose of the taking,

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141 For a stricter proposal based on a similar understanding, see Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 5) (arguing for a complete ban on the "economic development rationale", citing its vagueness as a reason why it should *never* be used to justify a taking).

142 See, e.g., Emma JL Waring, 'The prevalence of private takings' in Nicholas Hopkins (ed), *Modern studies in property law: Volume 7* (Hart Publishing 2013).

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

not the outward legal appearance of the taker. As such, it provides a less sharp distinction between different kinds of takings, but also seems more relevant to the question of legitimacy. Specifically, the category performs an important function in that it directs attention at the fact that there might be inappropriate motives influencing the decision to take private property. Moreover, the main reason for paying particular attention to economic development takings is clear enough: the presence of strong economic incentives, often of a commercial nature, appears to increase the risk of eminent domain abuse.

The benefit of using a comparatively neutral and open-ended designation seems especially clear in mixed economies, where the influence of public-private partnerships can cause a generally blurring of lines between private and public sectors.[144] In such contexts, it seems particularly appropriate to devote special attention to cases where commercial interests stand to benefit – directly or indirectly – from a taking of private property. The presence of commercial incentives among the beneficiaries or their partners might contrast with the public spirited rationale provided to legitimise the taking. An important advantage of a categorisation based on the notion of economic development is that it can be used to flag cases where this contrast is present, suggesting that we should further scrutinize the legitimacy of the undertaking as a whole.

If we broaden our perspective even further, to consider commercially motivated interference in property on the global scale, this insight remains relevant. In fact, it seems appropriate to speak of a global crisis of confidence in property, particularly in relation to land rights, arising from how powerful commercial interests usurp proprietary power over an increasingly large share of the world's resources. It has been noted, in particular, that large-scale commercial actors are assuming control over an increasing share of the world's land rights, a phenomenon known as *land*

144 For the growing importance of public-private partnerships to the world economic order, see generally Stéphane Saussier, 'Public–private partnerships' (2013) 89 Journal of Economic Behavior & Organization 143.

grabbing.[145]

So far, most research on land grabbing has looked at how commercial interests, often cooperating with nation states, exploit weaknesses of local property institutions, to acquire land voluntarily, or from those who lack formal title.[146] However, the similarity between economic development takings and state-aided land grabbings in favour of large commercial companies is striking. Specifically, it has been noted that the purported public interest in economic development can be used to justify massive land grabs that would otherwise appear unjustifiable. In a recent article, Smita Narula cites *Kelo* directly and warns that procedural safeguards alone might not provide sufficient protection against abuse. She writes:

> Procedural safeguards, however, can all too easily be co-opted by a state because its claims about what constitutes a public purpose may not be easy to contest. Particularly within the context of land investments, states could use the very general and under-scrutinized language of "economic development" to justify takings in the public interest.[147]

This underscores the broader relevance of the study of economic development takings. In addition, it asks us to keep in mind that the question of what can be justified in the name of "economic development" is a general one, not confined to particular systems for organizing property rights.[148]

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

146 See, e.g., Levien (n 128).

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

148 To address this, and to restore confidence in the institution of property more generally, some academics and policy makers have proposed a novel concept of property as a human right. It has been argued, in particular, that a human right to land should be recognised on the international stage, a right that would apply even when those affected by a land grab lack formal title. If successful, this approach promises to deliver basic protection against interference in established patterns of property use independently of how particular jurisdictions approach property. Specifically, it would establish an important link needed to make the kinds of property protections discussed in this thesis justiciable in the context of land grabbing when those adversely affected lack formal title. See generally Olivier De Schutter, 'The Emerging Human Right to Land' 12(3) International Community Law Review; Olivier De Schutter, 'The Green Rush: the Global Race for Farmland and the Rights of Land Users' (2011) 52(2) Harvard International Law Journal

In India, for example, people have been displaced and dispossessed on a massive scale in the name of economic development.[149] The notion of the state's eminent domain has been a crucial enabler of these processes; it has even been used to justify large-scale economic development projects on land that is not privately owned at all, but rather under forms of state ownership/custodianship.[150] Apparently, embedding controversial policy choices regarding land use in a takings narrative has been used as a strategy to silence opposition of all kinds, including that which arises with respect to social and economic rights for the poor and the landless when they face displacement or loss of livelihoods.[151] Furthermore, it has been argued that the scope of eminent domain in India has become so wide that it allows for a "complete assertion of power" by the state.[152] This power, moreover, is apparently often used to "disempower people and redistribute rights and benefits", in a way that favours people who are already better-off than those negatively affected.[153]

This underscores the broader relevance of my subject. It it worth emphasising, however, that this thesis will generally assume that those adversely affected by the use of eminent domain do have recognised property interests. However, since I come at the takings issue from the social function perspective on property, I will still have occasion to emphasise the wider societal effects of economic development takings, including effects on non-owners.

In the next section, I consider *Kelo* in more depth, to argue that strict judicial deference to legislative and executive decision-makers is inappropriate in this regard. I focus especially on Justice

503; Rolf K′unnemann and Sofía Monsalve Suárez, 'International Human Rights and Governing Land Grabbing: A View from Global Civil Society' (2013) 10(1) Globalizations 123.

149 See Levien (n 128).

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

151 See Mehta (n 150) 143-144 ("the power of eminent domain has been interpreted as being close to absolute power of the State over all land and interests in land within its territory. The effect of this has been that those without access to land and rights over land (including the landless, artisans, women as a composite group), those who may have use rights but no titles, communities holding common rights and others with inchoate interests, have had to bear the burden heaved on to them by eminent domain.")

152 See Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (n 126) 43.

153 See Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (n 126) 33.

O'Connor's dissent, which I believe points to a way towards a stricter standard of judicial review for economic development takings, without unduly undermining the value of deference to politic decision-makers and the executive branch.

2.6.1 *Kelo*: Casting Doubts on the Narrow Approach to Judicial Review

Constitutional property rules in many jurisdictions indicate, with varying degrees of clarity, that eminent domain should only be used to take property either for "public use", in the "public interest", or for a "public purpose".[154] Such a restriction can be regarded as an unwritten rule of constitutional law, as in the UK, or it can be explicitly stated, as in the basic law of Germany.[155] In some jurisdictions, for instance in the US and in Norway, explicit takings clauses exist, but do not provide much information about the intended scope of protection.[156]

The question that arises is to what extent the formulations used give the judiciary a duty and a right to restrict the state's power to take property. In the US, most scholars agree that some judicial review on this basis is intended, but there is great disagreement about its extent.[157] In Norway, on the other hand, a consensus has developed whereby the notion of public use is interpreted so widely that it hardly amounts to a justiciable restriction at all, and certainly not in practice.[158] Indeed, the courts defer almost completely to the assessments made by the executive branch regarding the purposes that may be used to justify a taking.[159]

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154 For instance, a rather unclear "public use" formulation is used in the takings clause of the US constitution, as well as in the Norwegian constitution, while both the "public interest" and the "public purpose" formulations (but not "public use") are used in the South African Constitution. See Walt (n 115) 462 (arguing that while "public purpose" would traditionally have been understood more narrowly, there is no generally observed difference between the two notions as they are now understood in South African law).

155 See Chapter 2. Section **??** below.

156 See Chapter 2, Section **??** and Chapter 4, Section **??**.

157 Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1978) 57 Oregon Law Review 203, 205.

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

159 Holmøyvik and Aall (n 158) 368.

Some US scholars adopt a similar stance, but others argue that the public use restriction should be read as a stricter requirement, forbidding the use of eminent domain unless the public will make actual use of the property that is taken.[160] Most scholars fall in between these two extremes. They regard the public use restriction as an important limitation, but they also emphasise that the courts should normally defer to the legislature's assessment of what counts as a public use.[161]

As I discuss in more depth in Chapter 2, Section **??**, the debate in the US has its roots in case law developed by state courts – the federal property clause was for a long time not applied to state takings. This has changed, and today the Supreme Court has a leading role in this area of US law. It has developed a largely deferential doctrine, resembling the understanding of the public use limitation under Norwegian law.[162] The difference is that in the US, cases raising the issue still regularly arise and prove controversial. As mentioned in the introduction to this thesis, the most important such case in recent times was *Kelo*, decided by the Supreme Court in 2005.[163] This case saw the public use question reach new heights of controversy in the US.[164]

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

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

161 See, e.g., Merrill (n 4); Gregory S Alexander, 'Eminent Domain and Secondary Rent-Seeking' (2005) 1(3) New York University Journal of Law & Liberty 958.

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

163 *Kelo* (n 6).

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

level.[165] Kelo lost the case before the state courts, but the Supreme Court decided to hear it and assessed its merits in great detail.

The precedent set by earlier federal cases such as *Berman* and *Midkiff* was clear: as long as the decision to condemn was "rationally related to a conceivable public purpose", it was to be regarded as consistent with the public use restriction.[166] Moreover, the role of the judiciary in determining whether a taking was for a public purpose was regarded as "extremely narrow".[167] It had even been held that deference to the legislature's public use determination was required "unless the use be palpably without reasonable foundation" or involved an "impossibility".[168]

Despite this, in the case of *Kelo*, the court hesitated. Part of the reason was no doubt that takings similar to *Kelo* had been heavily criticised at state level, with an impression taking hold across the US that eminent domain abuse was becoming a real problem.[169] A symbolic case that had contributed to this worry was the infamous *Poletown Neighborhood Council v City of Detroit Poletown Neighborhood Council v City of Detroit*.[170] In this case, General Motors had been allowed to raze a town to build a car factory, a decision that provoked outrage across the political spectrum.[171] The case was similar to *Kelo* in that the taker was a powerful commercial actor who wanted to take homes. This, in particular, served to set the case apart from *Midkiff*, which involved a taking in favour of tenants, and to some extent also *Berman*, which involved a taking of businesses (and homes) in the interest of removing blight.[172] Moreover, the Michigan Supreme

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

166 See *Midkiff* (n 162) 241; *Berman v Parker* (n 162).

167 *Berman v Parker* (n 162) 32.

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

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

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

171 See generally Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 169).

172 *Berman v Parker* (n 162); *Midkiff* (n 162).

Court had recently decided to overturn *Poletown* in the case of *Hatchcock*.[173]. Hence, it seemed that the time had come for the Supreme Court to re-examine the public use question.[174]

Eventually, in a 5-4 vote, the court decided to apply existing precedent and uphold the taking of Kelo's home. The majority also made clear that economic development takings were indeed permitted under the public use restriction, also when the public benefit was indirect and a private company would benefit commercially.[175] This resulted in great political controversy in the US. According to Ilya Somin, the *Kelo* case ranks among the most disliked decisions in the history of the Supreme Court.[176]

Importantly, many commentators emphasised that *Kelo* was an economic development taking.[177] This category had no clear basis in the property discourse before *Kelo*. Indeed, in terms of established legal doctrine, it would be more appropriate to say that the case revolved entirely around the notion of "public use".

However, when considering the most common reasons given for condemning the outcome in *Kelo*, it becomes clear why many felt it was natural to classify the case along additional dimensions. A survey of the literature shows that many made use of a combination of substantive and procedural arguments to paint a bleak picture of the *context* surrounding the decision to take Kelo's home. Important aspects of this include the imbalance of power between the commercial company and the owner, the incommensurable nature of the opposing interests, the lack of regard for the owner displayed by the decision makers, the close relationship between the company and the government, and the feeling that the public benefit – while perhaps not insignificant – was made conditional

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

174 See, e.g., Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 169); Claeys, 'Public-use limitations and natural property rights' (n 160).

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

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

177 See, e.g., Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 5); Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 5).

on, and rendered subservient to, the commercial benefit that would be bestowed on a commercial beneficiary.[178] Plainly, the decision to condemn in *Kelo* appeared to suffer from what I will refer to here as a *democratic deficit*.

The social function theory of property makes it natural to emphasise the worry that economic development takings can lack democratic merit. Moreover, the theory inspires reasoning that can justify a departure from the established doctrine of extreme deference, in favour of more substantial judicial review. It seems to me that such a perspective was indeed adopted by the minority of the Supreme Court in *Kelo*, particularly Justice O'Connor.[179] She wrote a strongly worded dissent, characterising the majority's decision as follows:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[180]

As demonstrated by this quote, the overarching concern raised by Justice O'Connor was that allowing takings such as *Kelo* could legitimise a form of governmental interference in property that would systematically favour the rich and powerful to the detriment of the less resourceful. In this way, the power of eminent domain could become a tool for establishing and sustaining patterns of inequality, under the pretence of providing an economic benefit. Hardly anyone would openly

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178 See, for instance, Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377; Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 5); Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (n 160); Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 5); Daniel S Hafetz, 'Ferreting out favoritism: Bringing pretext claims after Kelo' (2009) 77(6) Fordham Law Review 3095; Zachary D Hudson, 'Eminent domain due process' (2010) 119(6) Yale Law Journal 1280.

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

180 *Kelo* (n 6) 505.

regard this as desirable. Indeed, it is not hard to agree that if Justice O'Connor's predictions about the fallout of *Kelo* are correct, then it is indeed "perverse".

The crucial question becomes whether her predictions are warranted. In fact, the main importance of her dissent might be that it flags this issue as a crucial one in relation to very typical uses of eminent domain in the modern world. In light of its high level of generality, Justice O'Connor's dissent becomes a call for empirical work, to shed light on how economic development takings actually come about, and how they affect political, social and bureaucratic processes. In addition, it raises the question of how to *avoid* negative effects, that is, how to design rules and procedures that can help bring about desirable economic development without creating a democratic deficit. These will be the main two themes that will occupy the remainder of this thesis.

2.7 Conclusion

In this chapter, I have proposed a theoretical foundation for approaching the question of economic development takings. Specifically, I suggested that a social function perspective on property is an appropriate starting point for an analysis of such takings. Furthermore, I argued that the notion of human flourishing provides a good template for carrying out a normative analysis of when economic development takings are legitimate. This approach, in turn, led to an argument in favour of a broader style of judicial review of such takings, namely one that embraces considerations based on social justice and the ideal of democracy.

On this basis, I went on to give a preliminary analysis of economic development takings. To make the discussion concrete, I considered the case of *Kelo*, which propelled the notion of an economic development taking to the front of the takings debate in the US. I focused particularly on the dissenting opinion of Justice O'Connor, and I argued that she approached the issue in a way that is consistent with the theoretical basis proposed in this chapter.

In the next chapter, I will now continue my analysis of economic development takings, by

considering the legitimacy question in more depth. Specifically, I ask what role the law can and should play in ensuring that the state's power to take property is not used improperly in the context of economic development. This will lead to two sets of broad policy recommendations for dealing with the ills of economic development takings, targeting the diagnosis and the cure respectively. This, in turn, will set the stage for the second part of this thesis, where the recommendations provided in the next chapter will be tested and made more concrete through a case study of takings for Norwegian hydropower development.

3 Possible Approaches to the Legitimacy Question

3.1 Introduction

This chapter considers the question of legitimacy of economic development takings in more depth. First, it presents there existing approaches, based on evidence from England and Wales, the United States, and the European Court of Human Rights. The chapter starts by considering the idea that parliament itself imbues each instance of a taking with legitimacy, as the result of a decision made in a legitimate manner within a democracy. Such a narrative can easily become quite focused on procedural aspects, leaving little room for substantive judicial scrutiny of takings. The doctrine of deference, in particular, can come to develop as the main norm that guides the courts when faced with controversial takings. In England and Wales, this perspective carries great weight, particularly historically, when parliament itself would authorise most takings directly through so-called private Acts.

I argue that the expanding state and the increasingly expanding use of eminent domain puts this perspective on legitimacy under strain. To some extent, it can be upheld by a well-organised executive, compelled to remain faithful to parliament and the ideas of democracy. However, a threat to the stability and success of such a procedural approach can arise from the lack of any clearly defined safeguards to protect against institutional failure and substantive abuse. If property as an

institution begins to falter, for instance because takings for profit become too prevalent, the courts might find themselves unable to intervene on behalf of those democratic ideals that motivated the idea of deference in the first place. I will argue that recent cases of economic development takings in England illustrate this danger, suggesting that we should also consider substantive approaches to legitimacy.

Following up on this, I go on to consider the US, where the public use restriction is considered to be an important substantive limitation on the government's power to take property. I track the history of public use scrutiny in some depth, showing that it was widespread and extensive at the state level, at least until a contrasting position of almost unconditional deference to the legislature was adopted by the Supreme Court in the case of *Berman*. After this, at the federal level at least, the public use restriction was effectively stripped of its content.[1] The eventual backlash of this came with *Kelo*, which was decided in keeping with precedent, but with severe doubts arising among the justices, particularly those who looked at the history of the public use doctrine and how it had worked prior to *Berman*.

I argue that a contextual approach to the public use requirement, based on broad assessments of local conditions, was prevalent among the state courts in early public use cases. This arguably also reflects a social function understanding of property, connecting the public use test to the property theorising in chapter 1. Moreover, I note that there has been a resurgence of extensive public use scrutiny after *Kelo*, particularly at the state level. I note, however, that this change appears to have been largely ineffective at curbing dubious uses of eminent domain. Specifically, it has been argued that recent reforms, and broad substantive standards such as the public use requirement, are likely to become only symbolic nods to the danger of abuse: hidden within the complex arrangements of modern government, there is business as usual regardless.

This in turn raises the issue of how to combine the institutional and the procedural perspective

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

on legitimacy, to ensure that substantive standards actually translate into effective protection. This brings me to the third approach to legitimacy, which I call the institutional fairness approach. I argue that this approach has been adopted recently by the ECtHR in Strasbourg, as they have developed a system of pilot judgements to deal with their vastly increasing case load. The idea of such judgements is that the Court will focus on systemic problems, to determine whether they should order the state to take general measures to improve their own institutions. By doing this, the Court will protect itself from having to deal with many similar cases. Instead, it can move on to novel issues of principle that need to be considered.

Quite apart from the practical motivation behind this development, I argue that the institutional perspective on fairness that it conditions is the way forward towards testing for legitimacy in takings cases. It should work well because it allows courts to adopt a middle ground between the procedural and the substantive approach. I consider the case of *Hutten-Czapska v Poland* in some depth to argue for the merits of this approach.[2]

Following up on this, I consider the question of how the courts should proceed to assess the legitimacy of economic development taking against such an institutional fairness perspective.[3] Building on a list of conditions due to Kevin Gray, I propose a concrete heuristic for this purpose. In addition to the original points made by Gray, I add three of my own, inspired by the discussion in this and the previous chapter.

A legitimacy test can never provide more than a partial solution to the legitimacy problem. Specifically, in cases when the desire for economic development is a genuine reflection of democratic decision-making, the follow-up question is how to better enable the collective to communicate this desire to private owners, without resorting to eminent domain. I address this question by looking to the theory of governance for common pool resources, developed by Elinor Ostrom and

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2 See *Hutten-Czapska v Poland* ECHR 2006–VIII 628.

3 There is not yet any case law on this from the ECtHR.

others. Specifically, I note how the connection between this theory and property law suggests the possibility that new institutions should be introduced to allow the collective to push for economic development involving privately owned property. In fact, such a proposal has already been made, by Heller and Hills, who proposed that so-called *Land Assembly Districts* could replace the use of eminent domain in many cases when holdouts make economic development on privately owned land hard to implement.

I analyse the proposal in some depth, pointing out problems to suggest that Land Assembly Districts are not the final answer to the legitimacy question for economic development takings. Specifically, I note the context dependence of their proposal, and the underlying tension between the ideal of self-governance and the fear of tyranny by local elites. This goes to show that the cure for illegitimacy, much like its diagnosis, depends on the circumstances, and what one regards as the property's proper function. In light of this, I believe the critical examination of Land Assembly Districts marks a natural end to this chapter, as well as to the theoretical part of this thesis as a whole.

3.2 England and Wales: Legitimacy through Parliament

In England and Wales, the principle of parliamentary sovereignty and the lack of a written constitutional property clause has led to expropriation being discussed mostly as a matter of administrative law and property law, not as a constitutional issue.[4] Moreover, the use of compulsory purchase – the term used to denote takings in the UK – has not been restricted to particular purposes as a matter of principle.[5] The uses that can justify taking property by compulsion are those uses that parliament regard as worthy of such consideration.[6] However, as private property has typically

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

[5] See, e.g., Emma J L Waring, 'Aspects of Property: The Impact of Private Takings' (PhD Thesis, 2009) 48-49.

[6] See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 48-49.

been held in high regard, the power of compulsory purchase has traditionally been exercised with caution.[7]

In his *Commentaries*, William Blackstone famously described property as the "third absolute right" that was "inherent in every Englishman".[8] Moreover, Blackstone expressed a very restrictive view on the appropriateness of expropriation, pointing out that it was only the legislature that could legitimately interfere with property rights. He warned against the dangers of allowing private individuals, or even public tribunals, to be the judge of whether or not the common good could justify takings. Blackstone went as far as to say that the public good was "in nothing more invested" than the protection of private property.[9]

In terms of historical accuracy, Blackstone's claims about property in England and Wales can be questioned. Specifically, it has been argued that his description of property might be shaped not so much by practical reality as by political values gaining ground among the bourgeoisie after the decline of the feudal system.[10] However, the fact remains that compulsory purchase powers appear to have been granted relatively infrequently during his time, with no great increase in prevalence until the industrial revolution and the birth of the modern state.[11] Moreover, the conferral of such powers would typically require parliamentary involvement on a case-by-case basis, a practice reflecting that takings of private property, although far from unheard of, were indeed considered

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7 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 47-48.

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

9 Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (n 8) 134-135.

10 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 34-35 (describing Blackstone's account as a "myth").

11 See Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 15. That said, recent scholarship has pointed out that expropriation appears to have taken place more frequently than previously thought, particularly following the glorious revolution, see Julian Hoppit, 'Compulsion, Compensation and Property Rights in Britain, 1688–1833' (2011) 210(1) Past & Present 93.

draconian.[12]

Interestingly, the procedure followed by parliament in takings cases often resembled a judicial procedure; the interested parties were given an opportunity to present their case to parliament committees that would then effectively decide whether or not compulsion was warranted.[13] On the one hand, the direct involvement of parliament in the decision-making is suggestive of a fundamental respect for property rights. But at the same time, parliamentary sovereignty meant that the question of legitimacy was rendered mute as soon as compulsory purchase powers had been granted. The courts were not in a position to scrutinize takings at all, much less second-guess parliament as to whether or not a taking was for a legitimate purpose.[14]

During the 19th Century, as an industrial economy developed, so-called *private* acts, granting compulsory purchase powers to specific legal persons, grew massively in scope and importance.[15] Railway companies, in particular, regularly benefited from such acts.[16] During this time, the expanding scope of private-to-private transfers for economic development led to high-level political debate and controversy.[17] Usually, it would attract particular opposition from the House of Lords.[18] Interestingly, this opposition was not only based on a desire to protect individual property owners. It also often reflected concerns about the cultural and social consequences of changed patterns of land use.[19]

Hence, the early *political* debate on economic development takings in the UK shows some re-

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12 See William D McNulty, 'The Power of "Compulsory Purchase" under the Law of England' (1912) 21(8) The Yale Law Journal 639, 43-46.

13 See Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 13-16.

14 See, e.g., McNulty (n 12) 643.

15 See Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

16 Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204. See generally RW Kostal, *Law and English Railway Capitalism* (Clarendon Press 1997).

17 See Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

18 Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

19 Allen, *The Right to Property in Commonwealth Constitutions* (n 11) 204.

flection of a social function approach to property protection. At the same time, as society changed following increasing industrialisation, a more expansive approach to compulsory purchase would eventually emerge as the norm.[20] The idea that economic development could justify takings gradually became less controversial.

Today, the law on compulsory purchase in England is regulated in statute. Hence, parliament rarely gets involved on a case-by-case basis, and the role of the courts is largely limited to the application and interpretation of statutory rules.[21] Moreover, with respect to the question of legitimacy of takings more broadly, the starting point for English courts is that this is a matter of ordinary administrative law.[22] More recently, the Human Rights Act 1998 adds to this picture, since it incorporates the property clause in P1(1) into English law. Even so, the usual approach in England is to judge objections against compulsory purchase orders on the basis of the statutes that warrant them, rather than constitutional principles or human rights provisions that protect property.[23] It is typical for statutory authorities to include standard reservations to the effect that

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[20] Arguably, the social function perspective helps explain why this happened. Indeed, the expanded use of private takings in England during the 19th century, particularly in connection with the railways, might have served a more easily justifiable social function than that commonly associated with economic development takings today. Waring, in particular, notes how railway takings tended to affect aristocratic landowners rather than marginalised groups ("unlike private takings today, the railway legislation was most likely to affect those who could best defend their property rights from attack"), see Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 111.

[21] See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 116-121. Some common law rules still play an important role, such as the *Pointe Gourde* rule, which stipulates that changes in value due to the compensation scheme itself should be disregarded when calculating compensation to the owner. The rule takes it name the case of *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* [1947] UKPC 71. The underlying principle, including also statutory regulations with a similar effect, is referred to as the "no scheme" principle, see Compulsory Purchase and Compensation: Disregarding the Scheme (Discussion Paper, Law Commission 2001). The principle is found in many jurisdictions, see Jacques Sluysmans, Stijn Verbist and Regien de Graaff, 'Compensation for Expropriation: How Compensation Reflects a Vision on Property.' (2014) 2014(1) European Property Law Journal 3. It is often quite contentious, and notoriously hard to apply in practice. For a recent clarification of (some aspects of) the principle, see *Waters and other v Welsh National Assembly* [2004] UKHL 19. I note that a strict interpretation of the no-scheme principle effectively precludes benefit sharing between takers and owners, a phenomenon that is also relevant in the context of economic development takings. See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

[22] See Taggart (n 4).

[23] See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 121-132. The important statutes are the Acquisition of Land Act 1981, the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004.

some public benefit must be identified in order to justify a compulsory purchase order, but the scope of what constitutes a legitimate purpose can be very wide. For instance, to justify a taking under the Town and Country Planning Act 1990, it will generally suffice to argue that it will "facilitate the carrying out of development, redevelopment or improvement on or in relation to the land".[24]

While various governmental bodies are authorised to issue compulsory purchase orders (CPOs), a CPO typically has to be confirmed by a government minister.[25] The affected owners are given a chance to comment, and if there are objections, a public inquiry is typically held. The inspector responsible for the inquiry then reports to the relevant government minister, who makes the final decision about whether or not it should be granted, and on what terms. The CPO may later be challenged in court, but then on the basis of the statute authorising it, not on the basis of whether or not the purpose mentioned in that statute is legitimate as such.[26]

That said, the idea that property may only be compulsorily acquired when the public stands to benefit permeates the system. Indeed, this has also been regarded as a constitutional principle, for instance by Lord Denning in *Prest v Secretary of State for Wales*.[27] Moreover, in *R v Secretary of State for Transport, ex p de Rothschild*, Slade LJ spoke of "a warning that, in cases where a compulsory purchase order is under challenge, the draconian nature of the order will itself render it more vulnerable to successful challenge".[28]

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24 Town and Country Planning Act 1990, s 226.

25 See Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 48.

26 See, e.g., Waring, 'Aspects of Property: The Impact of Private Takings' (n 5) 48-49. The typical way to launch an attack on a taking would be to argue that it serves a purpose that falls outside the scope of the statute authorising it, or, more subtly, that the administrative decision-maker took irrelevant purposes into account when granting the power. See, e.g., *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, (2010) 1 AC 437.

27 See *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 ("I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands.").

28 *R v Secretary of State for Transport, ex p de Rothschild* (1989) 1 All ER 933 (CA) 938.

In keeping with the principle of parliamentary sovereignty, this warning targets judicial review of administrative decision-making, not legislation. Despite this limitation, the English approach to legitimacy has traditionally proved quite effective in preventing controversy from arising with respect to the use of eminent domain.[29] An underlying respect for private property, as well as the idea that the authority to interfere with it rests on the authority of parliament, appears to have influenced the decision-making framework and the surrounding administrative practices. Hence, legitimacy has become an objective to be pursued through legislation, regulation, and administrative practice, not judicial scrutiny.[30]

However, England and Wales have also seen controversial economic development takings being challenged in court. Indeed, such cases appear to have become more frequent.[31] For instance, in the case of *Alliance*, many properties were taken in order to facilitate the construction of a new stadium for the football club Arsenal.[32] Some owners who stood to lose their business premises protested on the basis that the purpose was dubious, pointing also to the fact that the inspector in charge of the public inquiry had recommended against the takings.[33] Their arguments also invoked P1(1) of the ECHR, to overcome the limitations of traditional judicial review in England and Wales. However, these argument were all quite summarily rejected by the Court.[34]

Arguably, the *Alliance* case reflects a weakness of the English approach to legitimacy. This weakness, moreover, appears to go beyond whatever doubts one might have about the principle of

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

30 For a more detailed analysis of how this works, noting, among other things, that higher levels within the executive are also meant to act as safeguards of private property, filling – to some extent – the possible role of courts in this regard, see in , 85-100.

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

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

33 *Alliance Spring Co Ltd v The First Secretary of State* (n 32) 6-7.

34 See (*Alliance Spring Co Ltd v The First Secretary of State* [n 32] 6-7). For a critical discussion, describing the Court's assessment against P1(1) as "worryingly brief", see Gray, 'Recreational Property' (n 31).

parliamentary sovereignty applied to property as a constitutional and/or human right. Specifically, if the framework laid down or condoned by parliament greatly empowers the administrative branch, while failing to appropriately regulate administrative practices, the deference due to parliament might effectively become undue deference to the executive branch. If the *practice* of using compulsory purchase continues to expand in relation to for-profit undertakings, there appears to be a significant risk of abuse associated with broad powers granted to the executive to take property for economic development. Plainly, if values such as those expressed by Blackstone are discredited further, there appears to be a lack of alternative sources for legitimacy in a system so reliant on a narrative of pure procedure.

To some extent, it would be possible for the Supreme Court to develop a more restrictive stance on compulsory purchase to address this, within the established constitutional order. In fact, there are some signs that this might be about to happen, specifically with respect to the broad powers granted under the the Town and Country Planning Act 1990 s 226. In the case of *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*, Lord Walker cited *Kelo* and went on to comment that "economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive".[35]

However, the outcome of the *Sainsbury* case arguably also underscores the weaknesses of an indirect approach to legitimacy through administrative law. Instead of relying on Lord Walker's observations about the sensitivity of economic development takings, the majority of the Court quashed the compulsory purchase order on the basis that the local government had taken into account promises that the taker had made regarding a regeneration project in a different part of town. This was regarded as contravening section 226 of the Town and Country Planning Act 1990, which only directs attention at the potential for improvements on or in relation to "the land",

[35] See *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 26) 82.

i.e., the land that is subject to compulsory purchase. The reasoning behind the decision, therefore, rests largely on a technicality, not any substantive assessment of legitimacy.

On a more purposive assessment, the taking in *Sainsbury* should arguably even have been upheld: the owner and the taker were both large commercial companies, they each owned a share of a plot of land suitable for joint development, they both wanted to develop at the expense of the other party, and the taker appeared to have the best overall plan for the community. Ironically, the English approach resulted in such a taking being struck down as illegitimate, while the taking in *Alliance*, involving the displacement of local people in favour of a football club, received little or no scrutiny at all. In light of this, it seems that alternatives to the traditional idea of legitimacy should be considered, at least if one agrees with Lord Walker's characterisation of economic development takings as "particularly sensitive".[36]

3.3 The US: Legitimacy through Public Use

By contrast to the situation in England and Wales, the US Constitution is a basis for judicial review also with respect to the federal and state legislatures. Considering its status as a basis for potentially extensive review, the Constitution is remarkably terse. The takings clause, arriving as the final clause of the fifth amendment, reads simply "nor shall private property be taken for public use, without just compensation".[37]

The compensation requirement is clearly stated, if embryonic, but the takings clause is also understood to include the requirement that property may only be taken for "public use". This is the aspect of the clause that will interest me in this thesis, since it provides an anchor for legitimacy that is particularly relevant – and contentious – in relation to economic development takings.[38]

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[36] See *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 26) 82.

[37] See **us**

[38] The compensation requirement is also important, of course, but the problems is gives rise to are rather more technical,

Specifically, the question is to what extent such takings offend against the clause: is a taking for economic development by a commercial company really a taking for "public use"?

Going back to the time when the fifth amendment was introduced, there is not much historical evidence explaining why the takings clause was included in the Bill of Rights.[39] Moreover, there is little in the way of guidance as to how the takings clause was originally understood. James Madison, who drafted it, commented that his proposals for constitutional amendments were intended to be uncontroversial.[40] Hence, it is natural to regard the takings clause as a codification of an existing principle, not a novel proposal. Indeed, several state constitutions pre-dating the Bill of Rights also included takings clauses, seemingly based on codifying principles from English common law.[41]

Just like English scholars at the time, early American scholars emphasised the importance of private property. James Kent, for instance, described the sense of property as "graciously implanted in the human breast" and declared that the right of acquisition "ought to be sacredly protected".[42] Indeed, the Supreme Court itself expressed similar sentiments early on, when it spoke of the impossibility of passing a law that "takes property from A and gives it to B".[43]

However, just as in England, this early US attitude changed in response to industrial advances and a desire for economic development. As the 19th century progressed, eminent domain was used more frequently, now also to benefit (privately operated) railroad operations, hydroelectric projects,

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pertaining also more to the entitlements-aspect of property protection, not the social function dimensions I focus on in this thesis. For a more in-depth assessment of the compensation issue in the context of economic development takings, see Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 21).

39 See Fifth Amendment to the US Constitution 1791.

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

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

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

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

and the mining industry.[44] During this time, it also became increasingly common for landowners to challenge the legitimacy of takings in court, undoubtedly a consequence of the fact that eminent domain was used more widely, for new kinds of projects.[45]

Controversy over the public use requirement arose particularly often with respect to the so-called mill acts.[46] Such acts were found throughout the US, many of them dating from pre-industrial times when mills were primarily used to serve the farming needs of agrarian communities.[47] Following economic and technological advances, provisions originally enacted to serve local farming purposes were now being used by developers wishing to harness hydropower for manufacturing and hydroelectric plants.[48]

It is important to note, however, that mill acts could not be used to authorise large-scale compulsory transfer of natural resources from owners to non-owners.[49] Rather, mill acts provided management tools that could be used to ensure that owners of water resources could make better use of their rights. This would sometimes involve allowing riparian owners to interfere with, or take a necessary part of, the property of their neighbours, e.g., by constructing dams that would flood neighbouring land.[50] However, the primary purpose of most mill acts was to facilitate rational coordination among owners, to the benefit of their community as a whole. This point was frequently made by the courts to justify upholding takings on the basis of mill acts, including takings that

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44 Errol Meidinger, 'The 'Public Uses' of Eminent Domain: History and Policy' (1980) 11 Environmental Law 1, 23-33.

45 Meidinger (n 44) 24.

46 Meidinger (n 44) 24. See also Johnson (n 41) 306-313 and Morton J Horwitz, 'The Transformation in the Conception of Property in American Law, 1780-1860' (1973) 40 University of Chicago Law Review 248, 251-252.

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

48 See, e.g., *Head* (n 47) 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

49 See the discussion in *Head* (n 47).

50 See, e.g., Abram P Staples, 'The Mill Acts' (1903) 9(4) The Virginia Law Register 265, 265.

would benefit the manufacturing industry.[51]

More generally, case law on public use from the state courts at this time was characterised by a highly contextual understanding of property protection and the meaning of public use.[52] Arguably, the case law on public use from the states even deserves to be categorised as an early example of a legitimacy approach based on a social function understanding of property. Moreover, it was held to be of high quality, as indicated by the early Supreme Court jurisprudence on economic development takings, as discussed in the next section.

3.3.1 Legitimacy as Discussed by the Supreme Court

Initially, the Supreme Court held that the takings clause in the US Constitution did not apply to state takings at all.[53] Federal takings, on the other hand, were of limited practical significance since the common practice was that the federal government would rely on the states to condemn property on its behalf.[54]

This changed towards the end of the 19th century, particularly following the decision in *Trombley v Humphrey*, where the Supreme Court of Michigan struck down a taking that would benefit the federal government.[55] Not long after, in 1875, the first Supreme Court adjudication of a federal taking occurred, marking the start of the development of the federal doctrine on public use and

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51 See *Fiske v Framingham Mfg Co* 12 Pick 68 (1831). See also the discussion (including references to other cases) in *Head* (n 47).

52 See, e.g, *Scudder v Trenton Delaware Falls Co* 1 NJ Eq 694 (1832) (taking upheld, but said that "the great principle remains that there must be a public use or benefit. That is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to a general rule."); (*Dayton Gold & Silver Mining Co v Seawell* 11 Nev 394, 409 [1876]) (taking for a mineral company upheld on the basis that mining was the "greatest of the industrial pursuits" in the state of Nevada and that the benefits of the industry were "distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills".); (*Ryerson v Brown* 35 Mich 333, 337 [1877]) (taking struck down, by a Court that was "not disposed to say that incidental benefit to the public could not under any circumstances justify an exercise of the right of eminent domain". (*Ryerson v Brown* [n 52] 337). See also Gray, 'Recreational Property' (n 31) (with many references to state courts striking down takings as impermissible).

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

54 Meidinger (n 44) 30.

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

legitimacy.[56]

At the same time, the Supreme Court began to hear takings cases originating from the states, first on the basis of the due process clause of the fourteenth amendment, introduced after the civil war.[57] Later, in 1897, the Supreme Court held that state takings could be scrutinized also against the takings clause of the fifth amendment.[58]

In federal takings cases, the Supreme Court showed little willingness to enforce a strict public use requirement. In *United States v Gettysburg Electric Railway Co*, a case from 1896, deference to the legislature in federal takings cases was referred to as a principle that should be observed unless the judgement of the legislature was "palpably without reasonable foundation".[59]

Importantly, however, such a deferential stance was not adopted in cases originating from the states. In *Cincinatti v Vester*, a case from 1930, the Supreme Court commented that "it is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one".[60]

In the earlier case of *Hairston v Danville & W R Co*, from 1908, the same was expressed by Justice Moody, who surveyed the state case law and declared that "the one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."[61] Justice Moody continued by describing in more depth the typical approach of the state courts in determining public use cases:

> The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative

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

57 See, e.g, *Head* (n 47).

58 See *Chicago, Burlington & Quincy RR Co v City of Chicago* 166 US 226 (1897).

59 *US v Gettysburg Electric R Co* 160 US 668, 680 (1896).

60 *City of Cincinnati v Vester* 281 US 439, 447 (1930).

61 *Hairston v Danville & W R Co* 208 US 598, 606 (1908).

> importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected.[62]

Justice Moody goes on to give a long list of cases illustrating this aspect of state case law, showing how assessments of the public use issue had been inherently contextual.[63] Following up on this, he points out that "no case is recalled" in which the Supreme Court overturned "a taking upheld by the state *court* as a taking for public uses in conformity with its laws" (my emphasis). After making clear that situations might still arise where the Supreme Court would not follow state courts on the public use issue, Justice Moody goes on to conclude that the cases cited "show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people".[64]

Hairston is important for three reasons. First, it makes clear that initially, the deferential stance in cases dealing with state takings was primarily directed at state courts rather than legislatures and administrative bodies. Second, it demonstrates federal recognition of the fact that a consensus had emerged in the states, whereby scrutiny of the public use determination was consistently regarded as a judicial task.[65] Third, it provides a valuable summary of the contextual approach to the public use test that had developed at the state level.

The *Hairston* Court clearly looked favourably on the case law from state courts. Importantly, when a deferential stance was adopted, this was clearly contingent on the assumption that state courts would continue to administer the public use test with the required vigour. Despite this, *Hairston* would later be cited as an early authority in favour of almost unconditional deference to

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62 *Hairston v Danville & W R Co* (n 61) 606.

63 *Hairston v Danville & W R Co* (n 61) 607.

64 *Hairston v Danville & W R Co* (n 61) 606.

65 Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 60) 606.

legislators.[66]

This happened in *US ex rel Tenn Valley Authority v Welch*, concerning a federal taking.[67] The Court first cited *US v Gettysburg Electric R Co* as an authority in favour of deference with regards to the public use limitation.[68] The Court then paused to note that *Vester* later relied on the opposite view, namely that the public use test was a judicial responsibility.[69] The Court then attempts to undercut this by setting up a contrast between *Vester* and *Hairston*, by selectively quoting the observation made in the latter case that the Supreme Court had never overruled the state courts on the public use issue.[70] Hence, *Hairston* is effectively used to argue against judicial scrutiny, in a manner that is quite incommensurate with the full rationale behind the Court's decision in that case.

Later, *Welch* was used as an authority in the case of *Berman v Parker*.[71] This case concerned condemnation for redevelopment of a partly blighted residential area in the District of Colombia, which would also condemn a non-blighted department store. In a key passage, the Court states that the role of the judiciary in scrutinizing the public purpose of a taking is "extremely narrow".[72] The Court provides only two references to previous cases to back up this claim, one of them being *Welch*.[73]

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66 In fact, it was cited in this way also by the majority in *Kelo*, see *Kelo v City of New London* 545 US 469, 482-483 (2005).

67 *U S ex rel Tenn Valley Authority v Welch* 327 US 546, 552 (1946).

68 *US v Gettysburg Electric R Co* (n 59).

69 *City of Cincinnati v Vester* (n 60).

70 See *U S ex rel Tenn Valley Authority v Welch* (n 67) 552.

71 *Berman v Parker* (n 1).

72 *Berman v Parker* (n 1) 32.

73 The other case, *Old Dominion Land Co v US*, concerned a federal taking of land on which the military had already invested large sums in buildings. The Court commented on the public use test by saying that "there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress of what it had in mind. Its decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use", see *Old Dominion Land Co v US* 269 US 55, 66 (1925). A partial quote, to the effect that deference to the legislature is in order except when it involves an "impossibility", was used to justify the decision in *Hawaii Housing Authority v*

Moreover, both of the cases cited were concerned with federal takings, while in *Berman* the Court explicitly says that deference is due in equal measure to the state legislature.[74] It is possible to regard this merely as a *dictum*, since the District of Columbia is governed directly by Congress. However, *Berman* was to have a great impact on future cases. In effect, it undermined a large body of case law on judicial review of takings without engaging with it at all.

In *Hawaii Housing Authority v Midkiff*, the Supreme Court further entrenched the principle expressed in *Berman*.[75] Here the state of Hawaii had made use of eminent domain to break up an oligopoly in the housing sector. Given the circumstances of the case, it would have been natural to argue in favour of this taking on the basis that it served a proper public purpose.

However, the Court instead decided to rely on the doctrine of deference, shunning away from scrutinizing the takings purpose. Justice O'Connor, in particular, observed that "judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of eminent domain".[76]

Effectively, what had been a doctrine of deference towards state courts had now transformed into a doctrine of deference towards state legislatures (and, in practice, the executive branch). In light of this, it had to be expected that *Kelo* would be decided in favour of the taker.[77] However, the history of the public use requirement tells us that this outcome was by no means inevitable. Hence, the question arises whether legitimacy can be increased by reviving the public use test. The next section sheds some light on this, on the basis of legislative developments in the US after *Kelo*.

Midkiff 467 US 229, 240 (1984).

74 *Berman v Parker* (n 1) 32.

75 *Midkiff* (n 73).

76 *Midkiff* (n 73) 244.

77 In fact, as pointed out by Somin, the *Kelo* case represents a slight tightening of the earlier line on public use. See Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183.

3.3.2 Economic Development Takings after *Kelo*

Following *Kelo*, much attention was directed at the danger of eminent domain abuse in the US.[78] Moreover, the *Kelo* decision itself proved extremely unpopular. Surveys show that as many as 80-90 % believe that it was wrongly decided, an opinion widely shared also among the political elite.[79]

Many states responded by introducing reforms aimed at limiting the use of eminent domain for economic development.[80] Within two years, 44 states had passed post-*Kelo* legislation in an attempt to achieve this.[81] Various legislative techniques were adopted. Some states, including Alabama, Colorado and Michigan, enacted explicit bans on economic development takings and takings that would benefit private parties.[82] In South Dakota, the legislature went even further, banning the use of eminent domain: "(1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue".[83]

In other states, more indirect measures were taken, such as in Florida, where the legislature enacted a rule whereby property taken by the government could not be transferred to a private party until 10 years after the date it was condemned.[84] Many states also offered lengthy lists of uses that were to count as public, designed to restrict the room for administrative discretion while allowing condemnations for purposes that were regarded as particularly important.[85]

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78 See generally Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100.

79 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 78) 2109.

80 For an overview and critical examination of the myriad of state reforms that have followed *Kelo*, I point to Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust Journal 799. See also Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 78).

81 See '50 State Report Card' (*Castle Coalition*) ⟨http://castlecoalition.org/50-state-report-card⟩ accessed 17th July 2015.

82 See Eagle and Perotti (n 80) 107-108.

83 South Dakota Codified Laws § 11-7-22-1, amended by House Bill 1080, 2006 Leg, Reg Ses (2006).

84 Eagle and Perotti (n 80) 809.

85 Eagle and Perotti (n 80) 804.

Kelo has clearly had a great effect on the discourse of eminent domain in the US. However, the effects of the many state reforms that have been enacted are less clear. According to Somin, most of these reforms have in fact been ineffective, despite the overwhelming popular and political opposition against economic development takings.[86] At the same time, property lawyers report a greater feeling of unease regarding the correct way to approach the public use requirement, expressing hope that the Supreme Court will soon revisit the issue.[87]

Why have legislative reforms proved inadequate? Part of the reason, according to Somin, is that people are "rationally ignorant" about the economic takings issue.[88] For most people, it is unlikely that eminent domain will come to concern them personally or that they will be able to influence policy in this area. Hence, it makes little sense for them to devote much time to learn more about it. This, in turn, helps create a situation where experts can develop and sustain a system based on practices that a majority of citizens actually oppose.[89] To back up this analysis, Somin points out that surveys seem to show that people generally overestimate the effectiveness of eminent domain reform, by mistaking symbolic legislative measures for materially significant changes in the law.[90]

Arguably, this also shows that the legislative approach so far, which has focused on introducing more elaborate and detailed versions of the public use restriction, need to be supplemented by different kinds of proposals. Specifically, it seems important to also target the structural processes that result in the taking of private land for economic development. After all, it is when we direct attention at the decision-making involved in bringing about actual takings that we will locate those stakeholders who cannot afford to remain rationally ignorant about eminent domain.

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86 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 78) 2170-2171.

87 See MM Murakami, BCK Ace and RH Thomas, 'Recent developments in eminent domain: Public use' (2013) 45(3) Urban Lawyer 809 ("Until the Supreme Court revisits the issue, we predict that this question will continue to plague the lower courts, property owners, and condemning authorities").

88 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 78) 2170.

89 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 78) 2163-2171.

90 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 78) 2155-2157.

This points towards another perspective on legitimacy, whereby focus shifts towards the institutional setting where the relevant decisions are made. Importantly, cases such as *Kelo* suggest that this needs to involve more than administrative law and ideas about procedural due process. Specifically, institutional legitimacy appears to have an important substantive component whereby a decision is legitimate only in so far as it results from democratically legitimate decision-making within an administrative framework that is generally conducive to fair and proportional outcomes. Arguably, recent developments at the ECtHR point towards a perspective on legitimacy that emphasises this interconnectedness between substantive and procedural aspects of fairness at the institutional level.

3.4 Recent Developments at the ECtHR: Legitimacy as Institutional Fairness

It is often said that the P1(1) of the ECHR consists of three rules. The first rule guarantees a right to 'peaceful enjoyment of possessions', the second rule regulates the legitimacy of 'deprivation' and the third rule regulates how the states can legitimately 'control the use of property'.[91]

When dealing with complaints pertaining to P1(1), the Court in Strasbourg will typically first consider which of these three rules it should apply.[92] However, as noted by Allen, it is not clear that this choice has any great significance for the outcome.[93] In practice, the evaluation of legitimacy proceeds in much the same way regardless of which rule is used, with an emphasis on the *fair balance* that needs to be struck when states interfere with private property rights.[94]

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91 See *Sporrong and Lónnroth v Sweden* (1982) Series A no 52, para 61.

92 See Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005) 102-104.

93 See Allen, *Property and the Human Rights Act 1998* (n 92) 104-105.

94 See Allen, *Property and the Human Rights Act 1998* (n 92) [103. It is also typically assumed that an interference is only legitimate when it takes place for an appropriate purpose, but here the ECtHR has consistently maintained a deferential stance, pointing to the 'wide margin of appreciation' that the member states enjoy in this regard. See, e.g., *James and others v United Kingdom* (1986) Series A no 98, para 54.

In this regard, it is important to note that the Court has gradually adopted a more active role in assessing whether or not particular instances of interference are proportional and able to strike a fair balance between the interests of the public and the property owners. As argued by Allen, this has caused P1(1) to attain a wider scope than what was originally intended by the signatories.[95]

In the early case law behind this development, the focus was predominantly on the issue of compensation, with the Court gradually developing the principle that while P1(1) does not entitle owners to full compensation in all cases of interference, the fair balance will likely be upset unless at least some compensation is paid, based on the market value of the property in question.[96]

However, the fair balance test encompasses more than the issue of compensation. In particular, the hunting cases discussed in Chapter 1 show that the Court in Strasbourg is willing to reflect broadly on the context and purpose of interference, to critically assess the social function of the taking.[97] Moreover, institutional aspects of fairness have come to play an important role in the Court's reasoning in some other recent cases involving property.[98] This is particularly clearly demonstrated by the case of *Hutten-Czapska v Poland*.[99]

3.4.1 Legitimacy *Erga Omnes*

The striking conclusion in *Hutten-Czapska v Poland*, underscoring the institutional turn at the ECtHR, was that the case demonstrated 'systemic violation of the right of property'.[100] The case concerned a house that had been confiscated during the Second World War. After the war,

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95 Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (n 29) 1055.

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

97 See Section **??** of Chapter 1.

98 See *Hutten-Czapska* (n 2); *Lindheim and others v Norway* ECHR 2012 985.

99 See *Hutten-Czapska* (n 2).

100 *Hutten-Czapska* (n 2) para 239.

the property was transferred back to the owners, but in the meantime, the ground floor had been assigned to an employee of the local city council.[101] The state implemented strict housing regulations during this time, which eventually led to the applicant's house being placed under direct state management.[102] Following the end of communist rule in 1990, the owners were given back the right to manage their property, but it was still subject to strict regulation that protected the rights of the tenants.[103] In addition to rent control, rules were in place that made it hard to terminate the rental contracts.[104]

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

Specifically, the consequences for the owners were considered not in isolation, but in order to shed light on a broader question of sustainability.[105] The Court was particularly concerned with the fact that the total rent that could be charged for the house in question was not sufficient to cover the running maintenance costs.[106] In particular, it was noted that the consequence of this would be "inevitable deterioration of the property for lack of adequate investment and modernisation".[107]

In the end, the Court highlighted how three factors combined to bring both owners and their

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101 *Hutten-Czapska* (n 2) paras 20-31.

102 *Hutten-Czapska* (n 2) paras 20-31.

103 *Hutten-Czapska* (n 2) paras 31-53.

104 *Hutten-Czapska* (n 2) paras 20-53.

105 *Hutten-Czapska* (n 2) paras 60-61.

106 *Hutten-Czapska* (n 2) para 224.

107 *Hutten-Czapska* (n 2) para 224.

properties to a precarious position. First, the rigid rent control system made it hard to sustainably manage rental property. Second, tenancy regulation made it hard for owners to terminate tenancy agreements. Third, the Court noted that the state itself had set up many tenancy agreements during the days of direct state management, shedding doubt on the fairness of the obligations that these contracts imposed on owners.[108]

The Court's reasoning in *Hutten-Czapska* is also interesting because of how the 'social rights' of the tenants is placed on an equal footing to the property rights of the owners.[109] Arguably, property rights and social rights are not considered merely as separate sets of entitlements, locked in opposition to one another. In the reasoning of the Court they also appear as mutually dependent social functions, both hampered by an unsustainable approach to property and housing during the communist era and beyond.[110]

In this regard, the Court places considerable weight on the precarious situation of the owners and 'the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with the maintenance of property or to have the necessary repairs subsidised by the State in justified cases'.[111] Moreover, the Court commented that the 'burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole'.[112] Importantly, however, the Court did not set out to censor the political reasoning that motivated the rent control scheme, but rather

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108 *Hutten-Czapska* (n 2) paras 224-225.

109 *Hutten-Czapska* (n 2) para 225.

110 Specifically, the Court attached great significance to the finding that rents were too low to cover maintenance costs, see *Hutten-Czapska* (n 2) para 224. A lack of incentives for maintenance is clearly a threat to tenants as much as to owners, illustrating the interdependence between the two groups. Despite this, when summing up their reasoning in broad strokes, the Court itself reverts back to a traditional narrative when it speaks about the 'conflicting interests of landlords and tenants'. See *Hutten-Czapska* (n 2) para 225.

111 See *Hutten-Czapska* (n 2) para 224.

112 See *Hutten-Czapska* (n 2) para 225.

focused on the fact that it had not been implemented properly.[113]

On this basis, the Court concluded that there had been a systemic violation of P1(1), and ordered Poland to take measures to rectify the 'malfunctioning of Polish housing regulation'.[114] Hence, the lack of legitimacy was pronounced with a kind of *erga omnes* effect, establishing an obligation for Poland directed at all its citizens in equal measure, not merely the applicant.[115] Judgements of this kind, known as "pilot judgements", have now gained formal recognition as a distinct procedural form that the ECtHR can use to address systemic problems.[116]

The institutional approach conditioned by the introduction of pilot judgements might point to the core function that the ECtHR is likely to serve in the future.[117] Indeed, the ECtHR will hardly be able to protect human rights in Europe on a case-by-case basis. Nor would it seem appropriate for it to do so, given its remoteness to local conditions and its relative lack of democratic accountability. However, when the Court is able to identify systemic failures that look set to systematically give rise to imbalances and unfairness, it seems appropriate that it should take action.

This is particularly clear when, as in the case of *Hutten-Czapska*, the Court notes that the applicants have insufficient options available for achieving a fair balance by appealing to institutions within the domestic legal order. In such cases, it seems appropriate for the Court to demand a change at the level of the state's own institutions, giving rise to a broad duty for the state to improve those institutions. Moreover, by scrutinizing the procedures and principles that the states

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113 See *Hutten-Czapska* (n 2) para 224.

114 See *Hutten-Czapska* (n 2) para 237. The basis relied on for formulating such an order was Article 41 in the ECHR, first used in this way in the case of *Broniowski v Poland* ECHR 2005 647.

115 There was some dissent as to whether or not this was an appropriate response, with Judge Zagrebelsky in particular arguing against it on the grounds that it would see the Court "entering territory belonging specifically to the realm of politics". See *Hutten-Czapska* (n 2).

116 See generally B Blitz, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and Their Impact at National Level* (Intersentia 2010).

117 See, e.g., Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (2012) 12(4) Human Rights Law Review 655 (arguing that a "constitutional pluralism" approach to adjudication – better filtered, more principled, yet still context sensitive – is the way ahead for the ECtHR).

apply when fulfilling this duty, it is likely that the Court will still be able to steer and unify the development of the case law on human rights, at least to the extent that this is required to meet minimum standards.

Against the deferential implications of this shift of attention, it could be argued that the judicial or administrative bodies of the signatory states can easily circumvent their obligations by providing superficial reforms or biased assessments of the facts in human rights cases, to avoid embarrassment for the state's political or bureaucratic elites. However, this might then be raised as a more procedurally oriented complaint before the ECtHR, perhaps also against Articles 6 (fair trial) and 13 (effective remedy).[118]

In this way, the Court can streamline its functions, by always aiming to direct attention at issues that arise at a higher level of abstraction.[119] This, in my view, seems highly desirable. The ECtHR should not aim to micromanage the signatory states, particularly not in relation to a norm such a P1(1), which the Court itself regards as highly dependent on context. By shifting attention towards institutional fairness, the Court can avoid getting stuck in deference to the states without overstepping its bounds with regards to the democratic process.

Indeed, the case of *Hutten-Czapska* is highly suggestive of the merits of such a perspective, not only because of the special measures ordered, but also because the Court reasoned on the basis of institutional information to identify systemic weaknesses of Polish housing regulation.[120] Another

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

[119] A similar argument was given by Judge Zupančič in *Hutten-Czapska* (n 2) ("Is it better for Poland to be condemned in this Court 80,000 times and to pay all the costs and expenses incurred in 80,000 cases, or is it better to say to the country concerned: "Look, you have a serious problem on your hands and we would prefer you to resolve it at home...! If it helps, these are what we think you should take into account as the minimum standards in resolving this problem..."? Which one of the two solutions is more respectful of national sovereignty?").

[120] Specifically, it seems that the shift signalled by recent cases on property at the ECtHR does not end with a new take on remedies, but also signals some changes in the way the Court approaches the fair balance determination under P1(1). This seems natural; if the Court looks for systemic violations, not (only) individual transgressions, its substantive assessments of fairness will naturally be influenced.

example is the recent case of *Lindheim and others v Norway*.[121] Here the applicants complained that their rights had been violated by a Norwegian act that gave lessees the right to demand indefinite extensions of ground leases on pre-existing conditions.[122]

The Court agreed that this was a breach of P1(1). Moreover, it engaged in the same form of assessment as it had adopted in *Hutten-Czapska*. Specifically, it concluded that the Ground Lease Act 1996 as such was the underlying source of the violation. The problem was not merely that this act had been applied in a way that offended the rights of the applicants. In light of this, the Court did not only award compensation, it also ordered that general measures had to be taken by the Norwegian state to address the structural shortcomings that had been identified.[123]

The Court also commented that its decision should be regarded in light of "jurisprudential developments in the direction of a stronger protection under Article 1 of Protocol No. 1".[124] However, in light of the change in perspective that accompanies this development, it is interesting to ask in what sense exactly the protection is stronger. In particular, it is not *prima facie* clear that the Court's remark should be read as a statement expressing a change in its understanding of the content of individual rights under P1(1).

Rather, it may be read as a statement to the effect that the Court has assumed greater authority to address structural problems under that provision. This might even allow the Court to conclude that a violation has occurred due to structural unfairness, even when it is not possible to trace this back to any abnormal decision that specifically targets the individual entitlements of applicants.

If this is true, it could make a big difference in cases involving takings for economic development. As illustrated by Justice O'Connor's dissent in *Kelo*, a main concern here is that such takings are

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121 See *Lindheim and others v Norway* (n 98).

122 *Lindheim and others v Norway* (n 98) para 119.

123 See *Lindheim and others v Norway* (n 98).

124 *Lindheim and others v Norway* (n 98) para 135.

likely to have "perverse" consequences at the structural level, because they lack democratic merit. [125] In light of cases such as *Hutten-Czapska* and *Lindheim*, I think the ECtHR would have been likely to approach *Kelo* in a manner consistent with Justice O'Connor's approach.

Whether they would reach the same conclusion seems more uncertain, particularly since confidence in the states' ability and willingness to regulate private-public partnerships might be higher in Europe than in the US.[126] However, it seems unlikely that the ECtHR would follow the majority in *Kelo*, by simply deferring to the determinations made by the granting authority. Rather, Justice O'Connor's predictions about the fallout of the *Kelo* decision would likely have been of significant interest also to the justices at the Court in Strasbourg.

To conclude, I think notions of institutional fairness can help us locate a welcome middle ground between largely procedural notions of justiciable legitimacy, such as those found in England and Wales, and substantive notions, such as those found in the US. The question remains how Courts adopting such a middle ground should proceed when presented with a concrete case of alleged eminent domain abuse. In the next section, I present a possible heuristic.

3.5 The Gray Test

Pointing to early US case law on public use as a "laboratory of elementary proprietary ideas", Kevin Gray builds on the evidence found there to provide a set of conditions for recognising what he calls "predatory takings". [127] His conditions capture key aspects of eminent domain abuse that I believe should be recognised by a theory of economic development takings inspired by the notion of human flourishing and an institutional perspective on legitimacy. Below, I briefly present the

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[125] To quote Justice O'Connor's dissent in *Kelo*, see *Kelo* (n 66).

[126] For a discussion from the point of view of English law, arguing that the prevailing regulatory regime limits the risk of eminent domain abuse largely through regulation of the takings power rather than strict property protection, see (n 30).

[127] See Gray, 'Recreational Property' (n 31) 28-30.

criteria proposed by Gray, as well as three riders that I believe suggest themselves on the basis of the discussions presented earlier in this and the previous chapter. I will refer to the resulting set of conditions as the *Grey test*, to be understood as a proposed general heuristic for assessing the legitimacy of takings, especially in situations when there are strong commercial interests present on the taker side.

Several combinations of conditions might be sufficient to justify designating a taking as eminent domain abuse. The purpose of the Gray test is not to produce a definite set of such conditions that provide a final answer in any case. Rather, the aim is to provide a heuristic to facilitate concrete assessment against the social, economic and political circumstances surrounding the taking in question. If an economic development taking represents an abuse of power, one would expect it to run afoul with regard to some, and probably several, of the criteria set out in the following points.

Balance of Power among the Parties

In a typical case of eminent domain abuse, the parties that stand to benefit will be more economically and politically powerful than those from whom property is taken.[128] This can be reflected in the takers' ability to solicit legal assistance and other services to defend the taking, as well as in the owners' inability to launch a coordinated defence.[129] If there is an imbalance of power, this is particularly likely to be noticeable early on, during the planning stages, before the decision to condemn has actually been made.

After the decision has been made, the procedural position of the owners might improve. However, this might not serve to restore any meaningful balance between the parties; when special procedural protections kick in, it will often be too late for the owners to launch an effective defence against the taking. For instance, strict rules concerning cost reimbursement for costs incurred *after*

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

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

the decision to take has already been made, is not a sufficient response to an imbalance of power, especially not in legal systems that do not offer extensive judicial review of takings purposes.

More generally, a possible imbalance of power should be assessed against the decision-making process as a whole, going back to the first initiative made for taking the property in question. A critical assessment of what role the owners have played in the decision-making process is a good way to uncover more information about imbalances of power, and whether or not such imbalances could have unduly influenced the outcome.

The Net Effect on the Parties

As Gray notes, a hallmark of eminent domain abuse is that the net effect of the taking is a "significant transfer of valued resource from one set of owners to another"[130] In itself, this is not a conclusive sign of abuse, but it directs us to ask two important questions. First, we should inquire critically into the main purpose of the taking. Is the transfer of resources between the parties an acknowledged motive or an unacknowledged side-effect of some ostensibly distinct public purpose?

In the latter case, it might be clear that the public purpose is only a pretext for benefiting the taker, in which case it counts as clear evidence of abuse. In less obvious cases, if the transfer of resources arising from the fulfilment of the public purpose was not properly discussed and critically examined by the decision-maker, this too can point towards predation.

The assessment will be different if redistribution of (control over) resources is openly acknowledged as part of the rationale justifying eminent domain. In such cases, it is pertinent to ask further questions about the economic and social status of the parties, and the structure of the decision-making process, to shed light on whether the redistributive motive itself appears democratically legitimate. If there is eminent domain abuse, one would except the taking to fail to stand up to scrutiny in this regard.

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[130] See Gray, 'Recreational Property' (n 31) 31.

In some cases, it might be debatable whether a taking passes the net effect test. However, the importance of scrutiny is still significant, since it helps bring the crucial questions into the open, thereby ensuring higher quality of the decision-making regarding the taking. Indeed, if the Gray test is applied at an early stage of the proceedings, this in itself might help increase acceptance of the decisions reached. Making room for more extensive legitimacy tests in takings law might well end up bolstering the government's power to take property, as long as the power is used faithfully.

Initiative

In many suspicious economic development takings, the party benefiting commercially from the taking is the party that initially made the suggestion for using eminent domain.[131] In uncontroversial cases, on the other hand, the initiative tends to come from some government body that seeks to pursue a specific policy goal, e.g., to provide a public service or bestow a benefit on a particular group that is found to be in need of support. The contrast between this and cases when the initiative lies with the commercial beneficiaries themselves point to a disturbance of the decision-making underlying the decision to use eminent domain. As such, it is an important hallmark of abuse.

To investigate further under this point, one should take into account the wider social and political context of the taking, particularly the position of the parties involved. If the beneficiary is both more powerful and privileged than the owners *and* takes the initiative for the taking, this is clearly a sign pointing towards predation. On the other hand, if the beneficiaries are marginalised groups who could only expect any consideration if they were to take the initiate themselves, the situation might have to be viewed differently.

[131] See Gray, 'Recreational Property' (n 31) 32.

Location

The location, in a broad sense of the word, of the property that is taken, can be a strong indicator that eminent domain is inappropriate.[132] For instance, cases involving the taking of dwellings are naturally more suspect than cases involving the taking of barren or unused plots of land. Similarly, the taking of property that is important to the subsistence of the current owner should raise the bar for when a taking may be considered legitimate. Moreover, if the taker's choice of location appears to be one of convenience rather than necessity, this points towards predation. It is particularly telling if alternative locations would be less intrusive, or obviate the need for using eminent domain altogether.

On the other hand, the location of the property can sometimes point towards *increased* legitimacy of a taking that would otherwise appear suspect. This might be the case, for instance, if the property that is taken has special value to the taker or the community specifically because of its strategic importance with respect to the taker's own property or the rights of non-owners.[133] The proper balance of burdens and benefits might still be upset, but a taking that fits smoothly into a 'special value' narrative will be less suspect than one that does not.

Social Merit

As Gray notes, a taking that is hard to justify on the basis of its social merits is more likely to be predatory.[134] This asks for closer scrutiny of the kinds of public interests that can be used to justify

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132 See Gray, 'Recreational Property' (n 31) 33-34.

133 For instance, if riparian owners cannot make rational use of the water flowing over their land without intruding on the land of their neighbours, using eminent domain to resolve this might be considerably less suspect than other kinds of economic development takings. This particular scenario was much discussed in the US during the 19th century, in relation to mill acts which authorised neighbour-to-neighbour takings of limited property rights needed for development. See the discussion in Chapter 2, Section **??**. For an example involving non-owners, consider the increased legitimacy of interference in cases when property rights frustrate efforts to secure rights of non-owners, such as rights to drinking water in cases when riparian owners prevent non-owners access to water for their basic needs.

134 See Gray, 'Recreational Property' (n 31) 34. Gray writes of lap-dancing clubs and cigarette factories as examples of purposes that are suspect. Importantly, such purposes might well fulfil a public interest requirement via the

a taking. If the justification narrative surrounding a taking revolves solely around 'trickle-down' effects and the successful business ventures that the taking will facilitate, there is reason to be suspicious. Specifically, if the taking cannot sustain a social merit narrative, whereby attention is shifted away from purely economic considerations, this is a strong independent indication that the taking might count as predation.

The point here is not that the language of social merit should replace the language of public use or public interest as some kind of conclusive test of legitimacy. Rather, the point is that one should always be encouraged to analyse takings specifically in terms of non-economic, social, effects. This is particularly important in difficult cases, because it can help us arrive at a better understanding of where exactly the taking sits on the gray scale between admissible governance and predatory exploitation.

Environmental Impact

According to Gray, a typical feature of eminent domain abuse is that it has an adverse environmental impact. Moreover, a typical feature of eminent domain abusers is that they show disregard for such adverse affects.[135] This is an additional element that pertains specifically to the status of the taker, asking us to consider whether it is appropriate to grant their activities public interest status. It is not primarily a question of how the development stands with regard to environmental regulation. Rather, what is at stake is whether or not the characteristics of the taker and the development plans make it appropriate to use the power of eminent domain.

It might be appropriate to use environmental law as a starting point, but the relevant environmental standard with regard to the legitimacy question should be drawn up more strictly than

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

[135] See Gray, 'Recreational Property' (n 31) 34 ("predatory takers tend to be relatively unperturbed if they lay waste to the earth").

the standards generally applied to the type of development in question. Indeed, one should be entitled to expect *more* in terms of environmental awareness and concern from a developer and a development plan that benefit from the power of eminent domain.

Arguably, the mere fact that takers engage in active lobbying for leniency in relation to environmental standards can be enough to shed doubt on the proposition that they act in the public interest. What might otherwise be considered natural and admissible behaviour for a common commercial company can be improper or inadmissible behaviour for one that benefits from eminent domain powers. I note that this particular observation has general import, pertaining to a potentially wider set of obligations that takers may be expected to take on, not only environmental ones. This brings me to the first rider that I propose to add to Gray's original evaluation points.

Rider 1: Regulatory Effects

As discussed in Chapter 2, property has an important regulatory effect, also outside the realm of positive law. This effect typically changes following a taking, sometimes quite dramatically. For instance, if locally owned property is taken by external commercial actors for high-intensity commercial use, the post-taking regulatory status of the property will most likely be completely different to its status prior to the interference. Moreover, the changed status might have as much to do with informal social functions as it has to do with positive regulation.

It might be, for instance, that the property in question is found in a jurisdiction that emphasises the freedom of owners to do as they please without state interference. In this case, the fallout of allowing external commercial actors to take locally owned property can be particularly severe, as the new owner is likely to be unconstrained by locally grounded systems for sustainable resource management. In these cases, there is a risk that there will be a 'tragedy of the taken', arising from how the taking undermines an important building block of sustainability.

Indeed, a society based on egalitarianism and strict limits on state interference might find it

especially difficult to appropriately restrain the actions of actors who use the eminent domain power to accumulate property for high-intensity use.[136] If this is resolved by increasing the state's power to interfere with private property through regulation, the effect can be a further undermining of local management frameworks, increased subsequent use of eminent domain, and a general spreading and amplification of the democratic deficit already inherent in the original act of taking.

A different regulatory concern is that the legal status of the property can change, for instance because the development in question brings it under the scope of different rules. If so, it should be examined whether the new rules offer weaker protection for the local community, the environment, or the general public interest, in which case it reflects badly on the initial decision to use eminent domain.

Rider 2: Impact on Non-Owners

Following up on the theoretical arguments made in Chapter 1, it is appropriate to direct special attention at the status of non-owners directly affected by economic development takings. It is of particular interest to ascertain whether or not the interests of such non-owners were given due consideration prior to the decision to use eminent domain. If their interests appear to have been neglected, or have not been considered at all, there is additional reason to be sceptical of the purported public interest of the taking. Indeed, just as disregard for the environment is a typical sign of predation, a general disregard for local non-owners is also an indicator of abuse.

To shed further light on this, one might first ask what role non-owners played in the decision-making process. If the non-owners directly affected by the taking were allowed to express their opinion, and enjoyed some measure of influence, this can enhance legitimacy. If, on the other hand, the most immediately affected members of the public were not consulted, or not given a proper

[136] This problem can of course arise independently of the use of eminent domain, e.g., in the context of land grabs arising from voluntary or semi-voluntary transactions. However, the situation appears particularly problematic if the state itself is complicit in bringing about the problem, by undermining property's social function through the use of the takings power.

voice in the proceedings, it indicates abuse.

There is also an important substantive aspect to consider: how is the taking going to affect property dependants without recognised ownership rights? If it is clear that they will suffer severe adverse effects, for instance by being displaced from their homes or by loosing their livelihoods, this must be counted as an indication of predation irrespective of any mitigating procedural arrangements used to create the impression of "consultation" or the like.

Importantly, it also follows from the social function perspective that awarding compensation can not by itself excuse shortcomings in this regard. If people are displaced, for instance, the fact that new dwellings are provided somewhere else does not detract from the fact that a community has been destroyed. It is possible that the needs of the public necessitate such a drastic interference with property's proper function, but this should then at once give rise to a more in-depth scrutiny of legitimacy. Moreover, the bar to pass the legitimacy test should be raised considerably in such cases.

Rider 3: Democratic Merit

Perhaps the most important characteristic to consider when assessing the legitimacy of a taking is its democratic merit. In an important sense, putting a taking to the test against this measure serves to encapsulate all the other points raised above. Specifically, it asks us to consider the totality of these factors in order to judge whether good governance standards have been observed within a system based on democratic decision-making. The inquiry made in this regard should not be focused on second-guessing government policies, but should compel us to take seriously the idea that a commitment to democracy places real constraints on the exercise of government power. In this way, an overarching focus on democratic merit can hopefully render the principles of scrutiny expressed by the Gray test as a possible template for courts across different jurisdictions, with respect to both constitutional and human rights provisions.

The overarching question that arises with respect to democratic merit is whether the taking in question can be said to arise from a legitimate process of decision-making, in the pursuit of a fair and equitable outcome. It bears emphasising that in line with a more modern appreciation of the meaning of democracy and human rights, the relevant assessment under this point involves both procedural and substantive elements. Fairness in itself is a constraint on the democratic process, particularly when fundamental economic and social rights are involved. At the same time, the notion of democratic merit rightly brings procedural questions to the foreground. Indeed, it might be a weakness of Gray's original proposal that it does not single out procedural issues for special consideration.

On the one hand, it is inappropriate to reduce the takings question to a matter of administrative law. But on the other hand, the way in which the taking decision was made can often tell us much about its legitimacy, including how it stands with regard to broader notions of fairness. It is particularly important, in this regard, to inquire into the position of local owners and communities during the planning process leading up to the decision to use eminent domain. In the context of property as a human right, moreover, a stricter standard might be appropriate here, compared to that which would otherwise follow from administrative law.

Importantly, our commitment to property as a social institution requires us to take into account that the owners generally make up the group of people who will be most directly affected by any decision involving the future of their property. As such, they should normally be granted a decisive voice in decision-making processes leading up to economic development. At the same time, the social function account leaves room for recognising that this presumption in favour of emphasising the rights of owners can be defeated by the context. It is clear, for instance, that the substantive interests of absentee landlords might be limited compared to the substantive interests of local non-owners who depend more directly on the property for their livelihoods. In these cases, the social function approach allows us to recognise that a taking might have significant democratic merit,

even if it is based on a form of decision-making that prioritises the interests and participation rights of non-owners.

Nevertheless, within a system based on private property rights it will always be appropriate to show caution in this regard. The presumption should always be, within such a system, that the owners are the primary stakeholders in decision-making processes involving their property. Moreover, if this presumption is defeated, it would usually point to a structural weakness of property's function within society, a weakness that should arguably be addressed by more general reforms of property, not by inflating the state's power to undermine it. If caution is not observed here, property can soon become a less secure basis on which to support local communities, including those marginalised groups that are most in need of protection from predators.

By itself, however, a legitimacy test cannot make property a more secure basis for promoting good outcomes in cases when the public desires economic development. What the Gray test provides is a list of possible symptoms to look our for when attempting to diagnose a suspected case of eminent domain abuse. Hopefully, this can help flag problems and limit damages, but it can not be regarded as a solution, especially not in cases when the public's apparent desire for economic development is a genuine reflection of a democratic commitment.

In short, after diagnosing a lack of legitimacy, the question becomes how to find a cure, preferably without harming the patient, i.e., the democratic system. In the next section, I consider this challenge in more depth, premised on the idea that there is a need for alternatives to eminent domain in cases when the collective wishes to take decisive steps to promote economic development on privately owned land.

3.6 Alternatives to Takings for Economic Development

As mentioned briefly in Chapter 2, the work of Ostrom and others on common pool resources suggests that sustainable resource management can often be better achieved through local self-

governance than through markets or states.[137] The connection between this work and property theory is highly interesting, and has been explored in some recent work, particularly by US legal scholars.[138] As these scholars have observed, the connection can be made at a very high level of generality. Indeed, in a democracy, property as such has a kind of (partial) commons structure, since property as an institution depends on the collective choices we make regarding the legal order.[139] In cases when property is made subject to eminent domain, this perspective becomes particularly salient, since then the collective explicitly withdraws its backing for the rights of the owner, in favour of collective decision-making about the future of the property in question.[140] Moreover, in case of an economic development taking, the property in question typically pertains to land or some other natural resource, which invariably form part of a larger resource system with some common pool characteristics.[141]

Importantly, to designate something as a common pool resource does not in any way imply that the resource in question is open-access or that it is held as a form of common property, a public trust, or under some other legal construction moving away from the sphere of private property.[142]

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137 See generally Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge University Press). For a recent exposition of the main ideas, placing the work in a broader academic context, see the revised version of Ostrom's Nobel Lecture, Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100(3) The American Economic Review 641.

138 See generally Carol Rose, 'Ostrom and the lawyers: The impact of Governing the Commons on the American legal academy' (2011) 5(1) International Journal of the Commons; LA Fennel, 'Ostrom's Law: Property Rights in the Commons' (2011) 5(1) International journal of the commons 9.

139 For similar observations, see Carol M Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory' (1990) 2(1) Yale Journal of Law & the Humanities 37, 51; Hanoch Dagan and Michael A Heller, 'The Liberal Commons' (2001) 110(4) Yale Law Journal 549, 577.

140 A common pool resource is typically identified by the fact that exclusion is difficult or costly, while use can cause depletion (and hence should be limited), see, e.g., Elinor Ostrom and Charlotte Hess, 'Private and Common Property' in Boudewijn Bouckaert (ed), *Property Law and Economics* (Edward Elgar 2010) 57. Hence, the mere fact that some property is apt to be regulated, or taken, by the collective, demonstrates that property has common pool characteristics (although these might be imposed by the polity, rather than arising from the nature of the underlying good).

141 See, e.g., Fennel (n 138) 16 ("we are *always* operating at least partially within a commons of some sort"). I also mention Smith's notion of a "semicommons", used to describe settings where common pool arrangements for resource management interact with individual property rights, see generally Henry E Smith, 'Semicommon Property Rights and Scattering in the Open Fields' (2000) 29(1) The Journal of Legal Studies 131; Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) The Journal of Legal Studies S453.

142 See, e.g., Ostrom and Hess (n 140) 58.

Perhaps more controversially, designating something as a common pool resource does not in any way imply that the resource *should* be removed from this sphere.[143] According to Ostrom and Hess, the appropriate property regime for a given common pool resource is a pragmatic question that depends on the circumstances.[144]

It should be noted, however, that this neutral position on the relationship between property and common pool resources is premised on a bundle of rights understanding.[145] Potentially, a more ambitious theory of property could suggest a different perspective. Specifically, the question arises as to how theories of common pool resource management relates to the social function account. This is a particularly interesting avenue for future work, as it could shed light on the normative stance that private property can be a good basis for sustainable self-governance, at least when backed up by a human flourishing account of what private property should be.

In this thesis, I will limit myself to noting how the link between property and theories of commons governance provides a possible route towards an institutional perspective on how to solve legitimacy problems associated with economic development takings.

To make progress in this regard, it will be useful to first briefly consider one of the most important theoretical legacies of Ostrom's work, namely a list of eight design principles that she formulated on the basis of empirical studies.[146] These principles were formulated because they seemed to be particularly crucial in ensuring good governance at the local level, and have since been supported by a growing body of empirical evidence.[147] In brief, the so-called CPR principles

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143 See Ostrom and Hess (n 140) 58 ("there is no automatic association of common-pool resources with common-property regimes – or, with any other particular type of property regime").

144 See Ostrom and Hess (n 140) 58.

145 See Ostrom and Hess (n 140) 59.

146 See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 90.

147 See M Cox, G Arnold and SV Tomas, 'A Review of Design Principles for Community-based Natural Resource Management' (2010) 15(4) Ecology And Society 38 (the authors also suggest splitting some of the original principles in two parts, resulting in a slightly more fine-grained list, not needed in this thesis).

are the following:

1. **Well-defined boundaries:** There should be a clearly defined boundary around the resource in question, and a clear distinction should exist between members of the user community, who are entitled to access the resource, and non-members, who may be excluded. This will internalise the costs of resource exploitation and other externalities, ensuring that proper incentives for sustainable management arise within the community of resource users.[148]

2. **Congruence between appropriation and provision rules and local conditions:** Management principles should be flexible and responsive to changing local conditions. Moreover, management practices should be anchored in the economic, social, and cultural practices prevalent at the local level. In addition, the individual benefits should generally exceed the individual costs associated with membership in the community of users, and collectively managed benefits should be distributed fairly among community members.[149]

3. **Collective-choice arrangements:** The individual members of the user community should have an opportunity to participate in decision-making processes regarding the rules that govern the user community and the resource management. In addition to securing fairness and legitimacy, this will enhance the quality of the decision-making, as the users themselves have first-hand knowledge and low-cost access to information about their situation and the state of the resource in question.[150]

4. **Monitoring:** There should be mechanisms in place to ensure that the behaviour of users is monitored for violations of management rules. To increase efficiency, monitoring should be

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[148] Importantly, the possibility of excluding non-members marks a distinction between open-access resources and common pool resources, where the latter appears much less susceptible to a commons tragedy than the former, because externalities are internalised to a clearly defined community. See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 91-92.

[149] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 92.

[150] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 93.

locally organised. Moreover, to ensure local responsiveness and legitimacy, individuals acting as monitors should themselves be members of the user community or in some way answerable to this community.[151]

5. **Graduated sanctions:** There should be an effective system in place for penalising violations of user community rules. These penalties should be graduated so that more severe or repeated violations are sanctioned more severely than minor or one-time transgressions.[152]

6. **Conflict-resolution mechanisms:** The user community should be endowed with low-cost procedures for conflict resolution. These procedures should be sensitive to local conditions, to ensure local legitimacy.[153]

7. **Minimum recognition of rights:** The user community should be protected from interference by external actors, including government agencies. As a minimum, the existence of local institutions and the right to self-governance should be recognised and respected by external government authorities.[154]

8. **Nested enterprises:** There should be vertical integration between local, small-scale, management institutions and larger institutions aimed at protecting and furthering non-local interests. This integration should be based on the minimum recognition of rights mentioned in the previous point. Furthermore, it should provide a template for integrated decision-making about larger scale issues, where local competences are employed incrementally in more general settings, involving also institutions working on behalf of municipalities, regions, states and the international community. Local institutions for resource management should

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[151] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 94-100.

[152] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 94-100.

[153] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 100-101.

[154] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 101.

> not only be respected by such larger scale structures, they should also feed into larger scale decision-making and be called to respond to greater community needs.[155]

There are at least two interesting connections between self-governance principles such as these and the issue of economic development takings, especially as that issue is approached in this thesis, on the basis of the social function theory of property. First, one may observe that when economic development takings appear to lack legitimacy with respect to social functions, this is typically also an indication that the surrounding framework for resource management is not well-designed. In particular, it appears that the Gray test closely tracks many of the design principles proposed by Ostrom.

For instance, consider the balance of power between the owners and beneficiaries of a taking, the first point to consider according to the Gray test. When a taking fails on this point, doubts naturally arise also with regard to the underlying framework for resource management, particularly aspects pertaining to the recognition of local rights, the adequacy of collective-choice arrangements, and the congruence between appropriation, provision and local conditions. If property is taken by powerful actors, chances are that these actors are not representative of local community interests. Moreover, takings characterised by an imbalance of power typically indicate that the government is in fact quite unwilling to recognise the rights of local people, even when these rights are formally recognised as property rights.

By contrast, the situation might be different if it involves a taking that is not suspect according to the Gray test. For instance, if property is taken from absentee landlords and given to local land users in order to facilitate development, this might be an honest attempt at setting up a management framework that complies with CPR principles. In such a case, one would also not expect the balance of power between owners and takers to point towards abuse.

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[155] See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 137) 101-102.

The second link between CPR design and economic development takings is arguably even more interesting. This link becomes apparent as soon as we shift attention away from diagnosing a lack of legitimacy towards coming up with alternative management principles that can restore it. Specifically, work done on local governance of common pool resources point to an *alternative* way of approaching the goal of economic development in cases that might otherwise result in the use of eminent domain.

This has not received much attention in the literature so far. One notable exception, discussed in depth in the following subsection, is the work of Heller, Dagan and Hills.[156] Looking at their work will serve to make the abstract discussion above more concrete, and will set the stage for a comparison between their proposal and solutions that can be facilitated by the system of land consolidation presented in Chapter 5.

3.6.1 Land Assembly Districts

In an article from 2001, Heller and Dagan considered the connection between CPR design and overarching (liberal) property values.[157] From this, they arrived at a proposal for what they call a "liberal commons", which adds some design constraints rooted in a desire to protect individual autonomy and minority rights. In particular, they emphasise the value of exit, the opportunity for members of the governance structure to alienate their share in the commons resource (conceived of as a property right).[158] The right of owners to leave the collective is thought of as a safety mechanism, to prevent failing institutions from trapping its members in a state of oppression.

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156 The work of Lehavi and Licht also deserves a brief mention, even though it focuses on compensation rather than alternatives to eminent domain. The reason is that this work relies on proposing a novel institution that also touches on issues related to self-governance. In particular, Lehavi and Licht propose that post-taking, collective, price bargaining should be carried out on behalf of owners by a Special Purpose Development Company, in an effort to give them a chance to get their share of the commercial benefit arising from development. See Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704. For a more in-depth discussion of this proposal, and the compensatory approach to economic development takings more generally, see Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 21).

157 See Dagan and Heller (n 139).

158 See Dagan and Heller (n 139) 567-572.

This, it is argued, is an important overarching design constraint, described as a "liberal" idea, that should complement the other design principles for local management of common pool resources.[159]

In a later article, responding to the *Kelo* controversy, Heller and Hills build on the idea of the liberal commons by proposing a novel approach to the takings issue, consisting of a proposal for a new institutional framework that can facilitate land assembly for economic development. The core idea is to introduce *Land Assembly Districts* (LADs), institutions that will enable property owners in a specific area to make a collective decision about whether or not to sell the land to a developer or a municipality.[160] The idea is that while anyone will be able to propose and promote the formation of a LAD, the official planning authorities and the owners themselves must consent before it is formed.[161] Clearly, some kind of collective action mechanism is required to allow the owners to make such a decision.

Heller and Hill suggest that voting under the majority rule will be adequate in this regard, at least in most cases.[162] How to allocate voting rights in the LAD is given careful consideration, with Heller and Hills opting for the proposal that they should in principle be given to owners in proportion to their share in the land belonging to the LAD.[163] Owners can opt out of the LAD, but in this case, eminent domain can be used to transfer the land to the LAD using a conventional eminent domain procedure.[164]

Heller and Hills envision an important role for governmental planning agencies in approving,

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159 Despite their commitment to protect the right of exit, Heller and Dagan are also aware of the destabilising effect exit can have on an otherwise well-functioning institution. To address this, they discuss additional mechanisms, such as rights of first refusal, that can ensure that exit does not prove too disruptive to the local collective, as long as a sufficient number of members chose to remain. See Dagan and Heller (n 139) 596-702.

160 Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465, 1469-1470.

161 Heller and Hills (n 160) 1488-1489.

162 See Heller and Hills (n 160) 1496. However, when many of the owners are non-residents who only see their land as an investment, Heller and Hills note that it might be necessary to consider more complicated voting procedures, for instance by requiring separate majorities from different groups of owners. See Heller and Hills (n 160) 1523-1524.

163 See Heller and Hills (n 160) 1492. For a discussion of the constitutional one-person-one-vote principle and a more detailed argument in favour of the property-based proposal, see Heller and Hills (n 160) 1503-1507.

164 Heller and Hills (n 160) 1496.

overseeing and facilitating the LAD process. Their role will be most important early on, in approving and spelling out the parameters within which the LAD is called to function.[165] While it is not discussed at any length, the assumption appears to be that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue in quite some depth. Hence, despite the overarching goal of self-governance, the power of the planning authority still appears significant under the LAD proposal as it currently stands.

If the owners do not agree to forming a LAD, or if they refuse to sell to any developer, Heller and Hills suggest that the government should be precluded from using eminent domain to assemble the land.[166] This is a crucial aspect of their proposal that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. A LAD will not only ensure that the owners get to bargain with the developers over compensation, it will also give them an opportunity to refuse any development to go ahead. Hence, the proposal shifts the balance of power in economic development cases, giving owners a greater role also in preparing the decision whether or not to develop, and on what terms. Hence, the LAD proposal promises to address the democratic deficit of economic development takings, without failing to recognise that the danger of holdouts is real and that institutions are needed to avoid it.

There are some problems with the model, however. First, it seems that planning authorities might have an incentive to refuse granting approval for LAD formation. After all, doing so entails that they give up the power of eminent domain for the land in question. For this reason, Heller and Hills propose that a procedure of judicial review should exist whereby a decision to deny approval for LAD formation can be scrutinized.[167] However, the question then arises as to how deferential courts should be in this regard, echoing the conundrum that engulfs the safeguard

[165] Heller and Hills (n 160) 1489-1491.

[166] Heller and Hills (n 160) 1491.

[167] Heller and Hills (n 160) 1490.

intended by the public use restriction. Presumably, one would want the courts to strictly scrutinise LAD rejections, to instil that LADs should normally be promoted. However, would the courts be comfortable providing such scrutiny, also against a government body claiming that the "public interest" speaks against LAD formation? This would likely depend on the exact formulation and spirit of the LAD-enabling legislation. To work as intended, some sort of presumption in favour of LAD approval appears to be in order, but this in turn can have the effect of making it easier for powerful landowners to abuse the LAD system, e.g., by pushing through LADs that enable them to impose their will on other community members.

This worry is related to a second possible objection against the LAD proposal, concerning the practicalities of the process leading up to the LAD's decision on whether or not to accept a given offer. Is it possible to organise such a process in a manner that is at once efficient, inclusive and informative, without making it too costly and time consuming? Here Heller and Hills envision a system of public hearings, possibly organised by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[168] The process envisioned here would resemble existing planning procedures to such an extent that additional costs could hopefully be kept at a minimum.

The significant difference would concern the relative influence of the different actors, with the owners as a group receiving a considerable boost as a result of the LAD. Rather than being sidelined by a narrative that sees the use of eminent domain as the culmination of planning, the owners are now likely to occupy center stage throughout, as they now will have the final say on whether or not the development will go ahead.

From this, however, arises the question of how the interests of other locals, without property rights, will be protected. Heller and Hills assumes that local non-owners will also be represented

[168] See Heller and Hills (n 160) 1490-1491. It might also be necessary for the planning authorities or other government agencies to take on some responsibilities with respect to providing guidance and assistance to less resourceful members among the owners.

during the stages leading up to the LAD's final decision, but their role in the process is not clarified in any detail.[169] This raises the worry that LADs might undermine local democracy by giving property owners a privileged position with respect to policy questions that should be decided jointly by all members of the community. The severity of this risk depends heavily on the circumstances. In a context of egalitarian property ownership and sensible government regulation of land uses and LAD operations, the risk should be minimal. In principle, the local anchoring that LADs provide should also benefit non-owners, by bringing the decision-making process closer and making it more easily accessible for the people most directly affected, including non-owners. Moreover, if some members of the local community remain marginalised, this should possibly be regarded as a regulatory failure or a reflection of underlying inequality in society, not a shortcoming of the LAD proposal as such. In these cases, a reasonable approach might even be to *expand* the function of LADs, by granting voting rights to a larger class of local property dependants, not only formally titled owners.[170]

However, the LAD proposal raises some highly problematic issues pertaining to the proposed mechanism of collective decision-making. As Kelly points out in a commentary, the basic mechanism of majority voting is deeply flawed.[171] For instance, if different owners value their property differently, majority voting will tend to disfavour those with the most extreme viewpoints, either in favour of, or against, assembly. If these viewpoints are assumed to be non-strategic and genuine reflections of the welfare associated with the land, the result can be inefficiency. In short, the problem is that a majority can often be found that does not take due account of minority interests.

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169 Heller and Hills (n 160) 1490-1491.

170 The important invariant to maintain, I believe, is that the locally anchored institution should be the active, invested, agent, while more centralised and/or expert-dominated government bodies should act as passive, impartial, regulators. In the processes leading to economic development takings, this equation is typically reversed, with government bodies and commercial companies being the active agents, while the owners and the local community are the passive agents whose property rights and dependencies place some nominal limits on the authority of other parties (limits which, due to the weakness of owners as a group, tend to be easily disregarded).

171 Daniel B Kelly, 'The Limitations of Majoritarian Land Assembly' (2009) 122 Harvard Law Review Forum 7.

For instance, if a minority of owners are planning development on their own land, and this conflicts with some LAD proposal targeting a larger area, the minority might find it difficult to defend themselves against the force of the LAD. Indeed, such a minority might effectively loose the battle for their property as soon as a LAD is formed, if the development description underlying LAD formation is incompatible with the kind of development they wish to pursue. For such owners, a presumption in favour of LAD formation might prove highly disadvantageous.[172]

Indeed, developers might come to rely on LADs to push through *de facto* condemnations of property, through a procedure that leaves minorities less protected than the traditional takings process. Indeed, it would be theoretically possible for any landowner to use a LAD to condemn any neighbouring property smaller than their own. Eventually, a whole community might be taken over by one or a few powerful landowners, through a sequence of appropriately designed LADs and development projects.

Despite these worries, the ideal of the LAD proposal is clearly stated and highly attractive. LADs should help to establish self-governance for land assembly and economic development. In particular, Heller and Hills argue that LADs should have "broad discretion to choose any proposal to redevelop the neighbourhood – or reject all such proposals".[173] As they put it, two of the main goals of LAD formation is to ensure "preservation of the sense of individual autonomy implicit in the right of private property and preservation of the larger community's right to self-government".[174] The problem is that these ideals turn out to be at odds with some of the concrete rules that Heller and Hills propose, particularly those aiming to ensure good governance of the LAD itself.

In relation to the governance issue, Heller and Hills emphasise, in direct contrast to their

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172 Of course, one might imagine these landowners opting out of the LAD, or pursuing their own interests independently of it. However, they are then unlikely to be better off than they would be in a no-LAD regime. In fact, it is easy to imagine that they could come to be further marginalised, since the existence of the LAD, acting 'on behalf of the owners', might detract from any dissenting voices on the owner-side.

173 See Heller and Hills (n 160) 1496.

174 See Heller and Hills (n 160) 1498.

comments about "broad discretion" and "self-governance", that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[175] This is a good thing, according to Heller and Hills, since it provides a safeguard against mismanagement, serving to prevent LADs from becoming battle grounds where different groups attempt to co-opt the community voice to further their own interests. As Heller and Hills puts it, the narrow scope of LADs will ensure that "all differences of interest based on the constituents' different activities and investments, therefore, merge into the single question: is the price offered by the assembler sufficient to induce the constituents to sell?".[176]

This means that there is a significant internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighbourhood bickering and majority tyranny on the other. Indeed, it is hard to see how LADs can at once have both a "narrow purpose" as well as enjoy "broad discretion" to choose between competing proposals for development. If such discretion is granted to LADs, what prevents special interest groups among the landowners from promoting development projects that will be particularly favourable to them, rather than to the landowners as a group? What is to prevent landowners from making behind-the-scene deals with favoured developers at the expense of their neighbours? It might be difficult to come up with rules that prevent mechanisms of this kind, without also making substantive self-governance an impossibility.

If a LAD is obliged to only look at the price, this might prevent abuse. But it will not give owners broad discretion to consider the social functions of property when choosing among development proposals. In my view, it is undesirable to restrict the operations of LADs in this way. It is easy to imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will be made in response to the formation of a LAD. Such proposals may involve

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175 See Heller and Hills (n 160) 1500.

176 Heller and Hills (n 160) 1500.

novel solutions that are superior to the original development plans, in which case it is hard to see any good reason why they should not be taken into account, even if they are proposed by a minority. Moreover, it is hard to see why they should be disregarded simply because they are less commercially attractive, or because the developer interested in pursuing such a proposal cannot offer the highest payment to the owners. In the end, the decision that the LAD makes concerns the future of the community as a whole. This is not an exercise in profit-maximization, and there are good reasons to believe that LAD regulation should encourage a broad perspective, not enforce a narrow one.

However, when it comes to the details, Heller and Hills seem quire adamant that the degree of self-governance needs to be limited in favour of strict regulation to reduce the risk of LAD abuse. In particular, they argue that "LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler".[177] Here, the notion of self-governance is made even thinner, as owners will effectively be barred from using LADs as a template for gaining the right to participate in development projects themselves.

Moreover, new questions arise. For one, what is meant by "affiliation"? Say that a landowner happens to own shares in some of the companies proposing development. Should they then be barred from voting? If so, should they be barred from voting on all proposals, or just those involving companies in which they are a shareholder? If the answer is yes, how can this be justified? Would it not be easy to construe such a rule as discrimination against landowners who happen to own shares in development companies? On the other hand, if the landowner in question is allowed to vote on all other proposals, would it not be natural to suspect that their vote is biased against assembly that would benefit a competing company? Or what about the case when some of the landowners are employed by some of the development companies? Should such owners be barred from voting

[177] Heller and Hills (n 160).

on proposals that could benefit their employers? This seems quite unfair as a general rule. But in some cases, employment relations could play a decisive factor in determining the outcome of a vote. This might happen, for instance, if an important local employer proposes development in a neighbourhood where it has a large number of employees. Heller and Hills give no clear answer to the questions arising in this regard, and at this point, the circle has in some sense closed in on their proposal. Indeed, just as courts today struggle with the "public use" requirement, it seems that the proposed "affiliation" criterion for depriving someone of their voting rights would provide a very shaky basis for judicial review.

More generally, it seems that how to best organise a LAD remains an open problem. The challenge is to ensure that LADs deliver a real possibility of self-determination, while also ensuring good governance and protection against abuse. That it remains unclear how to do this is acknowledged by Hiller and Hills themselves, who point out that further work is needed and that only a limited assessment of their proposal can be made in the absence of empirical data.[178] Later in the thesis, I will shed light on this challenge when I consider the Norwegian framework for land consolidation. This framework can be looked at as a sophisticated institutional embedding of many of the central ideas of LADs. In particular, I will discuss how Norwegian land consolidation can be employed in cases of economic development, and how it is increasingly used as an alternative to expropriation in cases of hydropower development. This will allow me to shed further light on the issues that are left open by Heller and Hills' important article.

3.7 Conclusion

The legitimacy issue is at the heart of this thesis. There are many ways of approaching it, catering to different ideas about the appropriate role that the courts should play in safeguarding private

[178] See Heller and Hills (n 160).

property. This chapter has tried to distil an approach that is particularly suited in cases when property is taken for economic development.

This led to a proposal for an approach that combines procedural and substantive standards, to arrive at a template for assessing the fairness and democratic merit of the decision-making as such, not merely the outcome. This is appropriate because it helps address a key worry associated with an economic development taking: that the decision to take represents an abuse of power, reflecting badly on the institutions that gave rise to it.

On this basis, the chapter went on to provide a possible heuristic for assessing the legitimacy of economic development takings, in a manner that is compatible with an institutional fairness perspective. This heuristic was based on six legitimacy indicators provided by Gray, with three new ones added, based on the work done in this and the previous chapter. The resulting heuristic, the Gray test, should be able to identify cases of eminent domain abuse, particularly those that offend against social functions of property at the institutional level, rather than merely the financial entitlements of owners.

Following up on this, the chapter considered the question of how to increase legitimacy without giving up on the idea that the collective should be entitled to push adamantly for economic development on private land. I argued that the work done by Elinor Ostrom and others on common pool resources provide a suitable starting point for making institutional proposals in this regard. Specifically, I briefly presented her design principles for local self-governance institutions, which I believe can be used as a starting point also for designing procedures to replace eminent domain for economic development.

Finally, I considered a proposal that has already been made along these line, namely the idea of Land Assembly Districts due to Heller and Hills. I analysed this proposals in some detail, pointing out some shortcomings, including a deep tension between the overarching goal of self-governance and the danger of majority and/or elite tyranny. Moreover, I noted that proposals such as these

are hard to make at the theoretical level; the appropriate institution for self-governance needs to be attuned to local conditions. Indeed, this is one of the key design principles proposed by Ostrom.

This observation marks the end of the first part of the thesis. In the next part, I will consider the case of Norwegian hydropower specifically. This will lead to an analysis of legitimacy of takings for this purpose along the lines of the Gray test, as well as a case study of an already operational alternative for self-governance in place of eminent domain. In this way, the second part will aim to shed light on key aspects of the theory developed in the first part, while exploring further the idea that social functions run as a common thread through individual property rights.

Part II

A Case Study of Norwegian Waterfalls

4 Norwegian Waterfalls and Hydropower

4.1 Introduction

Norway is country of many mountains, fjords and rivers, where around 95 % of the annual domestic electricity supply comes from hydropower.[1] The right to harness energy from rivers, streams and waterfalls generally belongs to local landowners under a riparian system.[2] Historically, waterfalls were very important to local communities, particularly as a source of power for flour mills and saw mills.[3]

Following the industrial revolution, local ownership and management came under increasing pressure. At the beginning, this pressure was exerted by private commercial interests, often foreign investors, who saw the industrial potential in hydropower and started speculating in Norwegian water resources.[4] Later, the pressure on local self-governance was exerted mainly by the government,

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1 See Statistics Norway, data from the year 2011, http://www.ssb.no/en/elektrisitetaar/.

2 This arrangement is rooted in the first known legal sources in Norway, the so-called "Gulating" laws, thought to have been in force well before AD 1000. See Knut Robberstad (ed), *Gulatingslovi* (4th edn, An edition of the old "Gulatingsloven", a collection of the first known legal principles used by a Norwegian court (the Gulating), dating back to before AD 1000, Det Norske Samlaget 1981) 111-112,120.

3 See Terje Tvedt, *A Journey in the Future of Water* (IB Tauris 2013) 121.

4 See Hjemfall, 'NOU 2004:26' (Report to the Ministry of Petroleum and Energy from a special committe appointed by the King in Council on 04 April 2003,) 30-31.

following the introduction of new legislation to regulate the development of hydroelectric power.[5] This legislation set up a system that gave highly preferential treatment to public utilities over private actors, including local owners.[6] At first, the motivation behind this reform was to facilitate a decentralised form of government control, led by public utilities controlled by the municipality governments.[7] However, the hydroelectric sector underwent gradual centralisation, a process that gained momentum after the Second World War when the state itself assumed a leading role.[8] At this time, local communities and local riparian owners became increasingly marginalised. In particular, they were forced to shut down their hydroelectric plants in order to connect the national, monopolised, electricity grid.[9]

Then, in the early 1990s, the electricity sector was reformed once again, largely inspired by the market-orientation and privatisation of the public sector in the UK under Thatcher.[10] The production sector was liberalised, while public utilities where reorganised as commercial companies.[11] At the same time, the regulatory system was decoupled from both political and commercial decision-making processes, to become more expert-based.[12] Moreover, the sector underwent additional centralisation, as a result of mergers and acquisitions among former public utilities.[13]

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5 See Lars Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (Ad notam Gyldendal 1996) 41-57 (describing the regulatory system set up during this time).

6 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 46 (describing legislation introduced to promote public utilities, including new expropriation authorities directed at local owners of waterfall).

7 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 44-47.

8 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 59-85. For the history of the state's involvement with hydropower generally, see Lars Thue, *Statens Kraft 1890-1947: Kraftutbygging og Samfunnsutvikling* (Universitetsforlaget 2006); Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006); Lars Thue and Yngve Nilsen, *Statens Kraft 1965-2006: Miljø og Marked* (Universitetsforlaget 2006).

9 See Hans Hindrum, *Elektrisitetsforsyning ved hjelp av statsstøtte* (NVE 1994) p.111.

10 See generally Atle Midttun and Steve Thomas, 'Theoretical ambiguity and the weight of historical heritage: a comparative study of the British and Norwegian electricity liberalisation' (1998) 26(3) Energy Policy 179.

11 See *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Court Report 164, 86 (describing how Norwegian electricity companies, most of which are still (partly) publicly owned, now operate as for-profit, limited liability companies).

12 [26-27]brekke12.

13 See Jens Bibow, 'Energiloven, forvaltningspraksis og EØS-retten: Organisatoriske krav til energiselskaper' (2003)

Following the reform, access rights to the national grid are meant to be granted equally to all potential actors on the energy market, including private companies.[14] After the passage of the Energy Act 1990, the energy companies controlling the local grids were no longer authorised to shut out competitors.[15] A side-effect of this is that it has become possible for local landowners to undertake their own hydropower projects. Local owners can now access the grid to sell the electricity they produce on Nord Pool, the largest electrical energy market in Europe.[16] This has led to increased tension between local interests and established hydropower companies. The following fundamental question has arisen: who is entitled to benefit from rivers and waterfalls, and who is entitled to a say in decision-making processes concerning their use?

This chapter sets the stage for discussing this question in more depth, by detailing how the hydropower sector is organised. It looks both to the law and to the commercial and administrative practices surrounding it. Moreover, special attention is directed at those aspects that have changed following liberalisation of the sector in the early 1990s. Specifically, it is argued that the tension between large-scale development companies and local owners can only be understood on the basis of a social function perspective on private ownership of waterfalls.

More generally, this chapter provides important background information for the following two chapters, where I consider expropriation of waterfalls and alternatives to it in the context of hydropower development. I start by giving a brief overview of the legal system more generally,

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42(10) 579, 583. I mention that despite significant continuous centralisation from the Second World War to this day, the Norwegian hydroelectric sector is still relatively decentralised compared to other countries, e.g., the UK, see **"cite** midttun98. Arguably, this is a lasting influence of a tradition based on local, egalitarian, ownership of water resources.

14 See generally Ulf Hammer, 'Hovedtrekk ved Organiseringen og Reguleringen av Kraftmarkedet' [1996] Lov og Rett 390. For an interesting presentation and analysis of grid-based markets in general, see Ingvald Falch, *Rett til Nett: Konkurranse i Nettbundne Sektorer* (Universitetsforlaget 2004).

15 See the Energy Act 1990 s 3-4.

16 See generally Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Erstatning for erverv av fallrettigheter' (2006) 2006 Tidsskrift for eiendomsrett 175; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Fallerstatning – Ulebergdommen' (2008) 2008 Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (2012) 2012(1) Tidsskrift for eiendomsrett 21.

emphasising also the role that private property has played in the development of Norwegian democracy.

4.2 Norway in a Nutshell

Norway is a constitutional monarchy, based on a representative system of government.[17] The executive branch is led by the King in Council, the Cabinet, headed by the Prime Minister. Legislative power is vested in the Storting, the Norwegian parliament, elected by popular vote in a multi-party setting.[18] In 1884, the parliamentary system first triumphed in Norway, as the cabinet was forced to resign after it lost the confidence of parliament. The principle has since obtained the status of a constitutional custom. In particular, the cabinet can not continue to sit if parliament expresses mistrust against it. However, an express vote of confidence is not required. In practice, due to the multi-party nature of Norwegian politics, minority cabinets are quite common. These can sustain themselves by making long-term deals with supporting parties, or by looking for a majority on a case-by-case basis.

The judiciary is organised in three levels, with 70 district courts, 6 courts of appeal, and the Supreme Court. The district courts have general jurisdiction over most legal matters; there is no division between constitutional, administrative, civil, criminal courts. [19] The courts of appeal have a similarly broad scope. Moreover, the right to appeal is ensured in most cases.[20] The Supreme

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17 For Norwegian constitutional law generally, see Johs Andenæs and Arne Fliflet, *Statsforfatningen i Norge* (10th edn, Akademika 2006).

18 It should be noted that the executive branch also enjoys considerable legislative power under Norwegian law. Both informally, because it prepares new legislation, and also formally, because it has wide delegated powers to issue so-called *directives* (forskrifter). Indeed, it is typical for acts of parliament to include a general delegation rule which permits the executive to legislate further on the matters dealt with in the act, by clarifying and filling in the gaps left open by it.

19 However, there are distinct procedural rules for civil and criminal cases and a special court exists for *land consolidation*. See the Land Consolidation Act 1979. Moreover, both the district courts and the courts of appeal follow special procedural rules in *appraisement disputes*, for instance when compensation is awarded following expropriation. See the Appraisal Act 1917 respectively, discussed in more detail in later chapters.

20 The right to an appeal is not absolute. In civil cases, it is generally required that the stakes are above a certain lower threshold, measured in terms of the appellants' financial interest in the outcome. See Civil Dispute Act 2005

Court, on the other hand, operates a very strict restriction on the appeals it will allow.[21] It typically only hears cases if a matter of principle is at stake, or if the law is thought to be in need of clarification.[22]

The Norwegian legal system is often said to be based on a special "Scandinavian" variety of civil law, which includes strong common law elements: legislation is not as detailed as elsewhere in continental Europe, some legal areas lack a firm legislative basis, it is generally accepted that courts develop the law, and the opinions of the Supreme Court are considered crucial to the legislative interpretation at the lower courts.[23] At the same time, legislation remains the primary source used to resolve most legal disputes. Moreover, when applying the law, the courts tend to place great weight on preparatory documents procured by the executive branch. These documents are widely regarded as expressions of legislative intent, even though parliament is not usually actively involved in the process during the preparatory stages.

The Constitution of Norway dates back to 1814 and was heavily influenced by contemporaneous political movements, particularly in the US and France.[24] Moreover, it was influenced by a desire for self-determination, as Noway was at that time a part of Denmark-Norway, largely controlled by the Danish elite. Following the Napoleonic wars, Norwegian politicians sought to take advantage of Denmark's weak position to gain independence. In the end, Norway was instead forced to enter into a union with Sweden, but the Constitution remained in place. Moreover, after the triumph of the parliamentary system in 1884, Norway would also eventually gain independence, in 1905,

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s 29-13.

21 See the Civil Dispute Act 2005, s 30-4.

22 See, generally, Jens Edvin A Skoghøy, 'Anketillatelse til Norges Høyesterett' in *Festskrift til Lars Heuman* (Jure 2008).

23 See, generally, Ulf Bernitz, 'What is Scandinavian law?' (2007) 50 Scandinavian Studies in Law 13.

24 See generally 'Grunnlovas Historie' (*Store norske leksikon*, 4th October 2014) ⟨https://snl.no/Grunnlovas_historie⟩ accessed 14th July 2015.

following a peaceful and democratic transition process.[25]

During the 19th century, farmers and peasants emerged as a powerful group in Norwegian politics. This, it is commonly held, was in large part due to the fact that they were also landowners, whose rights and contributions were not limited to traditional farming.[26] Importantly, Norwegian tenant farmers and small-holders had a significant degree of influence over the management of the land and its natural resources. The feudal tradition was never as strong in Norway as elsewhere in Europe.[27]

The Danish-Norwegian nobility had fallen into a fiscal crisis in the 18th century, weakening their influence further. This had in turn made it possible for tenant farmers in Norway to buy land from their landowners, including grazing grounds and non-arable land.[28] As a result, the distribution of land ownership in Norway had already become highly egalitarian at the time of the Constitution. Moreover, many resources attached to land were owned jointly by several members of the local community, as larger estates were partitioned into several individual smallholdings. As a result, Norway became a society were land ownership was not a privilege for the few, but held by the many, particularly compared to feudal Europe.[29]

In 1814, the landed nobility in Norway was further marginalised. Indeed, the Constitution itself prohibited the establishment of new noble titles and estates.[30] Then, in 1821, all hereditary titles were abolished (although existing nobles kept their titles for their lifetimes).[31] By the middle

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25 See generally Francis Sejersted, 'Unionsoppløsningen i 1905' (*Store norske leksikon*, 24th April 2015) ⟨https://snl.no/Unionsoppl%C3%B8sningen_i_1905⟩ accessed 14th July 2015.

26 The "classic" presentation of the political influence of farmers in Norway is Halvdan Koht, *Norsk Bondereising: Fyrebuing til Bondepolitikken* (Aschehough 1926).

27 See Tore Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (Samlaget 1999) 59-60.

28 See Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (n 27) 59-60.

29 For a comparative discussion of this, focusing on how it influenced the industrialisation process in Norway, setting it apart from the industrialisation process in the UK, see Ottar Brox, 'Fattigdom og framgang: Alternative fortider? – Norsk industrialisering i komparativt lys' (2013) 24(3/4) Norsk antropologisk tidsskrift 169.

30 Constitution of the Kingdom of Norway 1814, s 23.

31 See 'Lov, angaaende Modificationer og nærmere Bestemmelser af den Norske Adels Rettigheder' (Act of August 1,

of the 19th century, ordinary farmers had gained even greater political influence. In fact, they emerged as the leading political class, alongside the city bureaucrats.[32] During this time, Norway also introduced a system of powerful local municipalities. These were organised as representative democracies, becoming miniature versions of the cherished, as of yet unfulfilled, nation state (Norway was still in a union with Sweden at this time). Even today, municipalities retain a great deal of power in Norway, particular in relation to land use planning.[33] They represent a highly decentralised political structure, with a total of 428 municipalities in force as of 01 January 2013.[34]

Local control of water resources, ensured through property rights, was very important to farmers and rural communities in pre-industrial Norway. According to Terje Tvedt, 10 000 - 30 000 mills were in operation in Norway in the 1830s.[35] As Tvedt argues, the fact that these mills were under local control was particularly important because it helped ensure self-sufficiency. In addition, saw mills became an important source of extra income for Norwegian farming communities.

Today, the importance of water is clearly felt throughout Norwegian society. This is not because water is scarce, but rather because it is so plentiful. Not only is water power the main source of domestic energy. It also occupies a special place in Norwegian culture. It is important to the identity of many communities, particularly in the western part of the country, where majestic waterfalls are important symbols both of the hardship of the natural conditions and the sturdiness of local people. One particular aspect of this, with significant economic implications, is that waterfalls are

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1821).

32 See generally Marthe Hommerstad, *Politiske bønder - Bondestrategene og kampen om demokratiet 1814–1837* (Spartacus 2014).

33 They are the primary decision-makers for spatial planning, as pursuant to Planning and Building Act 2008.

34 This is down from the all-time high of 747 in 1930. There have long been proposals to reduce the number of municipalities further, but so far the political resistance against this has prevented major reforms. See 'Kriterier for god kommunestruktur' (1st December 2014) ⟨https://www.regjeringen.no/no/tema/kommuner-og-regioner/kommunereform/ekspertutvalg/sluttrapport/id751494/⟩ accessed 14th July 2015 (report to the Ministry from an expert committee on municipality reform, 2014).

35 See Tvedt (n 3) 121.

an important asset to Norwegian tourism. The so-called "Norway in a nutshell" tours, for instance, have become greatly popular, based on delivering access to wild and unspoilt nature, with fjords, waterfalls, idyllic villages, and railway lines that seem to defy gravity.[36]

Another aspect of the same is the great tradition in Norway for local resistance against large-scale development that is considered damaging to the environment. In the 1960s and 70s, when the state embarked on their most ambitious projects, this led to a general political movement in Norway which saw leftist protest groups join forces with local opposition groups in a fight against centralisation, exploitation of weaker groups, and environmental destruction.[37]

This all speaks to the fact that water resources are embedded in the social fabric in Norway in such a way that an entitlements-based account of property rights to such resources would be largely inappropriate. Rather, the case of Norwegian streams and waterfalls seems to be particularly suited for an investigation based on a social function view on property. As I show in this and the following two chapters, rivers and waterfalls serve to bring out tensions between rights and obligations in property, while also shedding light on the question of how to organise decision-making processes regarding economic development.

In the next section, I argue that the present law on hydropower in Norway tends to recognise only a small part of the relevant picture. On the one hand, it recognises the financial entitlements of individual owners, which it tries to balance against the regulatory needs of the state. But it largely fails to take into account that owners have broader interests, even obligations, relating to the sustainable management of their streams and their waterfalls. Moreover, it also seems that the law is increasingly failing to take into account that commercial interests can exert a strong pull on various state bodies, particularly those that are only weakly grounded in processes of democratic

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36 See Norway in a Nutshell ⟨http://www.norwaynutshell.com/en/explore-the-fjords/⟩.

37 See Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(1) Historisk tidsskrift 61.

decision-making.

As a result, the current narrative on water resource management in Norway appears to be based on a false dichotomy that sees the interests of "profit-maximising" owners, acting out of self-interest, pegged against the interests of a "benevolent" state, acting for the common good. In the following, I shed further light on this narrative and argue that it is deeply flawed.

4.3 Hydropower in the Law

Under Norwegian law, rights to harness power from rivers and waterfalls are regarded as private property.[38] The system is riparian, so by default, a stream belongs to the owner of the land over which the water flows.[39] The landowners do not own the water as such – freely running water is not subject to ownership – and the riparian owners' right to withhold or divert water is limited.[40] It is common in Norway to refer to owners of hydropower rights as *waterfall owners* ('falleiere'), a terminology I will also adopt-[41]

The waterfall owners have the exclusive right to harness the potential energy in the water over the stretch of riverbed belonging to them. This right can be partitioned off from rights in the surrounding land, and large-scale hydropower schemes typically involve such a separation of water rights from land rights. In this way, the energy company acquires the right to harness the energy,

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38 Historically, the law emphasised ownership of traditional agrarian water resources, such as fishing rights. However, new sticks were added to the waterfall bundle over the years, including the right to develop hydropower, see Arne Vislie, *Grensene for Grunneierens Rådighet over Vassdrag* (Centraltrykkeriet 1944) 14-32. For a detailed presentation of the history of water law in pre-industrial times, I refer to UA Motzfeld, *Den Norske Vasdragsrets Historie indtil Aaret 1800 med Domsamling* (Brøgger 1908).

39 See the Water Resources Act 2000 s 13.

40 See Water Resources Act 2000, s 8.

41 The Norwegian term 'fall' has a somewhat broader meaning than its English counterpart, 'waterfall'. The word 'fall' is used to describe a continuous section of any stream or river, typically identified by giving the total difference in altitude over the relevant stretch of riverbed. Furthermore, the Norwegian term 'falleier' refers to a legal person who possesses the rights to the hydropower over such a section. In this thesis, I will typically refer to the owners of waterfalls, streams and rivers with the intended reading being the same as the Norwegian notion of a 'falleier'. If special qualification is needed, for instance to distinguish between different classes of riparian owners, I will make a note of this explicitly.

while the local landowners retain ownership of the surrounding land.

Norwegian rivers, and especially rivers suitable for hydropower schemes, tend to run across grazing land and non-arable land that is owned jointly by local farmers. Hence, rights to streams and waterfalls are typically held among several members of the rural community.[42] Local owners might not be willing to give up their ownership to facilitate development, especially not on terms proposed by external developers. Hence, the authority to expropriate has become an important legal instrument for Norwegian hydropower companies.

This has resulted in a tension where, on the one hand, rights to harness hydropower from streams and waterfalls are considered private property, while on the other hand, it has become common to speak of hydropower as a resource belonging to the public. Since the Industrial Licensing Act 1917 was amended in 2008, this ambivalence in the discourse surrounding hydropower has also been part of the statutory provisions regulating hydropower development. I quote the two relevant sections side by side below:[43]

> A river system belongs to the owner of the land it covers, unless otherwise dictated by special legal status. [...]
>
> The owners on each side of a river system have equal rights in exploiting its hydropower.
>
> (Water Resources Act 2000, s 13)

> Norwegian water resources belong to the general public and are to be managed in their interest. This is to be ensured by public ownership.
>
> (Industrial Licensing Act 1917, s 1 (after amendment in 2008))

The intended reading of section 1 of the Industrial Licensing Act 1917, quoted on the right

[42] Rivers tend to run through land that has not to been enclosed. Moreover, in places where there has been a land enclosure, water rights are often explicitly left out, such that they are still considered jointly owned rights belonging to the community of local farmers. For more details on (forms of) joint ownership among Norwegian farmers, see, e.g., Geir Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' [2007] Tidsskrift for Eiendomsrett 293, 570.

[43] The first quote is taken from the general water law, with roots going back a thousand years to the so-called "Gulating" laws mentioned in Section **??**. The second quote is taken from a law directed specifically at large-scale hydropower, introduced during the early days of the hydropower industry.

above, is that it expresses a "general starting point".[44] According to the Ministry, it expresses no more than what has always been the purpose of the special licensing requirements for large-scale hydropower.[45]

Despite appearances, it would be wrong to regard this as an attempt to explicitly confront the principle of private property expressed in section 13 of the Water Resources Act 2000, quoted on the left above. At least, such a confrontation does not appear to have been intended by the Ministry.[46] However, the Ministry's comment underscores the extent to which the government regards it as natural to interfere with private rights to waterfalls, to pursue policies that it regards to be in the public interest. Taken in this light, section 1 of the Industrial Licensing Act 1917 reflects the prevailing opinion that there are few, if any, recognised limits on the state's power to manage privately owned water resources.[47]

This aspect of the Norwegian system has become particularly significant following the liberalisation of the electricity sector in the early 1990s.[48] Since then, there have been an increasing number of cases where owners who are interested in undertaking their own development schemes attempt to fend off commercial energy companies wishing to expropriate.[49] Importantly, the state has tended to side with the commercial companies in these cases, granting them the authority to expropriate for economic development. This has resulted in several Supreme Court decisions on

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44 See Ot.prp.nr.61 (2007-2008) , 72.

45 See Ot.prp.nr.61 (2007-2008) (n 44) 72.

46 There are no indications in the preparatory materials that the Ministry sought to confront the principles of ownership encoded in the Water Resources Act 2000.

47 For a reflection of the same attitude, citing the state's broad regulatory competence as the main reason not to nationalise Norwegian water power rights, I refer to the preparatory documents underlying the Water Resources Act 2000. See Lov om vassdrag og grunnvann, 'NOU 1994:12' (Report to the Ministry of Business and Energy from a special committee appointed by the Crown Prince Regent in Council 09 November 1990,) 152-153.

48 See, e.g., Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 16).

49 See, e.g., Christian Sontum and Einar Sofienlund, 'Ekspropriasjon av vannkraft – hvorfor den historiske metoden fra norsk rettspraksis ikke er relevant i dagens marked' (2007) 2007(4) Småkraftnytt.

hydropower and expropriation in the past few years.[50] Before discussing these cases in more detail in the next chapter, I provide an in-depth analysis of hydropower in the law and in practice, to shed further light on the underlying conflict that has led to the recent surge in cases on expropriation. First, I briefly present the key legislation regulating the hydropower sector.

4.3.1 The Water Resources Act

The Water Resources Act 2000 contains the basic rules regarding water management in Norway.[51] This act is not only concerned with hydropower, but regulates the use of river systems and groundwater generally.[52] In section 8, the Act sets out the basic license requirement for anyone wishing to undertake measures in a river system.[53] The main rule is that if such measures may be of "appreciable harm or nuisance" to public interests, then a license is required.[54] The water authorities themselves decide if this condition is met.[55] In relation to hydropower development, it is established

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50 See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82; *Otra Kraft DA, Otteraaen Brugseierforening v Bjørnarå and others* Rt-2010-1056; *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393; *BKK Produksjon AS v Austgulen and others* Rt-2011-1683; *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612.

51 Act No 82 of 24 November 2000 relating to river systems and groundwater (unofficial translation provided by the University of Oslo, http://www.ub.uio.no/ujur/ulovdata/lov-20001124-082-eng.pdf). I also mention the Water Framework Directive of the European Union, Water Framework Directive [2000] OJ L327/1. It has been implemented in Norwegian law as the Directive Regarding Frameworks for Water Management, FOR-2006-12-15-1446. It does not directly impact on the hydropower licensing procedure, so I will not say much about it in this thesis. However, I mention that there is some concern that the Norwegian implementation of the directive has not sufficiently recognized the need for structural reforms, preferring to rely on the established approach to water management, which is centralised and sector-based. See Gro Sandkjær Hanssen, Sissel Hovik and Gunn Cecilie Hundere, 'Den nye vannforvaltningen - Nettverksstyring i skyggen av hierarki' (2014) 3 Norsk statsvitenskapelig tidsskrift 155.

52 See the Water Resources Act 2000, s 1. A river system is defined as "all stagnant or flowing surface water with a perennial flow, with appurtenant bottom and banks up to the highest ordinary floodwater level", see Water Resources Act 2000, s 2. Artificial watercourses with a perennial flow are also covered (excluding pipelines and tunnels), along with artificial reservoirs, in so far as they are directly connected to groundwater or a river system, see the Water Resources Act 2000, s 2a-2b.

53 Measures in a river system are defined as interventions that "by their nature are apt to affect the rate of flow, water level, the bed of a river or direction or speed of the current or the physical or chemical water quality in a manner other than by pollution", see the Water Resources Act 2000, s 3a.

54 See the Water Resources Act 2000, s 8. There are two exceptions, concerning measures to restore the course or depth of a river, and concerning the landowner's reasonable use of water for his permanent household or domestic animals, see the Water Resources Act 2000, s 12.

55 See Water Resources Act 2000, s 18.

practice that most hydropower projects over 1000 KW will be deemed to require a license.[56]

The basic assessment criterion is that a license "may be granted only if the benefits of the measure outweigh the harm and nuisances to public and private interests affected in the river system or catchment area".[57] Hence, the water authorities are empowered to decide whether a licence *should* be granted, if they find that the benefits outweigh the harms. The courts are very reluctant to censor the discretion of the administrative decision-makers on this point.[58]

The Ministry of Petroleum and Energy maintains indirect control over the assessment process by issuing directives regarding the administrative procedure in licensing cases.[59] In addition, the procedure is determined in large part by administrative practices developed by the water authorities themselves.[60].[61]

A few basic procedural rules are encoded directly in the Water Resources Act 2000. This includes rules to ensure that the application is sufficiently documented, so that the authorities have enough information to assess its merits.[62] Moreover, a basic publication requirement is expressed, stating that applications are public documents and that the applicant is responsible for giving public notice. The intention is that interested parties should be given an opportunity to comment on the plans.[63] More detailed rules for public notice of applications are given in section 27-1 of the

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56 See, e.g., http://www.nve.no/no/Konsesjoner/Vannkraft/Konsesjonspliktvurdering/ (accessed 16 August 2014). Exceptions are possible, for instance projects that upgrade existing plants, or which utilise water flowing between artificial reservoirs.

57 See Water Resources Act 2000, s 25.

58 This is an expression of the principle of "freedom of discretion" for the administrative branch, a fundamental tenet of Norwegian administrative law. See generally Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 71-74.

59 See section 65 of the Water Resources Act 2000.

60 I return to a presentation of administrative practice in Section **??**.

61 In principle, many of the rules in the Public Administration Act 1967 also apply. However, in practice, these rules are of limited practical relevance compared to sector-specific practices. This has raised controversy in recent years, particularly in cases involving expropriation, as discussed in Chapter 4, Section **??**.

62 See Water Resources Act 2000, s 23.

63 See Water Resources Act 2000, s 24. There are some exceptions to the requirement to give public notice, however. It may be dropped in case it appears superfluous, or if the application must be rejected or postponed, see Water

Planning and Building Act 2008, which also applies to licensing applications under section 8 of the Water Resources Act 2000.[64]

The rules considered so far apply to any measures in river systems, not only hydropower projects. However, special procedures that apply to hydropower cases are described in other statutory provisions. The most important is the Watercourse Regulation Act 1917, which is specifically aimed at a certain subgroup of hydropower schemes, namely those that involve regulation of the flow of water in a river system.[65] However, according to section 19 of the Water Resources Act 2000, many provisions from the Watercourse Regulation Act 1917 also apply to unregulated, run-of-river, schemes, if they generate more than 40 GWh per annum.[66]

4.3.2 The Watercourse Regulation Act

In order to maximise the output of a hydropower scheme, the flow of water may be regulated using dams or diversions. Regulation was particularly important in the early days of hydropower, before the national electricity grid was developed.[67] Indeed, in the early days, it was common for electricity producers to get paid based on the stable effect they were able to deliver, rather than the total amount of energy they harnessed.[68]

Today, this has changed, as producers get paid based on the total amount of electricity they

Resources Act 2000, s 24a-24c.

64 In addition, I mention section 22, which regulates the relationship between licensing and planning in relation to water resources. In essence, the section stipulates that the water authorities may prioritise planning over assessment of individual licensing cases, e.g., by refusing to take applications under consideration if they interfere with ongoing planning procedures. However, the section leaves significant room for discretion in this regard. It also bears noting that watercourse planning is placed under centralised government control. This contrasts with land use planning in general, which is mainly the responsibility of the local municipality governments. See generally Norwegian Water Resources and Energy Directorate, 'Samlet plan for vassdrag' ⟨http://www.nve.no/no/energi1/fornybar-energi/vannkraft/samlet-plan-for-vassdrag/⟩.

65 See Section 4.3.2 below.

66 See Water Resources Act 2000, s 19.

67 See *Uleberg* (n 50) 83.

68 See Sontum and Sofienlund (n 49).

deliver, measured in kilowatt hours (KWh). The price fluctuates over the year, and the supply-side is still influenced by instability in the waterflow in Norwegian rivers. However, the smoothing effect of the national grid means that run-of-river schemes can be carried out profitably, even if most of the electricity from the plant is produced during peak periods.

Despite the growing importance of run-of-river schemes, many key rules regarding hydropower development are still found in the Watercourse Regulation Act 1917.[69] This act defines regulations as "installations or other measures for regulating a watercourse's rate of flow". It also explicitly states that this covers installations that "increase the rate of flow by diverting water".[70] The core rule of the act is that watercourse regulations that affect the rate of flow of water above a certain threshold are subject to a special licensing requirement.[71]

The threshold is defined in terms of the notion of a "natural horsepower", such that a license is required if the regulation yields an increase of at least 400 natural horsepower in the river. Natural horsepower is a measure of the gross estimate of the power that can be harnessed from a river stably for at least 350 days a year.[72] The definition is a simple mathematical expression, given below:

$$nat.hp(Q, H) = 13.33 \times H \times Q$$

This formula states that the natural horsepower of a regulation project ($nat.hp(Q, H)$) is a function of two variables, H and Q. The constant factor 13.33 is the force of gravity of Earth exerted on a mass of 1 kg (or, approximately, 1 litre of water). The variable H is the difference in altitude (measured in metre) from the intake dam to the power generator. The variable Q is the

69 Act relating to the regulation of watercourses of 14 December 1917 No. 17.

70 See Watercourse Regulation Act 1917 s 1.

71 See Watercourse Regulation Act 1917, s 2.

72 See Watercourse Regulation Act 1917, s 2.

amount of water (measured in litre) stably available every second for at least 350 days per year. The result is then a gross estimate (assuming no energy loss) of the stable horsepower output of the hydroelectric plant that harnesses the power of Q litres of water per second over a difference in altitude of H metres.

Section 2 of the Watercourse Regulation Act 1917 asks us for the *increase* of this figure after regulation. To arrive at this number, one first uses the formula with Q taken to be Q_1, the stable water flow prior to regulation, before calculating it with Q taken to be Q_2, the stable water flow after regulation. The difference between the second and the first figure ($nat.hp(Q_2, H) - nat.hp(Q_1, H)$) is the increase of natural horsepower resulting from regulation.

Effectively, at a time when electricity had to be produced at a stable effect, from a stable source of power, this increase in natural horsepower was a gross estimate of the value added to the river by regulation. In the present context, suffice it to say that if a hydropower project involves regulation at all (i.e., if it is not a run-of-river scheme), it will indeed yield 400 natural horsepower or more. Hence, a special license will be required pursuant to section 2 of the Watercourse Regulation Act 1917.

The criteria for granting a regulation license are similar to those for granting a license pursuant to the Water Resources Act 2000. In particular, section 8 of the Watercourse Regulation Act 1917 states that a license should ordinarily be issued only if the benefits of the regulation are deemed to outweigh the harm or inconvenience to public or private interests.[73] In addition, it is made clear that other deleterious or beneficial effects of importance to society should be taken into account.[74] Finally, if an application is rejected, the applicant can demand that the decision is submitted for review by parliament.[75]

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[73] See Watercourse Regulation Act 1917, s 8.

[74] See Watercourse Regulation Act 1917, s 8.

[75] See Watercourse Regulation Act 1917, s 8.

The Watercourse Regulation Act 1917 contains more detailed rules regarding the procedure for dealing with license applications. The most practically important is that the applicant is obliged to carry out an impact assessment pursuant to the Planning and Building Act 2008.[76] This means that the applicant must organise a hearing and submit a detailed report on positive and negative effects of the development, prior to submitting a formal application for a licence. Effectively, at least *two* detailed rounds of assessment are therefore required before a license is granted.

In addition to prescribing impact assessments, the Watercourse Regulation Act 1917 contains more specific rules concerning the second public hearing that should take place, when the application as such is processed. First, the applicant should make sure that the application is submitted to the affected municipalities and other interested government bodies.[77] Second, the applicant should send the application to organisations, associations and the like whose interests are "particularly affected".[78] Along with the application, these interested parties should be given notification of the deadline for submitting comments, which should not be less than three months.[79] The applicant is also obliged to announce the plans, along with information about the deadline for comments, in at least one commonly read newspaper, as well as the Norwegian Official Journal.[80]

In general, the issue of who owns and controls the water resources in question receives little attention in relation to licensing applications, both pursuant to the Watercourse Regulation Act 1917 and the Water Resources Act 2000. Instead, the focus is on weighing environmental interests against the interest of increasing the electricity supply and facilitating economic development. The issue of resource ownership is more prominent in relation to a third important statute, namely the Industrial Licensing Act 1917.

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76 Act no 71 of 27 June 2008 relating to Planning and Building Applications.

77 Watercourse Regulation Act 1917, s 6.

78 Watercourse Regulation Act 1917, s 6.

79 See Watercourse Regulation Act 1917, s 6.

80 Watercourse Regulation Act 1917, s 6. The Norwegian Official Journal is the state's own announcement periodical.

4.3.3 The Industrial Licensing Act

In the early 20th century, industrial advances meant that Norwegian waterfalls became increasingly interesting as objects of foreign investment. To maintain national control of water resources, parliament passed an act in 1909 that made it impossible to purchase valuable waterfalls without a special license.[81] The follow-up to this act is the Industrial Licensing Act 1917, which is still in force.[82] It applies to potential purchasers and leaseholders of rivers that may be exploited so that they yield more than 4000 natural horsepower.[83]

In practice, this means that the act does not apply to many run-of-river hydropower schemes, even large-scale projects. Even some regulation schemes fall outside the scope of the Industrial Licensing Act 1917, although most large-scale regulation schemes will be covered. Originally, the main rule in the Industrial Licensing Act 1917 stated that all licenses granted to private parties were time-limited, and that the waterfalls would become state property without compensation when they expired, after at most 60 years.[84] This was known as the rule of *reversion* in Norwegian law.[85]

In a famous Supreme Court case from 1918, the rule was upheld after having been challenged by owners on constitutional grounds.[86] This was based on the finding that reversion represented a form of regulation of property, not expropriation. Hence, it could not be challenged on the basis of section 105 of the Constitution, even though the owners were not awarded any compensation.

While the rule of reversion withstood internal challenges, it was eventually struck down by

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81 See the Industrial Concession Act 1909

82 Act relating to acquisition of waterfalls, mines, etc. of 14 December 1917 No. 16.

83 Unlike section 2 of the Watercourse Regulation Act 1917, this asks only for the number of horsepower in the river (after regulation), not the *increase* of this number.

84 See the old Industrial Licensing Act 1917, s 2, in force before the amendment on 26 September 2008.

85 This is a misnomer, however, in light of how most rivers and waterfalls were originally owned by local peasants, not the state.

86 See *Johansen v Den norske Stat ved 1 Regjeringens chef, 2 A/S Furuberg ved dets direktions formand* Rt-1918-403.

the EFTA Court in 2007, as a breach of the EEA agreement.[87] This conclusion was based on the fact that reversion only applied to privately owned companies, which the Court regarded as an illegitimate form of discrimination. After this ruling, the Industrial Licensing Act 1917 was amended. Today, only companies where the state controls more than 2/3 of the shares may purchase waterfalls or rivers to which the act applies.[88]

This means that such rivers and waterfalls can only be bought, leased or expropriated by companies in which the state is a majority shareholder. In practice, however, landowners are still able to sell the land from which the right to a waterfall originates, even if this also means transferring the waterfall to a new owner. The rule is typically only enforced when riparian rights as such are transferred, specifically for the purpose of large-scale hydropower development. In particular, small-scale development and large run-of-river schemes can still usually be carried out by local owners. The policy justification for the (amended) Industrial Licensing Act 1917 is based on the idea that giving preference to state-owned actors will protect the public interest in Norwegian hydropower. However, this perspective clashes with the fact that the electricity sector itself has been liberalised. The state may be a majority shareholder in the most powerful companies, but these companies are now run according to commercial principles, with little or no direct political involvement.[89]

Hence, as the EFTA court highlights in its judgement on reversion, there appears to be a lack of convincing policy reasons why state-owned companies should be given preferential treatment.[90]

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87 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 11). The EEA (European Economic Area) agreement sets up a framework for the free movement of goods, persons, services and capital between Norway, Iceland, Lichtenstein and the European Union. The EFTA (European Free Trade Association) oversees the implementation of the EEA for those members of EFTA that are also members of the EEA (all except Switzerland). For further details, see generally Henrik Bull, 'The EEA Agreement and Norwegian Law' [1994] (12) European Business Law Review 291; Mads Magnussen, 'Traktatbruddssøksmål ved EFTA-domstolen' [2002] Lov og Rett 131; Halvard Haukeland Fredriksen, 'Er EFTA-domstolen mer Katolsk enn Paven?' [2009] Tidsskrift for Rettsvitenskap 507.

88 See the Industrial Licensing Act 1917, s 2.

89 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 11) 86.

90 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 11) 84-87.

In light of this, Norway's response to the Court's decision is a curious one: instead of creating a level playing field, the preference given to state-owned commercial companies is made even more marked, as privately owned companies are now excluded from one segment of the hydropower market altogether.

4.3.4 The Energy Act

Before 1990, the Norwegian electricity sector was tightly regulated by the government.[91] The responsibility for the national grid was divided between various public utilities that would also typically engage in electricity production, wielding monopoly power within their districts. The most powerful utilities were controlled by the state, who also developed large-scale hydropower to supply the metallurgical industry with cheap electricity.[92] However, the county councils and the municipalities maintained a significant stake in the hydroelectric sector, as they often controlled the utilities responsible for the electricity supply in their own local area.[93] Prior to 1990, there was no real competition on the electricity market, and the local monopolists could deny other energy producers access to their segment of the distribution grid.[94]

This system was abandoned following the passage of the Energy Act 1990.[95] This act set up a new regulatory framework, where management of the grid was decoupled from the hydropower production sector.[96] In particular, the act established a system whereby consumers could choose their electricity supplier freely. At the same time, the act aimed to ensure that producers were

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91 See generally Torstein Bye and Einar Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (2005) 40(50) Economic and Political Weekly 5269; Dag Ove Skjold and Lars Thue, *Statens nett: systemutvikling i norsk elforsyning 1890-2007* (Universitetsforlaget 2007).

92 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 67-71.

93 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 85.

94 See *Uleberg* (n 50) 83-84.

95 See generally Jens Naas-Bibow and Gunnar Martinsen, *Energiloven med kommentarer* (2nd edn, Gyldendal 2011).

96 See generally Bye and Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (n 91).

granted non-discriminatory access to the electricity grid. This laid the groundwork for what has today become an international market for the sale of electricity, namely the Nord Pool.[97]

In response to this, monopoly companies were reorganised, becoming commercial companies that were meant to compete against each other, and against new actors that entered the market.[98] In addition to commercialisation, the market-orientation of the sector has also lead to centralisation, as many of the locally grounded municipality companies have disappeared as a result of mergers and acquisitions.[99] As a result, the local and political grounding of the electricity sector, which used to be ensured through decentralised municipal ownership, has been significantly weakened.

At the same time, the fact that any developer of hydropower is now entitled to connect to the national grid gives private actors a possibility of entering the Norwegian electricity market. They may do so not merely as (minority) shareholders in former utilities, but also as *competitors*, as long as they stick to run-of-river or small-scale hydropower.[100] In the next section, I give a step-by-step presentation of the licensing procedure for hydropower, which serves to summarise the legislative framework and provide information about the institutional framework within which it is called to function.

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97 See http://www.nordpoolspot.com/About-us/. See generally Skjold and Thue (n 91); Lars Galtung, 'Nord Pool og Kraftmarkedet' 39(6) Plan 22.

98 See DH Claes and A Vik, 'Kraftsektoren: fra samfunnsgode til handelsvare' in DH Claes and PK Mydske (eds), *Forretning eller fordeling? Reform av offentlige nettverkstjenester* (Universitetforlaget 2011).

99 Today, the 15 largest companies, largely controlled by the state and some prosperous city municipalities, own roughly 80% of Norwegian hydropower, measured in terms of annual output. See Ot.prp.nr.61 (2007-2008) (n 44) 28. I remark that the process of consolidation started even before the market-oriented reform of the sector. In particular, from 1960 onwards there was a significant push towards centralisation, as the state became a more dominant actor in the hydropower sector. For the state's increasing influence on the sector generally, see Skjold (n 8); Thue and Nilsen (n 8).

100 See generally Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 16); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 16); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 16).

4.3.5 The Licensing Procedure

The water authorities in Norway are centrally organised. The most important body is the Norwegian Water Resources and Energy Directorate (NVE), based in Oslo.[101] In many cases, the NVE have been delegated authority to grant development licenses themselves, but in case of large-scale development, they only prepare the case, then hand it over to the Ministry of Petroleum and Energy.[102] The Ministry, in turn, gives its recommendation to the King in Council, who makes the final decision.[103] Parliament must also be consulted for regulations that will yield more than 20 000 natural horsepower.[104]

As indicated by the survey of relevant legislation given in previous sections, there are many categories of hydropower projects. Moreover, different categories call for different licenses. Hence, the first step in the application process is for the developer to determine exactly what kind of license they require. This is further complicated by the fact that some categories overlap, since they are based on different measuring sticks for assessing the scale of an hydropower project.

One important parameter is the power of the hydropower generator, measured in MW (Megawatts). There are four categories of hydropower formulated on this basis: the micro plants (less than 0.1 MW), the mini plants (less than 1 MW), the small-scale plants (less than 10 MW), and the large-scale plants (more than 10 MW). In practice, one tends to use small-scale hydropower more loosely, to refer to all projects less than 10 MW. Still, a further qualification is sometimes required. For example, the authority to grant a license for a micro or mini plant has been delegated to the regional county councils since 2010, in an effort to reduce the queue of small-scale applic-

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101 See www.nvn.no.

102 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705) and directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270), pursuant to Water Resources Act 2000 s 64.

103 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

104 See Watercourse Regulation Act 1917, s 2.

ations at the NVE.[105] The council's decision is based on a (simplified) assessment made by the regional office of the NVE. In addition, licenses for micro and mini plants may be granted even in watercourses that have protected status pursuant to environmental law.[106]

For small-scale plants proper, the authority to grant a license is delegated to the NVE, with the Ministry serving as the instance of appeal.[107] For large-scale plants, the granting authority is the King in Council, based on a recommendation from the Ministry.[108] However, in practice, the decision is usually closely based on assessments and recommendations provided by the NVE.[109]

While the relevant licensing authority depends on the effect of the planned plant, the kind of license required depends on a different categorisation, relating to the level of planned water regulation, measured in natural horsepower. Here, there are three categories: run-of-river schemes (less than 500 natural horsepower), non-industrial regulations (less than 4000 natural horsepower), and industrial regulations (more than 4000 natural horsepower).[110]

Almost all hydropower schemes require a license pursuant to section 8 of the Water Resources Act 2000.[111] For run-of-river schemes, no further licenses are required for the development itself, although an operating license pursuant to the Energy Act 1990 is typically required for the electrical

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105 See delegation letter from the Ministry of Petroleum and Energy, dated 07 December 2009, available at http://www.nve.no (accessed 24 August 2014). The county council is an elected regional government institution situated between the municipalities and the central government. There are 19 county councils in Norway as of 01 January 2015. They are comparatively less important than both the municipalities and the central government, but have several responsibilities, particularly in relation to infrastructure, education and resource management. See generally Ole T Berg, 'Fylkeskommune' (*Store norske leksikon*, 29th April 2015) ⟨https://snl.no/fylkeskommune⟩ accessed 14th July 2015.

106 See Decision no 240, Stortinget (2004-2005), St.prp.nr.75 (2003-2004) and Innst.S.nr.116 (2004-2005).

107 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705).

108 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

109 For a detailed guide to the administrative process for large-scale applications, published by the NVE, see Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010).

110 See Watercourse Regulation Act 1917 s 2 and Industrial Licensing Act 1917, ss 1,2.

111 As mentioned in Section **??**, the exceptions are very small schemes (usually mini or micro) that are deemed to be relatively uncontroversial. Such schemes only require a license pursuant to the Planning and Building Act 2008.

installations.[112] For schemes involving a non-industrial regulation, an additional license pursuant to section 8 of the Watercourse Regulation Act 1917 is required. Industrial regulation schemes require yet another license, pursuant to section 2 of the Industrial Licensing Act 1917.

As is to be expected, the complexity of the licensing procedure tends to increase with the number of different licenses required. However, the licensing applications tend to be dealt with in parallel, so that all licenses are granted at the same time, following a unified assessment. In practice, when the Watercourse Regulation Act 1917 applies, it structures the procedure as a whole, also those aspects that pertain to other licenses.

In addition, yet another categorisation of hydropower schemes is used to determine the relevant application procedure. This categorisation is based on the annual production of the proposed plant, measured in GWh/year. There are three categories: simple schemes (less than 30 GWh/year), intermediate schemes (less than 40 GWh/year), and complicated schemes (more than 40 GWh/year). As mentioned in Section 4.3.2, the most important rules in the Watercourse Regulation Act 1917 applies to complicated schemes, regardless of whether or not the scheme involves a regulation.[113] In addition, applications for such schemes must be accompanied by an impact assessment pursuant to section 14-6 of the Planning and Building Act 2008.

This means that the applicant is required to organise a public hearing prior to submitting their formal application, to collect opinions on the project and provide an overview of benefits and negative effects of the plans, particularly as they relate to environmental concerns.[114] In practice, if an impact assessment is required this significantly increased the scope and complexity of the application processing.

For intermediate schemes that do not involve regulation, the rules in the Watercourse Regulation

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112 See Energy Act 1990, s 3-1.

113 See Water Resources Act 2000, s 19.

114 See directive of 19 December 2014 (FOR-2014-12-19-1758), pursuant to the Planning and Building Act 2008, ss 1-2,14-6.

Act 1917 do not apply. However, impact assessments *may* still be required.[115] Here the threshold of 30 GWh/year has been set as an additional threshold by the NVE, who have been delegated authority to require impact assessments for hydropower projects even when these yield less than 40 GWh/year.[116] For the intermediate schemes, NVE decides whether an impact assessment is required on a case-by-case basis. For simple schemes, on the other hand, impact assessments will not be required. Such schemes make up the core of what is described as small-scale hydropower in daily language.

The time from application to decision can vary widely, depending on the complexity of the case, the level of controversy it raises, and the priority it receives by the licensing authority. Usually, the assessment stage itself will last 1-3 years, sometimes longer.[117] While large-scale schemes involve more complicated procedures, they are also typically given higher priority than small-scale schemes. In recent years, following the surge of interest of small-scale development, a processing queue has formed at the NVE.[118] This means that small-scale applications typically have to wait a long time, sometimes several years, before the NVE begins processing them.[119]

As I will discuss in more depth in the next chapter, the issue of expropriation is rarely given special attention during the application assessment. This is so even in cases when an application to expropriate waterfalls is submitted alongside the licensing applications. The issue of expropriation is rarely singled out for special treatment, at least not in cases of large-scale development.

The procedural protection offered to local owners is very limited, particularly in relation to large-scale schemes. The NVE is not even obliged to notify the owners of licensing applications concerning their riparian rights. Typically, it is expected that the applicant notifies affected owners

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115 See Stokker (n 109) 20.

116 See directive of 19 December 2014 (FOR-2014-12-19-1758).

117 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø, 'NOU 2012:9' , 84-85.

118 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 117) 84.

119 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 117) 84.

when submitting a license application. However, it is not established practice for the NVE to check that the applicant has fulfilled their obligation in this regard.[120]

Interestingly, the applicant has been given responsibility for many aspects of the assessment process in licensing cases, including the assessment of possible alternatives.[121] This would seem to raise competency questions, particularly in cases where the owners themselves propose alternatives. However, even for such cases it is established practice for the NVE to rely on information supplied by the applicant, a practice that the Supreme Court has accepted.[122]

In cases that fall under the Watercourse Regulation Act 1917, the NVE must send its final report and recommendation to the interested parties for comments.[123] It is established practice that local owners do *not* count as interested parties in this regard.[124] This includes the owners of those rivers and waterfalls that the applicant wishes to expropriate. Hence, while the municipalities and various environmental interest groups are informed of how the case progresses and asked to comment prior to the final decision, the owners must inquire on their own accord if they wish to be kept up to date on the application process.

In summary, the procedural framework surrounding licensing of hydropower development leaves local owners in a highly precarious position when large energy companies wish to develop hydropower in their waterfalls. At the same time, the liberalisation of the electricity sector means that owners are in a far better position than before when it comes to developing hydropower themselves. This is discussed in more depth in the next section.

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120 See *Jørpeland* (n 50), and the discussion in Chapter 4, Section **??**.

121 See Stokker (n 109). For a concrete example of its effect in expropriation cases, I refer to *Jørpeland* (n 50) and the detailed assessment of this case offered in the next chapter.

122 See *Jørpeland* (n 50).

123 See Watercourse Regulation Act 1917 s 6.

124 See *Jørpeland* (n 50).

4.4 Hydropower in Practice

The history of hydropower in Norway can be roughly divided into four stages. The first stage was the development that took place prior to 1909. During this time, private actors dominated, with public ownership playing a minor role.[125] Moreover, there were many private interests speculating in acquiring Norwegian waterfalls, anticipating the value that these would have for industrial development.[126]

After 1909, the introduction of licensing obligations and the rule of reversion made it much harder for private companied to acquire waterfalls that were suitable large-scale industrial development. At the same time, local municipalities began to invest in hydropower to provide electricity to its citizens, a service they were increasingly being obliged to provide.[127] This marked the start of the second stage of hydropower development, which saw the development of a more strictly regulated sector. However, this sector was also highly decentralised, for a large part dominated by local actors.

In fact, throughout the first half of the 20th century, most hydroelectric plants were small-scale plants that supplied local communities with electricity.[128] Moreover, as late as in 1943, 89% of all hydroelectric power stations in Norway were still private, many of which were mini and micro plants that were owned and operated by the local community.[129] However, many bigger plants were also under private ownership, and 57% of the total hydroelectric power available at this time was supplied by the private sector. Interestingly, while the micro and mini plants accounted for

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125 See Ot.prp.nr.61 (2007-2008) (n 44).

126 See Hjemfall (n 4) 30-31.

127 See Ot.prp.nr.61 (2007-2008) (n 44).

128 See Utbygd vannkraft i Norge (Norges vassdrags- og elektrisitetsvesen 1946) 11. This is a report from the water directorate published in 1946, showing that as of 31 December 1943, 97.8% of all hydroelectric plants in Norway were small-scale plants. However, these plants contributed only 28% of the total hydroelectric power installed at that time.

129 See Utbygd vannkraft i Norge (n 128) 6. See also Hindrum (n 9) 111.

72.9% of the total number of plants, they only accounted for 1.6% of the total electricity supply.[130]

This clearly illustrates the importance of smaller, local initiatives, in the process of providing Norway with electricity, particularly in rural areas. By the end of 1943, 80% of the Norwegian population had access to electricity at home. In rural areas, the corresponding figure was 70%.[131] Hence, the decentralised approach to hydropower development, based on private ownership and local control, had already succeeded in supplying electricity to most of the country's population.

However, the regulatory regime was soon to undergo a significant change, designed to facilitate industrial development and increased state control. This change came quite rapidly after the Second World War, when the central government began to invest heavily in hydropower, often to ensure economic development by subsidising the metallurgical industry.[132] This period saw increased marginalisation of small private electricity companies, as well as local owners.[133] Indeed, it was often demanded, as a condition for allowing local communities access to the national electricity grid, that local hydroelectric plants had to be shut down.[134] During this time, the development of hydropower was seen as an important aspect of rebuilding the nation, a task carried out in the public interest, not primarily to supply the public with electricity, but rather to facilitate a specific kind of economic development that the central government regarded as desirable.[135]

The state-dominated system set up on this basis remained in place until the 1970s, when environmental concerns and discontent among local populations led to some new reforms.[136] As the scale of typical development projects had grown significantly, new projects would tend to meet

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130 See Utbygd vannkraft i Norge (n 128) 7.

131 See Utbygd vannkraft i Norge (n 128) 7.

132 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 59-65.

133 At the same time, powerful (private) metallurgical interests benefited greatly, sometimes also at the expense of the general supply of electricity. See **tvedt96**

134 See Hindrum (n 9) p.111.

135 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 59.

136 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 71-75.

with significant opposition from various stakeholders, including environmental interest groups, local communities, as well as municipal and regional government institutions.[137] The typical response from the state was to introduce measures that sought to pacify the regional and municipal government opposition, which was considered more serious than opposition from local people and environmental groups. The standard approach was to grant an increased share of the financial benefit to local and regional institutions of government, to instil support for state-led development plans.[138] To some extent, this also slowed down the centralisation process in the hydroelectric sector.[139] However, despite limiting the discontent among local power groups, high-profile controversies continued to arise, most notably the *Alta* case discussed in the next chapter.

The fourth stage of hydropower development began in 1990 after the passage of the Energy Act 1990. The liberalisation that followed saw the transformation of the hydropower sector into a commercial market, based on profit-maximising and competition. As a result, the structure of decentralised management withered away further, as many municipality companies were either bought up by more commercially aggressive actors or forced to merge and change their business practices in order to remain competitive.[140] At the same time, a new decentralised force emerged in the sector, in the form of local owner-led projects.[141]

The core idea behind the Energy Act 1990 was that the electricity sector should be restructured in such a way that production and sale of electricity, activities deemed suitable for market regulation, would be kept organisationally separate from electricity distribution over the national grid, a natural monopoly. However, the act itself does not explain in any depth how this is to be achieved.

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137 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 71-72.

138 See Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (n 37) 73-76.

139 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 85.

140 See Bibow (n 13) 583 (commenting on the increased consolidation of power on the electricity market, following acquisitions and mergers after 1990).

141 See Section **??** below.

In practice, the divide has not been strictly implemented. Most of the large energy companies in Norway continue to maintain interests in both distribution, production and sale of electricity, a phenomenon known as "vertical integration".[142] In fact, the degree of vertical integration in the electricity sector initially increased after the passage of the Energy Act 1990.[143]

To some extent, the water authorities have responded to this by making use of their authority to give organisational directives when they grant distribution licenses.[144] For instance, electricity companies are now required to keep separate accounts for production, distribution and sale of electricity.[145] It is also required that transactions across these functional divides are clearly marked, and that they are based on market prices.[146]

The water authorities have sometimes gone further, by requiring that a separate company is set up to manage distribution activities.[147] However, it is permitted for this reorganisation to take place through the formation of a conglomerate, under a single parent company that controls both the distribution company, the production company and the sales company. Indeed, this model has now been implemented by most of the large energy companies in Norway.[148]

It seems unclear whether this approach really achieves the stated objective. By adopting the conglomerate model of organisation, the major players on the market have successfully gained control over a larger share of both the production and distribution facilities for electricity. Hence, these actors effectively control the core infrastructure that makes up the backbone of the Norwegian electricity sector. The *intention* is that monopoly power should only be exercised with respect to

142 See Bibow (n 13) 580-583.

143 See Bibow (n 13) 583.

144 See Energy Act 1990, s 4-1, para 2, no 1.

145 See directive of 11 March 1999 (FOR-1999-03-11-302), s 4-4 a and s 2-6, issued by the NVE pursuant to directive of 7 December 1990 (FOR-1990-12-07-959), s 9-1, cf., Energy Act 1990, s 10-6.

146 See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-8.

147 See Bibow (n 13) 581-582.

148 Bibow (n 13) 582.

the distribution grid on non-discriminatory terms. But is this realistic when the conglomerate controlling the grid operator has significant stakes also in production and the trade of electricity?

This question calls for a separate study, and I will not be able to address it in any depth here. However, I will direct attention at one aspect that arises with particular urgency for small-scale development of hydropower, concerning access to the grid. It is quite common, in particular, that small-scale projects remain unrealised because the grid is regarded to lack sufficient capacity to accommodate new electricity.[149]

Following an amendment of the Energy Act in 2009, grid companies are now obliged to facilitate access for producers, even when this necessitates new investments.[150] However, the energy producer seeking access is typically required to reimburse the grid company for the cost of new investments, as determined in the first instance by the grid company itself (the NVE serves a supervisory function).[151] In addition, grid companies may still deny access in cases when the needed investments are not "socio-economically rational".[152]

Often, the relevant grid company will be a sister company of an energy producer operating in direct competition with the company seeking access. This can raise questions about the impartiality of the assessments carried out by the grid company. In expropriation cases, this becomes an issue particularly in relation to the assessment of the cost of undertaking an alternative development scheme.[153] Riparian owners are rarely pleased when they realise that the expropriating party is part of the same conglomerate as the grid company that estimates the grid connection costs associated with owner-led development.[154]

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149 See, e.g., Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 117) 84,161-162.

150 See Act no 105 of 19 June 2009 regarding changes in the Energy Act 1990.

151 See directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

152 See Energy Act 1990, s 3-4. The authority to decide whether this requirement is fulfilled is vested with the Ministry.

153 This assessment is often crucial, because it provides information about the value of the development potential that the owners stand to loose.

154 See, e.g., *SKS Produksjon AS v Odd Kristian Pedersen and others* LH-2015-92631.

Meanwhile, the market-orientation of the electricity sector has reduced the level of political control and accountability. Today, a management model based on economic rationality and expert-rule has become dominant. According to Brekke and Sataøen, this serves to set the reform that took place in Norway apart from similar energy reforms in Sweden and the UK.[155] Moreover, Brekke and Sataøen argue that this has resulted in a lack of legitimacy that has been a significant contributory cause of recent national-scale controversies, particularly with regards to the development of the national grid.[156]

At the same time, the growth of the small-scale hydropower sector gives local communities a new voice, as market participants, thereby acting as a counterweight to centralisation and expert-rule. Since the mid- to late 1990s, the small-scale sector has grown significantly. In a recent report, the potential for profitable small-scale hydropower projects was estimated to be around 20 TWh per year.[157] On this basis, the authors of the report estimate that the total present-day value of all waterfalls suitable for small-scale hydropower is about 35 billion Norwegian kroner, i.e., about 3.5 billion pounds.[158] This calculation is based on a model where the waterfalls are exploited in cooperation with an external commercial company, inspired by existing agreements between owners and the limited company *Småkraft AS*. Hence, the calculation might be an underestimate of what small-scale hydropower could represent for local communities if they remain in charge of development themselves.

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155 See Ole Andreas Brekke and Hogne Lerøy Sataøen, 'Fra Samkjøring til Overkjøring' (2012) 44(6) Plan 22.

156 The most serious case so far is that of *Sima - Samnanger*, concerning a new distribution line that will cut through the area known as *Hardanger*, a scenic part of south-western Norway. The plans met with significant resistance at both the national and the local level, but the government pushed ahead, leading to confrontations that also involved some acts of civil disobedience. See Brekke and Sataøen (n 155) 22-23.

157 See Normann Aanesland and Olaf Holm, Verdiskapning av Småkraft (Rapport Nr. 31, Universitetet for miljø- og biovitenskap 2009). For comparison, suggesting the scale of this potential, I mention that the total consumption of electricity in Norway in 2011 amounted to 114 TWh, see http://www.ssb.no/en/energi-og-industri/statistikker/elektrisitetaar. According to the government, about one third of the remaining potential for hydropower in Norway, measured in annual energy output, will come from small-scale projects. See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 117) 231.

158 See Verdiskapning av Småkraft (n 157) 1.

Small-scale hydropower has become socially and political significant in Norway. In the report mentioned above, it is estimated that the value of rivers and waterfalls amount to just under 50 % of the total equity in Norwegian agriculture.[159] Moreover, hydropower is increasingly seen as a possibility for declining regions to counter depopulation and poverty. In some communities, small-scale hydropower is the only growth industry. For these communities, pursuing hydropower development at the local level also provides a way to regain some autonomy with respect to how local natural resources should be managed. Hence, small-scale hydropower takes on great political and social importance, not just for the owners of waterfalls, but for the community as a whole.

For an example of a community where small-scale hydropower has played such a role, I point to Gloppen, a municipality in the county of Sogn og Fjordane, in the western part of Norway. 19 hydropower schemes have already been carried out, all except one by local owners, amounting to a total production of over 250 GWh per year. This prompted the mayor to comment that "small scale hydro-power is in our blood".[160] When interviewed, he also directed attention at the fact that hydropower had many positive ripple effects, since it significantly increased local investment in other industries, particularly agriculture, which had been severely on the decline.

To achieve such effects, it is important to organise development in an appropriate manner. Moreover, to explain how waterfalls came to be as valuable as they are today, it is crucial to direct attention to the way in which waterfall owners initially asserted themselves on the market. In the following, I do this by giving an in-depth presentation of an early model for local involvement in hydropower development, presented at a seminar in 1996.[161] This model contains an early expression of several ideas that would prove influential to the development of the small-scale hydropower sector.

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159 Verdiskapning av Småkraft (n 157) 1.

160 See Andreas Starheim, 'Kommunen med Småkraft i Blodet' [2012] (3) Småkraftnytt.

161 See Otto Dyrkolbotn and Arne Steen, *Nordhordlandsmodellen* (A manifesto on local hydropower development, published following a seminar at Dyrkolbotn Leirskole, fall of 1996, Dyrkolbotn Leirskole 1996).

However, certain other aspects of the model have not been widely adopted. These are aspects that pertain to the balance of power between owners and cooperating developers, as well as the relationship that should be established with larger communities of non-owners, including environmental groups and other water users. Hence, considering the model in some depth, and assessing its impact, will allow me to shed light on desirable social functions of waterfall ownership, and the extent to which such functions are fulfilled on the market today.

4.5 *Nordhordlandsmodellen*

In five brief points, the *Nordhordlandsmodellen* sets out a framework for cooperation between waterfall owners, professional hydroelectricity companies, local communities, and greater society.[162]

The first point makes clear that the aim of cooperation should be to ensure local ownership and control: external interests should never be allowed to hold more than 50 % of the shares in the development company. If the company is organised as a limited liability enterprise, then the plan stipulates that local residents – not necessarily owners – are to be given a right of preemption in the event that shares come up for sale. The possibility of organising the development company as a local cooperative is also mentioned.[163]

The second point of the model sets out a method for valuing the riparian rights prior to development. It stipulates that the appraisement should reflect the real value of such rights, normally estimated on the basis of lease capitalisation. More concretely, the valuation should be based on the premise that the riparian owners will be entitled to rent based on the level of annual production in the planned hydropower project. Then, for the purpose of appraisal, the expected rent per annum is capitalised to find the present value of the riparian rights, relative to the development project

[162] See Dyrkolbotn and Steen (n 161). The model was presented at a seminar in 1996, as the result of a collaboration between Otto Dyrkolbotn, a farmer and a lawyer, and Arne Steen, the director of *Nordhordland Kraftlag*, a municipality-owned energy company.

[163] References needed.

in question.[164]

After such a value has been calculated, the model stipulates that owners are to be given a choice of either leasing out their water rights to receive rent, or to use the capitalised value of (part of) this rent as equity to acquire shares in the development company. The third point in the model then offers a clarification, by stating that the development company should not in any event acquire ownership of riparian rights, but only a time-limited right of use. After 25-35 years, this usufruct should fall away and the waterfall should revert back to the owner of the surrounding land, free of charge. This is the proposed rule even in cases when the landowners themselves initially control the majority of the shares in the development company. Hence, the rule places a limit on alienation; no separation of water rights from land rights is allowed to last for more than 35 years. The model demonstrates the commercial viability of this organisational model by pointing to a concrete municipality-owned energy company that has stated its willingness to cooperate with owners on such terms, to help with financing and share the risk.[165]

Following up on this organisational blueprint, the fourth and fifth points of the model describe the intended role of the local development company in society, by stressing the relationship between hydropower and other interests and potential uses of the affected river. Importantly, the model stipulates that potential developers should be willing to take on formal obligations towards other user groups. Moreover, obligations should not only be negatively defined, as duties to minimise or avoid harms. Positive obligations should also be introduced, such as duties to improve other qualities of the river system, and to engage in active cooperation with other users.

The overall aim, it is made clear, is to ensure sustainable management of the river system as a

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164 This approach stands in stark contrast to the earlier valuation method used in the electricity sector, which relied on a purely theoretical assessment based on the aforementioned notion of a natural horsepower. See Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015); *Bergenshalvøens Kommunale Kraftselskap v Neset and others* Rt-1997-1594.

165 The company in question is Nordhordland Kraftlag, where one of the authors of the model, Arne Steen, was a director.

whole. Interestingly, the model predicts that active local ownership will achieve more in this regard than what can be achieved through governmental regulation alone. This claim is illustrated by a concrete example of a case in which the local owners decided to pursue a scheme that was less environmentally invasive than the project endorsed by the water authorities.[166]

The model goes on to emphasise the need for integrated processes of resource planning and decision-making, to ensure that hydropower development is not approached as an isolated economic and environmental concern, but looked at in a broader social and political context. To achieve this, it is argued that local communities need to play an important role in the management of water resources. Another concrete example follows, regarding *Romarheimsvassdraget*, a river system in the municipality of Lindås, in the county of Hordaland.

This river system was originally intended for large-scale development undertaken by BKK AS, without the participation of local owners.[167] The project would involve a total of three river systems, such that the water from *Romarheimselva* and another river would be diverted to a neighbouring municipality for hydropower development there. The local owners argued against these plans by proposing a number of smaller development schemes. Eventually, they were successful, as the NVE agreed to endorse an alternative consisting of 7 distinct run-of-river projects to be undertaken by local owners.[168]

It is important to note that when *Nordhordlandsmodellen* was formulated, owner-led development of hydropower was still a recent phenomenon, driven forward by individual owners and local groups that saw the potential and had enough know-how to get organised. Later, commercial companies emerged that specialised in cooperating with local owners.[169] This has made it relatively

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166 Today, this project has become Svartdalen Kraftverk, finalised in 2006. It produces 30 GWh annually, enough electricity for about 1500 households, see http://no.wikipedia.org/wiki/Svartdalen_kraftverk.

167 BKK AS is one of the 15 biggest hydropower companies in Norway, and would later also purchase Nordhordland Kraftlag.

168 See **vann25**

169 For a good survey of later developments, I point to Larsen, Lund and Stinessen, 'Erstatning for erverv av fallret-

easy to initiate a process of owner-led development. Moreover, owners are often approached by interested commercial actors who wish to cooperate with them. Most of them rely on cooperation on terms that reflect the main ideas expressed in the first three points of *Nordhordlandsmodellen*.

However, several adjustments have become standard, and these systematically benefit the external partner: the requirement that locals should at all times control a majority of the shares is dropped, the period of usufruct is typically longer than 35 years, the reversion to the landowners after this time is made conditional on payment for machines and installations, and no preemption rights are granted to local residents.[170] However, the core idea that riparian rights are to be valued based on a capitalisation of future rent is accepted. This means, in turn, that local owners rarely need to raise any additional capital to acquire shares in the development company. Moreover, the rent itself can become a significant source of income.

There are two main approaches to calculating this rent. The first approach, introduced already in *Nordhordlandsmodellen*, specifies the rent as a percentage of the gross income from sale of electricity, today often around 10-20 %.[171] In this way, passive owners need not take on any risk related to the performance of the hydropower company. The second approach has been developed by the company Småkraft AS, which is now the leading market actor specialising in cooperation with local owners.[172] According to their model, riparian owners are paid a share of the annual *surplus* from hydropower generation.[173]

This share is usually higher than the rent payable based on the net income; often, the owners are

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tigheter' (n 16); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 16); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 16).

170 See generally Katrine Broch Hauge, 'Erstatningsnivået ved tvangsovertaking av fallrettar' (PhD Thesis, 2015).

171 Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723 (available from the author upon request). See also Hauge (n 170) 55-57.

172 It is owned by several large-scale actors on the energy market, see www.smaakraft.no.

173 See Hauge (n 170) 57-60 (also discussing variants of this contractual idea, based on how the surplus is actually defined in the contract).

entitled to 50% of the profit.[174] Hence, if the project is a success, the riparian owners might be better compensated. However, the owners have to accept some risks as though they were shareholders, and they do so even though they might not have much of a say in how the company is run.[175]

To illustrate the financial scale of the rent agreements that have now become standard, let us consider a typical small-scale hydropower plant that produces 10 GWh annually. With an electricity price of NOK 0.3 per KWh, this gives the hydropower plant an annual gross income of NOK 3 million. If the rent payable is 20 %, the waterfall owners will receive NOK 600 000 annually, approximately GBP 60 000. This is typically many times more, sometimes by a factor of more than a hundred, than what the owners could hope to receive according to the traditional method for calculating compensation following expropriation.[176]

Hence, the financial consequences of the ideas expressed in *Norhordlandsmodellen* have been dramatic. However, the latter two points of the model, addressing the importance of responsible and inclusive management of river systems, have not had the same degree of influence. In the next section, I address this in more depth and comment on some recent developments that threaten to undermine the status of small-scale development as a sustainable alternative to large-scale exploitation. I argue, in particular, that the future of hydropower will likely leave local owners and their communities marginalised once again, unless a social function approach to small-scale development is adopted and entrenched in the law.

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174 Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 171) (available from the author upon request). See also Hauge (n 170) 58.

175 To limit the risk for owners, companies such as Småkraft AS also operates a system of "guaranteed" rent, but this rent is usually quite a lot less than what the owners could expect from an agreement based solely on rent based on gross income. Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 171) (available from the author upon request).

176 For an example based on comparing two concrete cases, see the discussion in Chapter 5, Section 5.4.1. For the compensation issue generally, see **dyrkolbotn15a**; Hauge (n 170).

4.6 The Future of Hydropower

In recent years, there has been a growing tension between the small-scale hydropower sector and environmental groups. There is talk of a brewing "hydropower battle", as environmentalists grow increasingly critical of what they regard as predatory practices.[177] Reports on small-scale producers who are alleged to have violated environmental regulations help fuel the negative impression of the industry.[178] At the same time, the price of electricity has been much lower in recent years than what had previously been forecast, causing severe financial difficulty for many small-scale developers.[179] This has also revealed that some of the investors on the market have engaged in speculative practices, by aggressively entering into agreements with local owners, without carrying out much hydropower development.[180]

On the regulatory side, the water authorities have now adopted much stricter procedures to assess licenses for small-scale hydropower.[181] In addition, different planning routines have been adopted to ensure that small-scale schemes are no longer considered individually, but in so-called "packages", collecting together applications from the same area. As a consequence of these changes,

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177 See 'Det yppes til ny vassdragsstrid!' (2012) 44(03-04) Plan 34.

178 In 2010, the NVE conducted randomised inspections and announced that 4 out of 5 mini and micro plants operated in violation of regulations pertaining to the amount of water they may use at any given time. See 'Små kraftverk driver ulovlig' (*Teknisk Ukeblad*, 13th December 2010) ⟨http://www.tu.no/kraft/2010/12/13/sma-kraftverk-driver-ulovlig⟩ accessed 15th July 2015. In the largest newspaper in Norway, this was reported under the heading that four out of five small-scale plants break the law, see 'Fire av fem småkraftverk driver ulovlig' (*Verdens Gang*, 13th December 2010) ⟨http://www.vg.no/nyheter/innenriks/stroemprisene/fire-av-fem-smaakraftverk-driver-ulovlig/a/10020264/⟩ accessed 15th July 2015. This is misleading, since mini and micro plants are distinct from small-scale plants proper. Most importantly, the former kinds of plants do not usually require a sector-specific development license. Because of this, it also seems plausible that the reported violations might in large part be due to a lack of knowledge and professionalism, not predation. I remark that questions later emerged regarding the accuracy of the report itself. Apparently, one of the plants that was reported to have violated regulations did not even exist, see Øyvind Lie, 'NVE inspiserte kraftverk som ikke finnes' (*Teknisk Ukeblad*, 20th December 2010) ⟨http://www.tu.no/kraft/2010/12/20/nve-inspiserte-kraftverk-som-ikke-finnes⟩ accessed 15th July 2015.

179 See Linda Sunde, 'Småkraft: Kong Midas i revers' (*Bondebladet*, 8th May 2014) ⟨http://www.bondebladet.no/midten/smakraft-kong-midas-i-revers/⟩ accessed 15th July 2015.

180 See Rune Endresen, Jostein Løvås and Stig Tore Laugen, 'Solgte før kraftflopp' (*Dagens Næringsliv*, 20th March 2014) ⟨http://www.dn.no/nyheter/2014/03/20/Energi/solgte-for-kraftflopp⟩ accessed 15th July 2015.

181 See Øyvind Lie, 'NVE varsler flere småkraftavslag' (*Teknisk Ukeblad*, 18th January 2012) ⟨http://www.tu.no/kraft/2012/01/18/nve-varsler-flere-smakraft-avslag⟩ accessed 15th July 2015.

the number of rejected small-scale applications have increased dramatically in recent years.[182]

At the same time, powerful market actors who favour a traditional mode of exploitation have seized the opportunity to lobby more aggressively against small-scale hydropower, in favour of large-scale projects.[183] Such projects, they argue, are preferable also from an environmental point of view. In recent years, this argument has proven influential in many quarters, particularly among state agencies, such as the NVE and the Norwegian Environmental Agency.[184] It has also been claimed that this perspective is backed up by research done on environmental effects of small-scale and large-scale projects.[185]

The core environmental argument against small-scale solutions has a very simply structure: small-scale plants indirectly affect a greater total area of land per energy unit produced, therefore they are considered more intrusive than large-scale schemes.[186] The stated premise of this reasoning is no doubt correct, since small-scale development is a decentralised approach to hydropower. In particular, several small-scale plants, at many different locations, are required to match the energy produced by a single larger plant. However, this quantitative observation has no bearing on the issue of how small-scale plants qualitatively effect the surrounding environment, compared to large-scale projects. Hence, the conclusion that large-scale projects are more environmentally friendly appears to be unsubstantiated.

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182 In 2013, the number of rejections tripled compared to previous years, while the number of accepted applications remained stable. See Linda Sunde, 'Rekordmange småkraft-avslag' (*Bondebladet*, 6th February 2014) ⟨http://www.bondebladet.no/nyhet/rekordmange-smakraft-avslag/⟩ accessed 15th July 2015.

183 See, e.g., Rune S Alexandersen, 'Troms kraft lobber for å stoppe konkurrent - vil bygge kraftverk til 649 mil' (*Nord 24*, 16th August 2014) ⟨http://www.nord24.no/nyheter/article7531155.ece⟩ accessed 15th July 2015.

184 See Jannicke Nilsen, 'Vil ha større vannkraftverk' (*Teknisk Ukeblad*, 14th October 2011) ⟨http://www.tu.no/kraft/2011/10/14/vil-ha-storre-vannkraftverk⟩ accessed 15th July 2015.

185 See generally Tor Haakon Bakken and others, 'Development of Small Versus Large Hydropower in Norway– Comparison of Environmental Impacts' (2012) 20 Energy Procedia 185; Tor Haakon Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (2014) 140 Journal of Environmental Management 93.

186 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 185) 96-99.

Plainly, there does not appear to have been much research done to shed light on the qualitative aspect of this debate. In particular, the parameters used to compare small-scale and large-scale developments tend to be defined in terms of generic buffer zones that do not take into account differences in the severity of different kinds of environmental intrusions. For instance, as long as both installations are observable by passers by, a hut with a turbine inside is considered to have the same "scenic impact" as a concrete dam that distorts the water level in a lake by several meters.[187]

Despite the lack of a qualitative argument in favour of large-scale hydropower, the idea that this kind of development is better for the environment now appears to be gaining ground in Norway. This represents a complete reversal compared to the political narrative that has dominated for the last 15-20 years. Indeed, the merits of small-scale development was strongly emphasised by political leaders around the turn of the century. In his New Year's speech 01 January 2001, the Prime Minister went as far as to declare that the age of large-scale development was over.[188] The same phrase was then repeated in the policy platforms of two successive national governments, in 2005 and 2009 respectively.[189]

However, as administrative practices and case law on hydropower shows, the end of large-scale exploitation has proved impossible to implement. Despite being official policy at the highest level of government for almost 15 years, large-scale development interests continue to dominate in the hydropower sector.[190] Interestingly, the leading national politicians are now changing their position as well.[191] Arguably, this demonstrates how the politicians have responded to pressure

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187 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 185) 95.

188 See, e.g., (n 177) 34.

189 See the "Soria Moria" declaration from 2005, p 57, and "Soria Moria II", from 2009, p 52 (available at www.regjeringen.no).

190 I believe the material presented in this thesis warrants making this claim. Moreover, it is underscored by the two recent Supreme Court decisions in *Jørpeland* (n 50) and *Otra II* (n 50).

191 See Øyvind Lie, 'Energiministeren etterlyser mer regulerbar kraft' (*Teknisk Ukeblad*, 28th October 2014) ⟨http://www.tu.no/kraft/2014/10/28/energiministeren-etterlyser-mer-regulerbar-vannkraft⟩ accessed 15th July 2015 (reporting on recent public statements made by the Minister of Petroleum and Energy in support of large-scale

from high-ranking bureaucrats and large energy companies.[192]

The political shift observed at present is likely to result in a further weakening of property and the rights of local communities. For example, it provides indirect political legitimacy to the NVE, who pursue an explicit policy of prioritising applications for large-scale projects when these come into conflict with small-scale schemes in the same rivers.[193] Hence, the NVE is likely to refuse to consider applications from owners as long as there are applications pending that might result in the expropriation of their property.[194]

To conclude this section, it should be mentioned that commercial actors operating in the small-scale sector do not appear to have taken a very keen interest in property's social functions. Indeed, the industry has occasionally sought to undermine property rights, possibly in an effort to mimic the successes of their large-scale competitors. The industry has argued, in particular, that expropriation should be made more easily available as a tool for small-scale developers and owners who wish to take property from reluctant neighbours.[195]

This argument rests on a peculiar form of anti-discrimination reasoning; as long as large-scale developers are allowed to take property by force, small-scale developers should be allowed to do the same. In a world where takings are endemic, this might make some sense. However, it is hardly an attitude that helps the small-scale industry preserve its image as the more sustainable hydropower option.

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development).

192 In addition to their environmental arguments, these actors also rely on more familiar arguments in favour of large-scale development, especially the idea that large-scale development is more efficient. See Lie, 'NVE varsler flere småkraftavslag' (n 181). For a contrasting view on efficiency, emphasising the efficiency benefits associated with small-scale development and a decentralised approach to hydropower, see **inn101**

193 See **nve12** See also Lie, 'NVE varsler flere småkraftavslag' (n 181).

194 For a concrete example of this, see *Smibelg* (n 154).

195 See Ola Brekken, 'Småkraftverk og ekspropriasjon' [2007] (4) Småkraftnytt; Ola Brekken, 'Småkraftverk og ekspropriasjon – replikk til NVE' [2008] (1) Småkraftnytt 21. The articles are written by a leading Norwegian energy lawyer, apparently in his capacity as legal representative of "Småkraftforeningen", an interest organisation for small-scale hydropower (the articles are published in the newsletter of this organisation).

These critical remarks should not detract from the fact that the growth in small-scale hydropower has led to dramatically increased benefit sharing with many local owners of rivers and waterfalls. However, recent events indicate that it is inappropriate to look at this development in isolation from other concerns. When assessing the future of small-scale hydropower and local property rights to waterfalls, it seems important to also take into account the broader societal consequences of new commercial practices. If one fails in this regard, the pernicious image of owners as socially passive "profit-maximisers" gains a firmer hold both on the political and legal narrative. The negative consequences this can have for property as an institution are already apparent in Norway, as I will argue in the next chapter.

The call for a broader understanding of the role of small-scale hydropower and owner-led development echoes the theoretical discussion presented in Chapter 2. There I argued that an entitlements-based perspective on property rights fails to do justice to the issues that arise in the context of economic development. In relation to hydropower development, this insight is strongly implicit in *Nordhordlandsmodellen*. However, in the current debating climate in Norway, it seems to be at risk of disappearing from view.

4.7 Conclusion

Water resources have been, and still are, very important to Norway as a nation. Not only does the energy of streaming water provide electricity to people and industries, it also provides a source of profit, prestige and power to those who harness it. Historically, many rural communities in Norway benefited greatly from this, as it was they who managed local water resources.

Plainly, they did rather well. By the end of 1943, at a time when small-scale plants still outnumbered large-scale plants 45 to 1, 80% of the population had domestic access to electricity. The government, especially local governments, also felt responsible for the supply of electricity to the public, but they generally assumed this responsibility without encroaching on local populations

who wished to manage their own resources.

As discussed in this chapter, the situation changed dramatically after the Second World War, when the government, especially the central government, assumed more direct control over the nation's water resources. This led to a situation where local owners became increasingly marginalised. In recent years, there has been a partial reversal of this trend, as the liberalisation of the electricity market has enabled local owners and communities to take part in hydropower development once again.

The result has been a growing tension between large-scale and small-scale development, which in turn corresponds to a tension between the owners of waterfalls and the energy companies that wish to expropriate. In the next chapter I will explore this corresponding tension in more depth, as I investigate the rules and practices relating to expropriation for hydropower development.

5 Taking Waterfalls

5.1 Introduction

The Norwegian water authorities have extensive powers to take waterfalls for hydropower development. However, they rarely need to reflect on this power, not even when they use it. The reason is that expropriation tends to be an *automatic* consequence of a development license; those who obtain a license to develop a large-scale hydropower plant almost always obtain also a license to expropriate the private property rights they require for this purpose.

In some cases, this follows from section 16 of the Watercourse Regulation Act 1917, which gives license holders a right to expropriate all property rights needed for the development in question.[1] However, even outside the scope of these provisions, the same approach to expropriation tends to be adopted. Specifically, the authorities adhere to the presumption that whenever a license to undertake large-scale development should be granted, then so should a license to expropriate.[2]

The expropriation presumption has remained in place even though the regulatory and economic context of riparian expropriation has changed dramatically after the liberalisation of the electricity sector. This is significant, especially due to how licensing cases are processed. As discussed in

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1 As mentioned briefly in the previous chapter.

2 The leader of the hydropower licensing division of the NVE expressed this presumption in Rune Flatby, 'Småkraftverk og ekspropriasjon – NVEs praksis' [2008] (1) Småkraftnytt 20 (noting also that the same presumption is not applied for small-scale projects, e.g., when some owners wish to expropriate from neighbours who oppose development).

the previous chapter, the administrative licensing assessment tends to focus on the environmental consequences of development, with little attention devoted to how the loss of property rights affects the owners and their local communities. This is so even though a license to develop is in effect also a license to expropriate.

How did this system come about, and where does it leave local owners whose waterfalls are targeted by large-scale proposals? This chapter addresses these two questions in depth.

First, the history of the law is presented. This will serve to demonstrate that the current state of affairs developed gradually from a pre-industrial starting point where expropriation of waterfalls was generally not permitted Further to this, the chapter discusses more recent changes, specifically the changes in the expropriation regime that were implemented following liberalisation of the electricity sector.

To make expropriation available as a tool for commercial companies, the earlier rules had to be modified. Specifically, public interest requirements had to be relaxed and limitations on private-to-private transfers had to be abrogated. The manner in which this was achieved, with only minimal parliamentary involvement, is in itself worth noting when addressing the legitimacy of current practices.

After the historical assessment, the chapter illustrates how the water authorities and the courts interpret and apply the rules currently in place. Specifically, I give a detailed presentation of the recent Supreme Court case of *Jørpeland*.[3] This case demonstrates that the standing of owners is very weak under administrative law, a result of how the expropriation issue is overshadowed by the licensing question.

I conclude this chapter with a more overarching assessment based on the theoretical framework presented in Part I of the thesis, to shed further light on the legitimacy of rules and practices sur-

[3] See *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393 (I mention that I acted as legal counsel for the owners in this case).

rounding takings of waterfalls in Norway. I argue that the current system is likely to systematically result in takings that fail the Gray test presented in Chapter 2. This sets the stage for the final chapter, where I consider land consolidation as a legitimacy-enhancing alternative to expropriation for hydropower development.

5.2 Norwegian Expropriation Law: A Brief Overview

As mentioned in Chapter 2, the right to property is entrenched in section 105 of the Norwegian Constitution. There it is made clear that when property is taken for public use, full compensation is to be paid to the owner. The formulation bears a striking resemblance to the formulation of the US takings clause in the fifth amendment. However, there is no active public use debate in Norway. The meaning of public use is hardly ever discussed by the courts, and according to legal scholars, the public use formulation places no limit at all on the state's authority to expropriate.[4]

However, it is a rule of unwritten constitutional law that administrative decisions which affect the rights of individuals can only be carried out when they are positively authorised by law.[5] Moreover, the Constitution is not understood as providing an authority for the state to expropriate. It merely expresses the presupposition that expropriation is possible.[6] Hence, when applying eminent domain, the government needs to justify this on the basis of a more specific authorising provision.

Historically, there was no general act relating to expropriation and a range of different acts authorised the executive to expropriate for specific purposes such as roads, public buildings, and

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4 See Jørgen Aall, *Rettsstat og menneskerettigheter* (Fagbokforlaget 2004) 249. For a comment to more or less the same effect, made by the court of appeal, see *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723.

5 See generally Alf Petter Høgberg and Morten Kinander, 'Det formelle legalitetsprinsippet og rettskildelæren' [2011] Tidsskrift for Rettsvitenskap 15.

6 See, e.g., Carl August Fleischer, 'Grunnlovens § 105' [1986] Jussens Venner 1, 6.

schools.[7] Today, many of these authorities have been broadened and included in the Expropriation Act 1959.[8] After an amendment in 2001, this act includes an authority for the government to authorise expropriation of property and use rights in order to facilitate hydropower production.[9] This is understood to include the authority to expropriate waterfalls.[10]

According to the Expropriation Act 1959, expropriation can only be authorised if the benefits undoubtedly outweigh the harms, as determined following a discretionary assessment.[11] Formally, the authorising authority is the King in Council. However, this authority can be delegated to ministries or other state bodies that the King in Council can instruct.[12] The compensation to the owner is determined following a judicial procedure administered by the so-called appraisal courts.[13] This is the name given to the regular civil courts when they hear appraisal cases, observing the special procedure set out in the Appraisal Act 1917. The appraisal procedure emphasises the importance of factual assessment and lay discretion (the appraisal court typically sits with four lay judges).[14] In addition, there are special rules regarding costs, indicating that the expropriating party is usually required to pay for the procedure, including the owners' legal expenses.[15] In other regards, the appraisal procedure resembles a typical adversarial process before a civil court.[16]

The Expropriation Act 1959 states that unless the Kind in Council decides otherwise, expropriation orders may only be granted to state or municipality bodies. This is formulated as a limiting

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7 See Utkast til lov om ekspropriasjon av fast eiendom m.v. 'NUT 1954:1' , 11-12.

8 Act no 3 of 23 October 1959 Relating to Expropriation of Real Property.

9 Expropriation Act 1959, s 2 no 51.

10 See, e.g., **sauda08**

11 See Expropriation Act 1959, s 2.

12 See Expropriation Act 1959, s 5.

13 Expropriation Act 1959, s 2.

14 See Appraisal Act 1917, s 11-12.

15 See Appraisal Act 1917, s 54.

16 See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

principle, but in effect it serves as a general authorisation for the executive to decide, without parliamentary involvement, that a larger class of legal persons may be granted expropriation licenses.

For many purposes, directives have been issued that extend the class of possible beneficiaries to any legal person, including companies operating for profit. In 2001, such a directive was issued for the authority to expropriate in favour of hydropower production.[17]

In addition to providing a general authority for expropriation, the Expropriation Act 1959 also contains several procedural rules. These are collected in Chapter 3 of the Act. Here the Act sets out minimal requirements for what an application for an expropriation license must include: it should make clear who will be affected, how the property is to be used, and what the purpose of acquisition is.[18] In addition, the Act requires the applicant to specify exactly what property they require, and to include information about the type of property in question and the current use that is made of it.

The owners must be notified, and the starting point is that every owner should be given individual notice, although this obligation is relaxed when it is "unreasonable difficult" to fulfil[19] In such cases, it is sufficient that the documents of the case are made available at a suitable place in the local area. In addition, a public announcement must then be made in the official notification publication of the government, as well as in two widely read local newspapers.[20]

The licensing authority is required to ensure that the facts of the case are clarified to the "greatest extent possible".[21] This formulation seems very strict, but is also highly non-specific. In practice, the level of scrutiny given to the expropriation question under Norwegian law varies greatly

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17 See Directive no 391 of 06 April 2001.

18 See Expropriation Act 1959 s 11.

19 See Expropriation Act 1959, s 12, para 2.

20 See Expropriation Act 1959, s 12.

21 The Norwegian expression is "best råd er", which literally means "best possible way". See Expropriation Act 1959, s 12, para 2.

depending on sector-specific administrative practices.[22] Moreover, established practice from several fields, including the hydropower sector, suggests that when expropriation takes place to implement a public plan or a licensed development, little attention is devoted to expropriation as a special issue.[23]

The applicant must cover costs incurred by owners in relation to a pending application for expropriation.[24] The exact formulation is that the applicant is obliged to cover the costs that "the rules in this chapter carry with them". That is, the applicant is obliged to cover the costs that are related to the owners' rights pursuant to Chapter 3 of the Expropriation Act 1959. In practice, an owner will be denied costs if the competent authority takes the view that they are unreasonable or disproportionate to their interests in the case.[25] Finally, the decision to grant an expropriation license must be justified, and the parties should be informed of the reasons for the decision.[26]

In addition to the procedural rules in the Expropriation Act 1959, the rules of the Public Administration Act 1967 also apply in expropriation cases. These rules largely stipulate the same requirements as those discussed above, so I omit a detailed presentation. Instead, I go on to present sector-specific rules pertaining to takings for hydropower.

5.3 Taking Waterfalls by Obtaining a Development License

As mentioned in the introduction, section 16 of the Watercourse Regulation Act 1917 establishes an automatic right to expropriate rights needed to implement a licensed watercourse regulation. This does not include a right to expropriate rivers and waterfalls needed for the hydropower development

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22 See Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 16) 380-381.

23 For zoning plans, see *Namsos Kommune v Braaholmen sameie* Rt-1998-416; *Harald Bø v Radøy kommune* Rt-1999-513. For hydropower, see *Jørpeland* (n 3).

24 See Expropriation Act 1959 s 15.

25 If the case progresses to an appraisal dispute, the competent authority to decide on costs is the appraisal court. Otherwise, the decision is left with the executive. See Expropriation Act 1959, s 15.

26 See Expropriation Act 1959, s 12, para 3.

as such. However, it includes a right to transfer water away from a river for development somewhere else. This has the *de facto* effect of a waterfall expropriation, since the water is transferred away from the source river.

This kind of expropriation has always been treated as waterfall expropriation in relation to the compensation issue.[27] Formally, however, the interference is not considered an expropriation of real property, but rather an expropriation of a right to remove the water, a sort of easement whereby the developer acquires the right to interfere with the rights of riparian owners in source rivers.

In theory, the rules in the Expropriation Act 1959 and the Public Administration Act 1967 still apply when the right to expropriate follows automatically from a development license. Indeed, the rules in the Public Administration Act 1967 express general principles of administrative law, pertaining to all kinds of individual decisions, including both expropriation and licensing decisions. The Expropriation Act 1959, for its part, explicitly states that it applies to property interferences authorised under the Watercourse Regulation Act 1917.[28] However, it is also stated that the rules in the Expropriation Act 1959 only apply in so far as they are "suitable" and do not "contradict" sector-specific rules.[29] This points to the potential caveat that while a range of procedural rules apply in theory, there is a risk that they will be ignored in practice, if they are deemed unsuitable by the licensing authorities.

This is practically significant in hydropower cases. Specifically, the water authorities regard the Watercourse Regulation Act 1917 as providing an exhaustive legislative basis for the licensing procedure.[30] This also means that the material assessment requirement in the Expropriation Act 1959 is not considered to have any independent significance alongside the assessment criterion in

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27 See *Jørpeland* (n 3).

28 See Expropriation Act 1959 s 30.

29 Expropriation Act 1959, s 30.

30 This was made clear through the case of *Jørpeland* (n 3), where this practice also got a stamp of approval from the Supreme Court.

the Watercourse Regulation Act 1917.[31]

This is so even though case law on the former assessment criterion emphasises the interests of affected property owners in a way that case law and administrative practice on the licensing issue does not.[32] As a consequence of how the law is understood on this point, it is very hard for owners to challenge the legality of a decision to allow expropriation of their riparian rights, especially when expropriation takes place pursuant to the Watercourse Regulation Act 1917.[33] Moreover, even if section 16 of the Watercourse Regulation Act 1917 does not apply, the water authorities rely on the presumption that an expropriation license should be granted whenever a large-scale development license is granted.[34]

Hence, in order to defend themselves, owners must proceed in a roundabout manner by addressing the licensing question, for instance by arguing that large-scale development will be environmentally unsound or by presenting a detailed development plan of their own in the hope of convincing the water authorities of its merits. This is a daunting task, particularly in light of the continued influence of case law and administrative practices developed during the period of monopoly regulation of the electricity sector.[35]

To shed further light on how the current situation came about, I will now present the history of the law in this area. As will become clear, the current state of affairs was not inevitable, but

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31 See *Jørpeland* (n 3) 30.

32 In addition, the formulation in Expropriation Act 1959, s 2 contains the additional qualification that the benefit of interference must "undoubtedly" outweigh the harm, meaning that this clearly must be the case (pertaining to the evidence, not the weight of the benefit compared to the harm), see *Løvenskiold-Vækerø Carl Otto Løvenskiold v Staten (Landbruks- og matdepartementet)* Rt-2009-1142. No corresponding requirement is included in the Watercourse Regulation Act 1917, s 8. Instead, the formulation there is that a license should "normally" not be given unless the benefits outweigh the harms. See also Odd Stiansen and Kjell Haagensen, 'Vannkraftutbygging' in *Vassdrags- og energirett* (2nd edn, Universitetsforlaget 2002) 325-236 (arguing that the "normally" qualification is without practical significance).

33 It follows from the discussion in Chapter 4 that large-scale development projects almost always involve a license pursuant to the Watercourse Regulation Act 1917 (or such that the rules from this act, including section 16 on expropriation apply pursuant to the Water Resources Act 2000).

34 See Flatby (n 2).

35 See Sections 5.4.2 and 5.4.3 below.

rather the result of a series of reforms that gradually undermined property as an anchor for active community participation in hydropower development.

5.4 Taking Waterfalls for Progress

In the now repealed Water Systems Act 1888, several provisions authorised appropriation of water-rights and land for various water-related purposes, but the criteria were very narrow.[36] Waterfall rights as such could never be expropriated, and expropriation of other rights pertaining to the use of water could only be permitted in so far as the affected owners were not thereby deprived of any water-power that they could reasonably make use of themselves.[37]

Specifically, expropriation for hydropower development was only permitted when it benefited waterfall owners who needed to acquire surrounding land in order to make better use of their own property rights.[38] Moreover, riparian owners could apply for licenses to engage in various industrial exploits, in some cases also when this would prove damaging to other landowners, for instance through deprivation of water or flooding.[39] These rules are similar to many of the rules found in contemporaneous mill acts from the US, discussed in Chapter 2. As in the US, these rules could be classified as giving rise to economic development takings. However, the source of the economic development potential as such was not supposed to be taken from the owners under these rules.[40] Rather, takings were only warranted with respect to additional rights that existing owners needed to realise the full potential of their own resources.

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[36] See WS Dahl, *Den Norske Vasdragsret* (Den Norske Forlagsforening 1888) 69-85. In addition, the purpose of expropriation was largely understood to be binding also on future use, so that the taker would not gain unrestricted control over the rights they acquired. Rather, they were obliged to use these rights to pursue the specific public purpose for which expropriation was authorised. See, e.g., Per Rygh, Ekspropriantens raadighet over ekspropriert ting (Rt-1912-113) 133-140.

[37] See Dahl (n 36) 58.

[38] See the Water Systems Act 1888, s 15-16. See also the commentary in Dahl (n 36) 60-65.

[39] See Water Systems Act 1888, s 14. See also the commentary in Dahl (n 36) 54-60.

[40] See Dahl (n 36) 168-170.

In fact, an important principle of Norwegian expropriation law at this time was that no property could be taken if the taker's interest in that property was part of the current owner's bundle of interests associated with the property.[41] This applied regardless of whether or not the owners, subjectively speaking, were likely to pursue the interest in question in an optimal way. On the basis of this principle, expropriation of waterfalls for hydropower development was not permissible. The reason was simple: the right to develop hydropower was considered part of the owners' bundle of interests. Hence, it could not be taken from them, as a matter of principle.

By contrast, if ancillary land was needed by someone wishing to make optimal use of *their* waterfall rights, expropriation was possible. In these cases, the takers did not seek to take the owners' rights as much as to negate them, in order to fully enjoy their own. More generally, expropriation at this time was considered a way to resolve conflicts between rights, not a way to redistribute them.[42]

Following industrial advances, the interest in hydropower exploded in the late 19th century.[43] As a result, the state increasingly came to see it as a political priority to regulate the hydropower sector, especially to prevent foreign speculators and industrialists from acquiring ownership of Norwegian resources.[44] As discussed in Chapter 3, the most important expressions of this came in the form of two new licensing acts, namely the Watercourse Regulation Act 1917 (Section 4.3.2 and the Industrial Licensing Act 1917 (Section 4.3.3).

Following up on this, parliament soon passed legislation that authorised expropriation of riparian rights for the benefit of public bodies, also when the purpose was hydropower development.[45]

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41 See Dahl (n 36) 168-170.

42 See Dahl (n 36) 168-170.

43 See Thor Falkanger, 'Acquisition of Real Property and State Approval' (1987) 31 Scandinavian Studies in Law 57, 58-59.

44 See Falkanger (n 43) 58-59.

45 Legislation that made it possible to expropriate waterfalls to the benefit of the municipalities was introduced in 1911, and a similar authority that authorised expropriation in favour of the state appeared in 1917, see Olaf Amundsen,

In 1940, these authorities were consolidated and integrated in the general water resources legislation, through the Water Systems Act 1940.[46] According to this act, the authority to expropriate waterfalls could be granted only to the state and the municipalities. Moreover, the municipalities could only expropriate waterfalls when the purpose was to provide electricity to the local district.[47] Private parties could not expropriate except in exceptional circumstances, when they already owned more than 50 % of the riparian rights they sought to exploit.[48]

In all cases of waterfall expropriation, it was felt that benefit sharing with local owners was required. Hence, special rules were introduced to ensure that takers would have to pay *more* than full compensation (typically a 25 % premium, but in some cases the owner was also given a right to opt for compensation in the form of a proportion of the electricity output of the plant).[49]

As I showed in Chapter 4, the electricity supply in Norway just after the passage of the Water Systems Act 1940 was already well developed, with 80 % of the population having access to electricity. Moreover, in the rural areas the supply often came from one among a vast number of small power plants. In light of the progress already made and the highly decentralised structure of the hydroelectric sector at this time, one might have expected expropriation to remain a relatively rare occurrence.

However, the prevalence of expropriation to facilitate hydropower development increased greatly after the war, as the state itself became engaged much more actively with hydropower development,

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Lov om vasdragsreguleringer av 14 december 1917 (nr. 17) med senere tillæg og forandringer: med kommentar (Aschehough 1928) 29.

46 This act has since largely been replaced by the Water Resources Act 2000.

47 See the Water Systems Act 1940, s 148. See also the commentary in A Hugo-Sørensen and Birger Olafsen, *Lov om vassdragene av 15. mars 1940: med kommentarer* (Tanum 1941) 201-210.

48 See the Water Systems Act 1940, s 55. See also the commentary in Hugo-Sørensen and Olafsen (n 47) 70-74. I remark that this was a novel rule in the 1940 Act, which contradicted earlier theories about the legitimacy of allowing expropriation for private benefit.

49 See Hugo-Sørensen and Olafsen (n 47) 70-91,184,210. For more on compensation, see below in Section 5.4.1.

also for commercially oriented industrial purposes.[50] Hence, despite the spirit and wording of the Water Systems Act 1940, this was the time when expropriation of rivers and waterfalls became a measure to facilitate large-scale transfer of resources.

This development had little do with supplying electricity to the people. Rather, it arose from increased political demand for hydropower to support the metallurgical and electrochemical industries, combined with the fact that the hydropower sector was reorganised and brought under increasingly centralised political control.[51]

Following this, a growing share of the financial benefits from development would accrue to urban areas, as local development companies were replaced by state companies and companies dominated by prosperous city municipalities.[52] In addition, a highly idiosyncratic compensation method was adopted in expropriation cases, resulting in a situation where waterfalls could be acquired very cheaply from local owners.

5.4.1 The Natural Horsepower Method

In Section 4.3.2, I presented the notion of a natural horsepower, used to determine when a development project requires development licenses pursuant to the Watercourse Regulation Act 1917 and the Industrial Licensing Act 1917. As mentioned, the natural horsepower of a development scheme is a gross measure of the stable electric effect harnessed following the development. Specifically, it measures the electric output that can be maintained for at least 350 days each year, a figure that is sensitive to fluctuating water levels. In practice, a power plant can often generate electricity at

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50 See Lars Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (Ad notam Gyldendal 1996) 59-71. See also Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006).

51 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 50) 69-71.

52 In 2007, as the result of a gradual centralisation process, the 15 largest hydropower companies in Norway, which are largely controlled by the state and some city municipalities, owned roughly 80% of Norwegian hydropower, measured in terms of annual output. In 2006, the public owners of hydropower in Norway benefited from receiving more than NOK 9 billion in dividends. See Ot.prp.nr.61 (2007-2008) , 28.

a much higher level, by using more water whenever it is available.[53]

For this reason, the number of natural horsepower in a development project is an unreliable measure of the total amount of energy harnessed in a year. As a result, it is also an unreliable starting point for assessing the value of a development project. Today, energy producers get paid for all the energy they produce, not just that which they can guarantee in advance.[54] Prior to the establishment of a national grid, this was different. Without a grid, fluctuations in electric output would not be evened out by supply from other parts of the country. Hence, the importance of maintaining a stable supply was much greater. Indeed, energy producers would often get paid based on the amount of electric effect they could deliver stably over the year, not the total amount of energy harnessed.[55]

Hence, early in the 20th century, the notion of natural horsepower could be used to provide a sensible measure of how much a developer would be willing to pay for access to riparian rights.[56] Indeed, the notion was used in this way on the market for waterfalls that existed prior to state regulation. The price of a waterfall, specifically, was typically calculated on the basis of the price that the developer was willing to pay per natural horsepower that the planned development would yield.[57] The total payment offered to the owners, consequently, would be found by multiplying the natural horsepower of the development with the price offered per natural horsepower.

This method was duly adopted by appraisal courts to fix the level of compensation following expropriation.[58] Moreover, when the notion of natural horsepower fell into disuse among energy

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53 See 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.

54 See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82, 83-84.

55 See *Uleberg* (n 54) 83.

56 See *Uleberg* (n 54) 83.

57 See *Uleberg* (n 54) 83.

58 Ingolf Vislie, 'Ekspropriasjon og Skjønn i Vassdrag' in *Vassdrags- og energirett* (2nd edn, Universitetsforlaget 2002) 521.

producers, because it no longer reflected the actual value of development projects, the courts did not modify their compensation practices. They stuck with the natural horsepower method, which was now applied on a customary basis, not as a way of calculating realistic economic values.[59]

Over time, the price level became more and more unrealistic as a measure of the value of waterfalls as a natural resource. After the liberalisation of the hydropower sector in the early 1990s, the discrepancy became extreme. To give an example: in 1999, the appraisal court of appeal awarded a one time payment of NOK 722 068 in compensation for a waterfall that yields 152 GWh per annum.[60] By comparison, in the case of *Sauda* from 2009, where a market-based valuation method was used, the owners of the *Maldal* river were awarded NOK 1 149 044 in compensation as a *yearly payment* for a waterfall that would yield 36.5 GWh per annum.[61] If we assume an interest rate of 4 %, this corresponds to a one time payment of NOK 28 726 100. This, in turn, corresponds to NOK 787 017 per 1 GWh produced annually. That is, the owners of *Maldal* were paid in the excess of 150 times more for their waterfall than the owners of *Hellandsfoss*.

The mismatch between economic values and compensation payments had been noted long before the liberalisation of the electricity sector. In fact, the existence of a major discrepancy had been noted as early as in the 1950s, by the head of the water directorate himself. In an article published in an internal newsletter in 1956, the director commented that the natural horsepower method did not result in compensation payments that reflected the true economic value of waterfalls as a natural resource.[62] Moreover, he speculated that the method could be sustained only through exploiting the lack of knowledge about hydropower development among rural populations.[63]

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59 See, e.g., *Bergenshalvøens Kommunale Kraftselskap v Neset and others* RG-2000-459, 1599 (the Supreme Court comments that the method is used customarily because the market provides "little guidance").

60 See *Bergenshalvøens Kommunale Kraftselskap v Neset and others* (n 59).

61 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 4).

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

63 See Rogstad (n 62).

One might think that the continued use of the natural horsepower method, in a situation when the water authorities themselves were aware of its shortcomings, would result in controversy. However, at this time, the local owners of waterfalls did not attack the method in court. Active resistance on this point would not be seen until much later, after the liberalisation of the electricity sector, as discussed in Sections 5.5.2 and 5.5.3 below. However, conflicts arose with respect to other aspects of the regulatory framework regarding hydropower, as discussed in the following section.

5.4.2 Increased Scale of Development and Increased Tension

As discussed in the previous chapter, the state pursued increasingly complex hydropower projects after the Second World War. At this time, technological and economic advances also made it more feasible to divert water over great distances, to collect several different rivers in a common reservoir for joint exploitation. Such projects became known as "gutter" projects, and they grew greatly in scope during the post-War years. Since the relevant licensing procedure was covered by the Watercourse Regulation Act 1917, the practical importance of the expropriation authority in section 16 of this act also increased dramatically.[64]

As mentioned in the previous chapter, the opposition to hydropower grew proportionally to the scale and complexity of typical development projects.[65] The critical focus was often on environmental effects, but the interests of local people also featured in these debates. Moreover, local

[64] See Innst.O.I. (1959) 11. This was a proposition to parliament regarding an amendment of the Watercourse Regulation Act 1917. The amendment proposed to remove an earlier rule that applied only to diversion regulations, whereby a license to divert water from a river should *normally* only be granted when the riparian owners in the source river agreed to the measure. This rule made licenses harder to obtain in the diversion cases. However, following the department's recommendation, the rule was removed in 1959. The department argued that the rule had an "unfortunate effect" on the administrative procedure in large-scale diversion cases, noting also the vastly increasing complexity and scale of typical diversion regulations. The minority in the parliamentary committee recommended against the amendment, noting that it would "greatly increase" the authority to expropriate waterfalls, contrasting with the expropriation rules in the Water Systems Act 1940, see Innst.O.I. (n 64) 14. The majority countered this argument by maintaining that the regulatory power of the state would be used to prevent any abuse of power, and that the practical significance of the amendment would be limited to ensuring a "more rational" procedural approach to large-scale applications, see Innst.O.I. (n 64) 14.

[65] See generally Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(1) Historisk tidsskrift 61, 64-65.

interest were often aligned with the environmental interests.[66]

Some controversies led to legal conflicts that came before the Supreme Court. Here the claims of owners and local communities were consistently rejected. First, the Court held that landowners who did not own waterfalls were not entitled to compensation based on the value of their rights as an asset for hydropower development.[67] Instead, they would only receive damages based on the value of their current use of the property. Second, it was held that when compensation was awarded to waterfall owners according to the natural horsepower method, then this would preclude additional compensation for harms and nuisances associated with large-scale watercourse regulation.[68]

In the case of *Aura*, the owners argued that they had originally agreed to sell their water rights to a private developer, on the understanding that a specific development project would take place, not involving diversion of water.[69] Hence, the owners thought that the purchaser of their water rights had not acquired a right to divert the water away from the river. Still, when the government later acquired the water rights in question, they decided to embark on a more intrusive project that *would* involve water diversion. For this reason, the owners argued that they were entitled to additional compensation.

The claim was rejected by the Supreme Court, which held that insufficient evidence had been provided to establish that the sale of the water rights was made conditional on a specific type of development.[70] Moreover, it was held – on the basis of the facts – that the sale of the water rights had *not* been restricted to only cover the waterfall (i.e., the right to harness hydropower from the

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66 See Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (n 65) 72-73.

67 See *Torgeir Tjønn and others v Hovedstyret for Norges vassdrags- og elektrisitetsvesen* Rt-1963-316, 332-333.

68 See *Endre Vange and others v Fellesskapet Vikfalli* Rt-1971-1217; *Sør-Trøndelag Kraftselskap and others v Grunneierne og rettighetshaverne i Driva-skjønnet and others* Rt-1982-1518.

69 See *Staten ved Hovedstyret for Norges vassdrag- og elektrisitetsvesen v Peder Utigard and others* Rt-1961-1282, 1284 (the original transaction took place in 1906-1910, when there was still a market for sale of waterfalls to private speculators and developers).

70 See *Aura* (n 69) 1285-1286.

river in question). According to the Supreme Court, the fact that the rights in question had been referred to as "water rights" meant that the right to divert away the water was also included.[71]

In the later case of *Mardøla*, the situation was similar, with the crucial difference being that these local owners had not sold "water rights"; their contract explicitly stated that what had been sold was the waterfalls.[72] However, the government interpreted this to mean that they had a right to divert water away from the river, without paying any additional compensation.[73] This contradicted the premise of *Aura*, where the decision to allow a diversion was premised on the fact that *not only* the waterfalls had been acquired by the developer. Still, in *Mardøla*, the Supreme Court cites *Aura* as the primary authority in favour of a *general rule* by which the sale of a "waterfall" also includes the right to divert water away from the river.[74] No explanation is provided by the Court to reconcile this with what was actually said in *Aura*.[75]

The case of *Mardøla* illustrates the increasing tension that arose regarding hydropower in the 1970s, and arguably also a tendency on part of the Supreme Court to side with large-scale development interests. Indeed, the development in *Mardøla* stirred up a high level of controversy that also resulted in civil disobedience and criminal prosecution of environmental activists.[76]

The culmination of the increasing tension surrounding hydropower at this time came with the case of *Alta*, where the question of procedural legitimacy was raised in full breadth. To this day,

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71 See *Aura* (n 69) 1284-1285.

72 See *Nesset kommune and others v Staten v/Norges vassdrags- og elektrisitetsvesen* Rt-1973-107, 112 (the voluntary sale dated back to the early 20th century, when the market for waterfall was still unregulated).

73 See *Mardøla* (n 72) 112.

74 See *Mardøla* (n 72) 112.

75 Arguably, the Court's finding on this point has since been overruled by *Jørpeland* (n 3). Here a waterfall right was defined explicitly as a right to exploit the hydropower in a river along its present trajectory. This definition was provided in order to avoid the conclusion that a diversion of water by someone other than the waterfall owner (in the source river) amounts to a waterfall expropriation. It bears noting that if the Court had concluded in keeping with the precedent set by *Mardøla*, by holding that the diversion right is part of the waterfall bundle, it would have shed serious doubt on the legitimacy of the established practice of allowing diversions under section 16 of the Watercourse Regulation Act 1917, with no prior acquisition of the waterfall rights in source rivers.

76 See *Statsadvokat Knut Hval, aktor mot A* Rt-1971-1120.

the *Alta* case remains the most important Supreme Court precedent in the area of hydropower law.

5.4.3 The *Alta* Controversy

The *Alta* case went before the Supreme Court in 1982 after a long period of high-intensity conflict going back to the mid-seventies.[77] In *Alta*, the affected local population largely lacked formal title to the property they sought to defend. This was because the development in question would take place in the northernmost part of Norway, in the native land of the Sami people.[78]

Norway has a history of discrimination against the Sami, and as their culture is largely nomadic, their land rights were never formalised in private law.[79] As a result, land and natural resources in the county of Finnmark are largely owned by the state, at least in the sense of the state appearing as the nominal *in rem* owner.[80]

Due to the sensitive context of interference, the *Alta* plans met with particularly strong criticism from local people, as well as environmental groups and groups fighting for aboriginal rights. A broad political movement was mobilised in opposition to the plans, eventually resulting in several serious cases of civil disobedience.[81] The case also came before the courts, as the local population and

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77 See *Alta Laksefiskeri Interessentskap and others v Staten (Norges Vassdrags- og elektrisitetsvesen) and others* Rt-1982-241. For commentaries, see Torstein Eckhoff, 'Alta-dommen' [1982] Lov og Rett 399; Erik Boe, 'Altadommen – en rettslig løsning på konflikten mellom energiforsyning, naturvern og minoritetsbeskyttelse' (1983) 6(3) Retfærd 76; 'Alta-dommen og Høyesteretts oppgave. En studie i forholdet mellom jus og økologi' [1988] (4) Kart og Plan 401.

78 For Sami law generally, see Susann Funderud Skoglund, *Samerett: om samenes rett til en fortid, nåtid og fremtid* (Universitetsforlaget 2002).

79 See Øyvind Ravna, 'Samerett og samiske rettigheter i Norge' in Tore Henriksen og Øyvind Ravna (ed) (Gyldendal juridisk 2012) 149-156

80 In the past 30 years, partly as a response to the controversy of the *Alta* case, there has been a gradual change in attitude, whereby the rights of the Sami people receives greater legal recognition. In 2007, formal title to most of the land in the county of Finnark was transferred to a special state agency which is regulated by a special statute that obliges it to manage the land with due regard to customary and prescriptive rights of aboriginal groups and local people. See generally Kirsti Strøm Bull, 'Finnmarksloven: finnmarkseiendommen og kartlegging av rettigheter Finnmark' (2007) 46(9) Lov og rett.

81 This included hunger strikes and attempts at sabotage, see Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (n 65) 80-83. For the Alta controversy generally, see 'Alta Controversy' (*Wikipedia, the free encyclopedia*, 23rd January 2015) ⟨https://en.wikipedia.org/wiki/Alta_controversy⟩ accessed 16th July 2015; Lars Martin Hjorthol, *Alta. Kraftkampen som utfordret statens makt* (Gyldendal akademisk 2006).

environmental groups claimed, primarily on the basis of administrative law, that the development licenses that had been granted were invalid.[82]

The *Alta* case did not involve expropriation of waterfalls. However, because of the priority given to the licensing procedure over specific expropriation procedures, the principles expressed in *Alta* also largely determine the legal position of waterfall owners whose rights to hydropower are expropriated.[83] Moreover, the case involved expropriation of other property rights as well as special usufructuary rights held by the Sami people.

Alta was admitted to the Supreme Court in plenum, directly on appeal from the district court.[84] The presiding judge commented that as far as he knew, it was the longest and most extensive civil case that the Court had ever heard.[85] In an opinion totalling 138 pages, the Court considers a long range of objections against the development licenses, all of which are either rejected or held to provide insufficient reasons to declare the licenses invalid.

First, the Court summarily rejects arguments based on indigenous and human rights law on the basis that the interference in question would not be sufficiently severe to raise any issues in this regard. After concluding in this way, the Supreme Court goes on to approach the case on the basis of administrative law instead.[86] The focus was solely on the procedural rules of the Watercourse Regulation Act 1917. In this regard, the opponents of the *Alta* development had pointed to a large number of purported shortcomings of the decision-making process.

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82 See Eckhoff (n 77).

83 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 4); *Jørpeland* (n 3).

84 This is a special arrangement available in cases that raise important questions of principle, see Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes s 30-2 and Courts of Justice Act 1915, Act No 5 of 13 August 1915 relating to the Courts of Justice, s 5.

85 *Alta* (n 77) 254.

86 See Eckhoff (n 77) 351-352. It also bears noting that the most important international instrument protecting indigenous rights, ILO Convention No 107, was not ratified by Norway at the time of *Alta* (Norway later ratified its replacement, ILO Convention No 169). Still, it was argued that it had the status of customary international law, an argument not considered in any depth by the Supreme Court. See generally Asbjørn Eide, 'Menneskerettigheter og samenes rettigheter' [1980] Lov og Rett 139.

First, it had been argued that the original licensing application did not meet the requirements stipulated in section 5 of the Watercourse Regulation Act 1917. Essentially, the original application contained little more than technical details about the planned development, with hardly any identification or assessment of deleterious effects.[87] This shortcoming had been openly acknowledge by the water authorities themselves, who had nevertheless initiated a public hearing.[88]

The Supreme Court concluded that this was "clearly unfortunate".[89] However, several reports and assessments had subsequently been provided, to fill the gaps left open by the initial application. For this reason, the Supreme Court held that the initial mistakes were irrelevant, since it was the licensing process as a whole that should be assessed.[90] Shortcomings at specific stages in the assessment would not be given weight unless they could be seen to imbue the process with a dubious character overall.[91]

The Court then moved on to assess whether the process as a whole fulfilled the procedural requirements of sections 5 and 6 in the Watercourse Regulation Act 1917. In addition, the Court considered whether the assessment of the licensing criteria in section 8 of the Watercourse Regulation Act 1917 had been sufficiently detailed.

In addition to assessing a large amount of information regarding the situation in *Alta* and how it had been assessed by the water authorities, the *Alta* Court also made some important statements of principle. In particular, the Court held that since a licensing decision itself is discretionary, it is appropriate to grant the executive some margin of appreciation also with regard to the question of how to interpret vague requirements of administrative law.[92]

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87 See *Alta* (n 77) 264-265.

88 See *Alta* (n 77) 265.

89 *Alta* (n 77) 265.

90 See *Alta* (n 77) 265-266.

91 *Alta* (n 77) 265.

92 See *Alta* (n 77) 262-264.

The Court made a second decision of principle when it supported the state's contention that the administrative licensing assessment did not have to be as thorough as that required in a subsequent appraisal dispute.[93] This also serves to downplay the risk of factual error; if mistakes are made with regard to the owners' losses at the assessment stage, these mistakes can be corrected later by a correct compensation award.

In fact, the *Alta* Court agreed that the license had been based on erroneous information about some issues, particularly regarding alternative ways to meet the need for electricity in Finnmark.[94] However, the Supreme Court did not regard the factual errors in this regard as relevant to the licensing decision.[95]

Here a third clarification of principle took place. The Court held, in particular, that the duty to consider alternatives – different ways in which the public purpose could be satisfied – is very limited in hydropower cases.[96] On this basis, the Court argues that factual errors and inadequate information regarding alternatives is less relevant.[97] Apparently, since this information is not required in the first place, if the authorities get it wrong, it does not as easily count as a breach of procedure.

The Court's perspective on alternatives appears to have been at odds with how parliament had actually approached the licensing question, on three separate occasions.[98] Indeed, there was little doubt that the favourable political assessment of the *Alta* development depended strongly on the perceived electricity crisis in Finnmark and the supply situation in Norway generally, as well as

93 See *Alta* (n 77) 279.

94 See *Alta* (n 77) 346-357.

95 See *Alta* (n 77) 346.

96 See *Alta* (n 77) 346.

97 *Alta* (n 77) 346.

98 See *Alta* (n 77) 342.

the perceived inadequacies of alternative solutions.[99]

Hence, it is quite remarkable how little attention the Court directs towards the factual errors and the inadequate information that had been provided concerning alternatives.[100] By contrast, the Court goes into painstaking detail regarding issues that seem to have been far less important to the political decision-makers.

The dismissive attitude towards the duty to correctly assess alternatives is a controversial aspect of the *Alta*-decision.[101] On this point especially, the decision has met with criticism from commentators arguing that the decision shows the extent to which the courts in Norway tend to identify themselves with other organs of state.[102] Some have taken a more positive approach by arguing that *Alta* would be unlikely to become a leading precedent, especially with regard to the duty to assess alternatives.[103] But this has been proven wrong. Indeed, *Alta* continues to receive favourable citations by the Supreme Court, both in relation to hydropower as well as with regard to administrative law more generally.[104]

It should be mentioned, however, that after the *Alta* decision, the legal position of the Sami people has improved quite significantly.[105] Moreover, the controversy surrounding *Alta* has been regarded as a catalyst for change in this regard.[106] Hence, it is unlikely that the courts today would

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99 See *Alta* (n 77) 338-347.

100 See also the surprise expressed in Eckhoff (n 77) 349-351.

101 See Stiansen and Haagensen (n 32) 311. For criticism of the Supreme Court on this point, see Inge Lorange Backer, *Naturvern og Naturinngrep* (Universitetsforlaget 1986) 580-584.

102 See, e.g., Hans Petter Graver, 'Norms and Decisions' (1988) 32 Scandinavian studies in law 49, 64 (commenting also that "government prestige" was at stake).

103 See Backer, *Naturvern og Naturinngrep* (n 101) 580-584.

104 See *Naturvernforbundet i Oslo og Akershus med flere v Staten v/Miljøverndepartementet og Oslo Kommune* Rt-2009-661; *Jørpeland* (n 3).

105 See generally Jon Gauslaa, 'Utviklingen av sameretten de siste 25 årene og betydningen for arealforvaltning og rettspleie' in Øyvind Ravna (ed), *Areal og Eiendomsrett* (Universitetsforlaget 2007). Gauslaa presents the emergence of *Sami law*, a collection of rules and principles serving to protect established land use patterns and the Sami way of life while also giving the Sami people a better opportunity to partake in decision-making processes that affect them as group.

106 See Ravna, 'Samerett og samiske rettigheter i Norge' (n 79) 156.

be as quick as the *Alta* court to dismiss arguments based on aboriginal rights.[107]

However, with regard to local owners more generally, the *Alta* decision is considered to express key principles that still apply.[108] At the same time, the context surrounding takings for hydropower development have changed significantly since *Alta*. First, as discussed in the previous chapter, takings of waterfalls now occur in a very different economic context. Moreover, as discussed in the next section, the legal context has also changed, giving rise to a situation where expropriations of waterfalls have become pure takings for profit.

5.5 Taking Waterfalls for Profit

Following the introduction of the Water Resources Act 2000, the legislative authority to expropriate waterfalls was expanded and incorporated in the Expropriation Act 1959. This change in the law was not singled out for political consideration. In fact, the increased scope of expropriation was not mentioned at all when the Ministry presented their proposals to parliament. Rather, the new expropriation authority was described merely as a "simplification" of existing law.[109]

The original proposal stemmed from the report handed to the Ministry by a commission appointed to prepare a new act relating to water resources. The report totals almost 500 pages, but devotes only three of those pages to discussing the new expropriation authority.[110] Here the committee notes that a range of different authorities for expropriation has long co-existed in the law, with many of them positing strict and specific public interest requirements as a precondition for granting a license. This, the commission argues, is not a very "pedagogical" way of providing

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107 See Gauslaa (n 105) 180.

108 See *Jørpeland* (n 3). See also Stiansen and Haagensen (n 32) 312.

109 Ot.prp.nr.39 (1998-1999) (Proposal to parliament for the Water Resources Act 2000,) 223-225.

110 See Lov om vassdrag og grunnvann, 'NOU 1994:12' (Report to the Ministry of Business and Energy from a special committee appointed by the Crown Prince Regent in Council 09 November 1990,) 235-237.

expropriation authorities.[111] Moreover, the commission notes that it runs the risk of omitting important purposes for which expropriation should be possible. Hence, the commission proposes to replace all older authorities by a sweeping authority that will make expropriation possible for the purpose of facilitating "measures in watercourses".[112]

The commission comments that their formulation might seem wide, but remarks that this is not a problem since the executive can simply refuse to issue an expropriation order when they regard expropriation as undesirable.[113] The commission does not reflect on the consequences of such a perspective, neither in relation to property rights nor in relation to the balance of power between the legislature, the executive and the courts.

However, the later case of *Sauda* shed light on this question, as it emerged that the new authority would, for the first time in Norwegian history, make it possible for private commercial interests to openly expropriate waterfalls.[114]

5.5.1 *Sauda*

In *Sauda*, a case before the court of appeal, the riparian owners formally protested a license that granted a private company the right to expropriate their rivers and waterfalls.[115] In the district court, the owners' principal argument was that the executive could not grant such a right to a private party, since the legislation authorising private expropriation of waterfalls had not been properly authorised by parliament.[116]

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111 Lov om vassdrag og grunnvann (n 110) 235.

112 Lov om vassdrag og grunnvann (n 110) 235-236.

113 Lov om vassdrag og grunnvann (n 110) 235.

114 In cases involving diversion of water, a *de facto* right to expropriate could be granted to private actors already under section 16 of the Watercourse Regulation Act 1917. See the discussion in Section 5.4.2 above.

115 See *Aktieselskabet Saudefaldene v Hallingstad and others* TSTAV-2004-84901 (the decision from the district appraisal court) and *Aktieselskabet Saudefaldene v Hallingstad and others* (n 4) (the decision from the appraisal court of appeal).

116 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 115).

This argument appeared weak, since the Expropriation Act 1959 contains a provision which implies that the executive is authorised to decide what legal persons can benefit from expropriation licenses under that act.[117] However, the owners argued that the executive had not appropriately informed parliament that private takings of waterfalls would result from including the waterfall expropriation authority in the Expropriation Act 1959. It was pointed out, in particular, that the crucial amendment to the Expropriation Act 1959 had been passed as a mere formality following the adoption of the Water Resources Act 2000, on the basis of the Ministry's description of the new expropriation authority as a "simplification" of existing law.

To back up their constitutional argument, the owners presented the written testimony of two members of the parliamentary committee that had prepared and voted for the Water Resources Act 2000 and the associated amendments of the Expropriation Act 1959.[118] Neither of them could recollect that they had been aware that their actions would make private expropriation possible. Plainly, they had not been told, and had not realised on their own, that this would be the result. Their ignorance was not in fact very surprising, since the crucial change in the law was only apparent as an implicit consequence of the combined effect of three different sections in two separate acts.[119] In the entire collection of preparatory documents, the change was discussed only once, and then only very briefly, in the report from the committee to the Ministry.

On this basis, the owners argued that the purported expropriation authority was not constitutionally valid, since parliament had not intended it. Unsurprisingly, this argument was rejected by the district court.[120] It had to be assumed that members of parliament understood the con-

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117 See section 3 of the Expropriation Act 1959. As mentioned in Section **??** above, the provision makes its impact in a rather roundabout way, by stating that no one except state bodies may be granted a permission to expropriate, *unless* the King in Council has decided otherwise.

118 Presented to the Court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 115) (available from the author on request).

119 The Water Resources Act 2000 s 51 and 2 Expropriation Act 1959, s 3 respectively.

120 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 115).

sequences of their own legislative actions.

Interestingly, however, when the case went before the court of appeal, the issue was not discussed at all, since the court decided to rely on a *different* authority as the legislative basis for allowing the expropriation to go ahead. Specifically, since the expropriation in question involved a diversion of water, the court of appeal held that the taker did not in fact require the expropriation license it had been granted pursuant to the Expropriation Act 1959. Section 16 of the Watercourse Regulation Act 1917 would suffice.[121] Hence, the constitutional question could be laid to rest.

In addition to the constitutional complaint, the owners in *Sauda* also raised procedural objections. They argued, in particular, that the expropriation question had been insufficiently assessed by the water authorities.[122] The court did not agree, and the procedural arguments at stake here foreshadow the later Supreme Court case of *Jørpeland*, discussed in more depth in Section 5.6.

While the owners in *Sauda* lost the validity dispute, the level of compensation they received was dramatically increased compared to earlier practice. Because of this, the development company appealed the decision to the Supreme Court, with the owners lodging a counter-appeal regarding the question of legitimacy. The Supreme Court decided not to hear the case, possibly because it had recently considered the compensation issue in the case of *Uleberg*, discussed in the next section.

5.5.2 *Uleberg*

Just before the *Sauda* case was decided by the court of appeal, the Supreme Court had addressed the compensation question in the case of *Uleberg*.[123] Here the Supreme Court agreed in principle that the natural horsepower method was not binding on the appraisal courts. Specifically, the Court held that market value compensation could be awarded just in case small-scale development

[121] See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 4). See also the discussion in Section 5.2 above.

[122] See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 4).

[123] See *Uleberg* (n 54).

by owners would have been "foreseeable" in the absence of expropriation.[124] In *Uleberg*, this was not the case. Specifically, the Supreme Court found that the relevant date of valuation was in 1968, when the waterfall rights in question had been transferred to the developer by a voluntary agreement.[125]

This agreement stated that the final payment to the owners should be fixed by the appraisal courts at the time when the development took place. Both the appraisal court and the appraisal court of appeal took this to mean that the valuation should be based on the value of the waterfall at the time when the compensation was awarded. However, the Supreme Court disagreed, holding instead that the intended reading was that the valuation should be based on the value of the waterfall at the date when the voluntary agreement was made (with interest paid for the delay).[126]

Furthermore, the Supreme Court then stated, without any substantive argument, that since this was the date of valuation, the natural horsepower method should be used.[127] Presumably, this was based on the opinion that it was obvious that owner-led development would have been 'unforeseeable' at this time. The exact meaning of the foreseeability requirement has since become a much contested issue, resulting in several Supreme Court cases pertaining specifically to the compensation question.

5.5.3 Recent Developments on Compensation

Since *Uleberg*, there have been many controversial cases involving expropriation of waterfalls.[128] In most of these, the issue of compensation has occupied center stage. With respect to this issue,

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[124] See *Uleberg* (n 54) 81.

[125] See *Uleberg* (n 54) 70.

[126] See *Uleberg* (n 54) 71.

[127] See *Uleberg* (n 54) 62.

[128] See generally Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Erstatning for erverv av fallrettigheter' (2006) 2006 Tidsskrift for eiendomsrett 175; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Fallerstatning – Ulebergdommen' (2008) 2008 Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (2012) 2012(1) Tidsskrift for eiendomsrett 21.

owners initially appeared to be gaining significant ground, as the appraisal courts started to apply a market-based method quite systematically, resulting in dramatically increased compensation payments.[129]

The large energy companies consistently resisted this development, typically by arguing that small-scale hydropower was unforeseeable and therefore not compensable according to the principle expressed in *Uleberg*.[130] Moreover, the large energy companies would tend to argue that a license to undertake large-scale development was by itself conclusive evidence in support of the claim that small-scale development was unforeseeable.[131] The large-scale development license showed, according to the large energy companies, that a license to undertake small-scale development could not be regarded as foreseeable.

This line of argument clearly conflicts with the so-called no-scheme principle, whereby compensation for expropriated property is to be based on the situation such as it would have been in the absence of the expropriation scheme.[132] In the absence of plans for large-scale development, it is often quite clear that the owners would have succeeded in obtaining a license to undertake small-scale hydropower. However, the large-scale energy companies maintained that small-scale hydropower should be considered unforeseeable even in these cases, since large-scale development was the preferred option for the licensing authorities.

In most early cases before the lower courts, this argument failed. Moreover, in the case of

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129 See the discussion on the natural horsepower method above, in Section **??**.

130 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.

131 See, e.g., *Otra I* (n 130) 17.

132 This principle is also referred to as the "Pointe Gourde" principle in common law, and is sometimes known as the "elimination rule" in Europe. See generally **sluysman15** For a more detailed presentation of the version that applies in Norway, including a comparison with England and Wales, as well as an assessment of the special issues that arise when the principle is applied to economic development takings, see Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 16).

Otra I, it appeared as though it was rejected also by the Supreme Court.[133] However, the Court did not focus specifically on the no-scheme principle and how it should be applied in hydropower cases. Moreover, the taker in that case succeeded in having the appraisal court of appeal's decision overturned on the basis that inadequate reasons had been provided to justify the amount of compensation awarded to owners.[134] The court of appeal therefore had to hear the case again. This time, the taker was able to successfully argue that small-scale hydropower was unforeseeable. Hence, the court of appeal used the natural horsepower method to calculate compensation.[135]

The owners duly appealed the decision to the Supreme Court, which agreed to consider the case for a second time.[136] But this time, the Supreme Court endorsed the understanding of the no-scheme principle of the large energy companies. Specifically, the Court refused to censor the appraisal court of appeal's assessment of foreseeability, even though it was based explicitly on the premise that the expropriation project was preferable from the point of view of the licensing authorities.[137]

If the precedent set by *Otra II* stands, market value compensation will generally not be awarded in future cases where waterfalls are expropriated in favour of large-scale schemes.[138] However, it should be noted that the Supreme Court has been very vague on how exactly it understands the no-scheme principle in these cases. Instead of tackling this issue directly, the Court has chosen to rely largely on deference to the foreseeability determinations carried out by the appraisal courts.

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133 See *Otra I* (n 130) 31-48.

134 See *Otra I* (n 130) 52.

135 In fact, the court used a slightly modified version of the method, first developed in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 4), serving to make the discrepancy between market value and compensation slightly less pronounced. See *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* LA-2010-181441.

136 See *Otra II* (n 130).

137 See *Otra II* (n 130) 53-54.

138 The precedent has already been used to deny small-scale compensation in the case of *SKS Produksjon AS v Odd Kristian Pedersen and others* LH-2015-92631 (appeal to the Supreme Court denied).

This is clearly illustrated by the earlier case of *Kløvtveit*.[139] Here the Supreme Court agreed with the appraisal court of appeal that it might in principle be foreseeable that the owners, in the absence of expropriation, could have cooperated with the taker to implement the expropriation project. This too contradicts the no-scheme principle, but unlike the reasoning of *Otra II*, it also provides an alternative route to market value compensation, on the basis of a valuation of the expropriation project itself. In effect, it points to an approach that promises to deliver a form of *benefit sharing* between owners and takers.

For this reason, *Kløvtveit* is an interesting decision. However, it seems quite unlikely that it will become an important precedent for the future. Its importance was undermined already by *Otra II*, when the presiding judge explicitly denied that cooperation between the taker and the owners was a realistic scenario in that case.[140] Moreover, *Kløvtveit* itself was eventually sent back to the appraisal court of appeal, because the Supreme Court held that the date of valuation had been incorrectly determined.[141] On the second hearing in the appraisal court of appeal, cooperation between owners and taker was regarded as unforeseeable, so market value compensation was denied.[142]

In fact, no case heard by the Supreme Court so far has concluded with compensation based on market values. In the end, the natural horsepower method has always been used. This, no doubt, sends a clear signal to the appraisal courts. In the future, it seems likely that we will see a resurgence of the natural horsepower method and a return to compensation awards amounting to tiny fractions of the actual values that are taken from local owners.

In light of this development, the broader issue of legitimacy becomes increasingly important. The financial entitlements of owners and communities, which seemed to be more strongly protected

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139 See *Kløvtveit* (n 130).

140 See *Otra II* (n 130) 69-71.

141 See *Kløvtveit* (n 130) 35-39.

142 See *BKK Produksjon AS v Austgulen and others* LG-2011-205374.

after *Uleberg*, are again at risk of being undermined. Moreover, as the social function theory of property indicates, the issue of legitimacy goes well beyond the individual financial entitlements of owners. It also pertains to the status of the local communities, the duties of owners in this regard, sustainable management, and the democratic legitimacy of decision-making regarding natural resources. These aspects have not received any attention from Norwegian courts so far. However, as I have already mentioned, the case of *Jørpeland* saw the procedural legitimacy of hydropower takings come to the forefront, for the first time since the case of *Alta*. In addition to clarifying legal points in this regard, the case also sheds light on the practices adopted by the water authorities in expropriation cases. Hence, it provides an excellent opportunity for a closer inquiry into the legitimacy question.

5.6 A detailed case study: *Ola Måland v Jørpeland Kraft AS*

The expropriating party was a public-private commercial partnership, Jørpeland Kraft AS. Originally, this limited liability company was jointly owned by Scana Steel Stavanger AS, with 1/3 of the shares, and Lyse Kraft AS, with the remainder.[143] Lyse Kraft AS is a publicly owned energy company with the city municipality of Stavanger being the dominating shareholder. Scana Steel Stavanger AS, on the other hand, was a subsidiary of the publicly traded Scana Steel Industrier ASA. The largest shareholder of the parent company is a private individual, a leading business person and one of the richest people in the city of Stavanger.[144]

Scana Steel had long operated a steel mill in the small town of Jørpeland, belonging to the municipality of Stranda, in Rogaland county, south-west Norway. The source of energy was a relatively

[143] See *Jørpeland Kraft AS v Ola Måland and others* TSTAV-2007-185495, 2.

[144] See Harald Birkevold, 'Milliardærer mot strømmen' (*Aftenbladet*, 21st October 2009) ⟨http://www.aftenbladet.no/nyheter/okonomi/skatt/Milliardarer-mot-strommen-2078850.html⟩ accessed 3rd September 2015 (the business man in question is John Arild Ertvaag).

small hydropower plant harnessing energy from the river that reaches the sea near Jørpeland.[145] At the height of activity, the mill had about 1200 employees and was an important local institution.[146] However, after going bankrupt and being reorganised in 1977, the importance of the steel mill declined significantly.[147] After a second bankruptcy in 2015, Scana Steel Stavanger AS was wound up. The mill was reorganised yet again, and the number of employees was reduced from around 100 to around 30.[148]

In parallel with the decline of the steel mill, the hydropower plant in Jørpeland was rebuilt and expanded, not to supply energy for local industry, but to sell electricity on the national grid.[149] Jørpeland Kraft AS was charged with undertaking this development, which was thereby decoupled from the steel mill operations. In 2011, the same year when *Måland* came before the Supreme Court, Scana Steel Stavanger AS sold their shares in Jørpeland Kraft AS to the German investment company Aquilla Capital.[150] In light of this, the story of Jørpeland also illustrates broader trends in the history of hydropower in Norway, reflecting the discussion contained in Chapter 4.

The river that gave rise to controversy in *Måland* was not located in the same municipality as Jørpeland, but in a different valley across a mountain range, in the municipality of Hjelmeland. The contested license in *Måland* gave Jørpeland Kraft AS the right to divert the water from this river for electricity production at Jørpeland. In the following, I present the facts of the case in more detail, before considering the legal questions that were addressed by the courts.

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145 See Camilla Aadland, 'Scana Industrier vil eie kraften selv' (*Teknisk Ukeblad*, 2nd November 2009) ⟨http://www.tu.no/kraft/2009/11/02/scana-industrier-vil-eie-kraften-selv⟩ accessed 3rd September 2015.

146 See Eilef A Meland and Geir Nybø, *Konkursen ved Stavanger Staal A/S: reorganisering, ansettelsestrygghet og arbeidsmarkedspolitikk* (Rogalandsforskning 1982) 11.

147 See Meland and Nybø (n 146) 8-15.

148 See Tor Inge Jøssang, 'Smelter igjen på stålverket' (*Aftenbladet*, 21st April 2015) ⟨http://www.aftenbladet.no/nyheter/lokalt/ryfylke/Smelter-igjen-pa-stalverket-3679339.html⟩ accessed 3rd September 2015.

149 See Aadland (n 145).

150 See John Sandvik, 'Vannet blir delvis tysk' (*Strandbuen*, 6th July 2011) ⟨http://strandbuen.no/index.php?page=vis_nyhet&NyhetID=7652⟩ accessed 3rd September 2015.

5.6.1 The Facts of the Case

One relatively small river from which Jørpeland Kraft AS suggested to extract water was not located in Jørpeland. Rather, it runs through the neighbouring municipality of Hjelmeland, on the other side of a mountain range, until it eventually reaches the sea at Tau, another neighbouring municipality.

The plans to divert the river would deprive the riparian owners of water along some 15 kilometres of riverbed, all the way from the mountains on the border between Hjelmeland and Jørpeland, to the sea at Tau. Not all the water would be removed, but the flow of water would be greatly reduced in the upper part of the river known as *Sagåna*, the rights to which is held jointly by Ola Måland and five other local farmers from Hjelmeland.

The water in question comes from a lake called *Brokavatn*, located 646 meters above sea level, where altitude soon drops rapidly, making the river suitable for hydropower development. Plans were already in place for such a project, which would use the water from just below the altitude of Brokavatn, to the valley in which the original owners' farms are located, about 80 meters above sea level.

A rough estimate of the potential of this project was made by the NVE itself, stating that the energy yield would be 7.49 GWh per annum.[151] This is about five times more energy than the water from Brokavatn would contribute to the project proposed by Jørpeland Kraft AS.[152]

Importantly, the estimate was not made in relation to the expropriation case, but as part of a national project to survey the remaining energy potential in Norwegian rivers.[153] Ola Måland and the other owners of the river were not identified as significant stakeholders and were not notified

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151 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 16.

152 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

153 The survey was carried out in 2004 and its results are summarised in Torodd Jensen (ed), *Beregning av Potensial for Små Kraftverk i Norge* (Rapport nr. 19-2004, NVE 2004).

of the assessment that had been made. Moreover, even after Jørpeland Kraft AS had submitted a formal application for permission to divert the water, the owners were not notified by the water authorities.[154]

Moreover, the procedural approach to the case was the traditional one, with an assessment directed at evaluating the environmental impact. Many interest groups were called on to comment on environmental consequences, and public debate arose with respect to the balancing of commercial interests and the desire to preserve wildlife and nature.[155]

One of the local owners, Arne Ritland, also commented on the proposed project. He did this in an informal letter sent directly to Scana Steel Stavanger AS.[156] In this letter, he inquired for further information and protested the proposed diversion of water from Brokavatn. He also mentioned the possibility that an alternative hydropower project could be undertaken by original owners, but he did not go into any details, stating only that a locally owned hydropower plant had previously been in operation in the area.[157]

Arne Ritland received a reply from Scana Steel Stavanger AS, which stated that more information on the project and its consequences would soon be provided. Ritland did not pursue the matter further at this time. Meanwhile, Scana Steel Stavanger AS submitted his letter to the NVE, who in turn presented it as a comment directed at the application.[158]

This prompted the majority owner of Jørpeland Kraft AS, Lyse Kraft AS, to undertake their own survey of alternative hydropower in Sagåna.[159] The conclusions were sent to the water au-

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154 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 16. However, a generic orientation letter was apparently sent by Jørpeland Kraft AS, a letter that the owners themselves could not remember having received. See *Jørpeland Kraft AS v Ola Måland and others* LG-2009-138108, 5.

155 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

156 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 17.

157 The plant he was referring to dates back to the time before there was a national grid. It ensured a local supply of electricity, but has since been shut down, in keeping with the general trend mentioned in Chapter 4, Section 4.4.

158 *Jørpeland Kraft AS v Ola Måland and others* (n 143) 18.

159 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

thorities, but the owners were not informed that such an investigation was being conducted.[160] Moreover, the water authorities did not take steps to investigate the commercial potential of local hydropower on their own accord. Instead, they referred to the conclusion presented by Jørpeland Kraft AS, stating that if the local owners decided to build two hydropower plants in Sagåna, then one of them, in the upper part of the river, would not be profitable, neither with nor without the contested water. The other project, in the lower part, could apparently still be carried out, even after the diversion.[161]

No mention was made of what the original owners stood to loose, nor was there any argument given as to why it made sense to build two separate small-scale power plants in Sagåna. Nevertheless, the NVE handed the expropriating party's findings over to the Ministry, without conducting their own assessment and without informing the original owners.[162]

In addition to the report made by Jørpeland Kraft AS, the municipality government of Hjelmeland also commented on the possibility of local hydropower. In their statement to the NVE, they directed attention to the data in the NVE's own national survey, which suggested that a single hydropower plant in Sagåna would be a highly beneficial undertaking.[163] On this basis, they protested the diversion, arguing that original owners should be given the possibility of undertaking such a project.

This statement was not communicated to the original owners, and in their final report the NVE dismissed it by stating that the most efficient use of the water would be to transfer it and harness it at Jørpeland.[164]

In addition to the statement made by Ritland, one other property owner, Ola Måland, com-

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[160] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 23.

[161] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 23.

[162] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 22-23.

[163] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

[164] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

mented on the plans.[165] He did so without having any knowledge of the commercial potential of the waterfall and without having been informed of the statement made by the municipality of Hjelmeland. On this basis, Måland expressed his support for Jørpeland Kraft's plans, citing that the risk of flooding in Sagåna would be reduced.[166] He also phrased his letter in such a way that it could be interpreted as a statement on behalf of the owners as a group.[167] However, Måland was the only person who signed.

In the final report to the Ministry, the NVE refers to Måland's letter and state that the original owners are in favour of the plans.[168] For this reason, the NVE concludes that the opinion of the municipality of Hjelmeland should not be given any weight.[169] The NVE neglects to mention that Arne Ritland's statement strongly opposed the development.

The report made by the NVE was not communicated to the affected local owners at all, so the owners had no chance of correcting the mistakes that had been made. However, the report was sent to many other stakeholders, including the municipality of Hjelmeland.[170] In light of the report, the municipality changed their original position and informed the Ministry that they would not press for local hydropower, since this was not what the affected owners (i.e., Ola Måland) wanted.[171]

This happened without the owners' knowledge. However, while the case was being prepared by the water authorities, the original owners had begun to seriously consider the potential for hydropower on their own accord. In late 2006, Jørpeland Kraft's application reached the Ministry and a decision was imminent. At the same time, the owners were under the impression that they

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165 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 17.

166 He later joined the other owners in opposition to the expropriation.

167 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 17.

168 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

169 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 19.

170 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 24.

171 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 24.

would receive further information before the case progressed to the assessment stage.

All the owners, including Ola Måland, had now come to realise the commercial value of the water from Brokavatn. Hence, they approached the NVE, inquiring about the status of the plans proposed by Jørpeland Kraft AS. They were subsequently informed that an opinion in support of the transfer had already been delivered to the Ministry. This communication took place in late November 2006, summarised in minutes from meetings between local owners, dated 21 and 29 November.[172] On 15 December 2006, the King in Council granted a concession for Jørpeland Kraft AS to transfer the water from Brokavatn to Jørpeland.[173]

At this point, it had become clear to the original owners that the water from Brokavatn would be crucial to the commercial potential of their own project. They also retrieved expert opinions that strongly indicated that the NVE was wrong to conclude that diversion to Jørpeland would be the most efficient use of the water.[174] In light of this, the owners decided to question the legality of the licence (with the corresponding permission to expropriate). They argued, in particular, that the administrative decision to grant the license was invalid.

In the following section, I present the main legal arguments relied on by the parties, as well as a summary of how the three national courts judged the case.

5.6.2 Legal Arguments

First, the owners argued that procedural mistakes had been made by the water authorities when preparing the case.[175] This, in turn, had resulted in factual mistakes forming the basis of the decision to grant the development license. Since the outcome might have been different if these mistakes had not been made, the owners concluded that the development license could not be

[172] Presented to the courts, available upon request.

[173] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 3.

[174] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 23.

[175] See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 12.

upheld.

Second, the owners argued that expropriation of their rights would result in a disproportionate loss of an economic development potential.[176] Moreover, they argued that the economic loss would clearly be greater than the gain also from the point of view of the public, since the owners were in a position to make more efficient use of the contested water. Therefore, allowing expropriation would only serve to benefit the commercial interests of Jørpeland Kraft AS, to the detriment of both local and public interests.

Third, the owners argued that the government had not fulfilled its duty to consider the case with due care.[177] In particular, the assessment of local community interests and the interests of local owners had not been satisfactory. Particular attention was directed at the fact that local owners had not been informed about the progress of the case, and had not been told of assessments pertaining to their interests.

Fourth, the owners argued that irrespective of how the matter stood with respect to national law, the expropriation was unlawful because it would be in breach of the provisions in P1(1) of the ECHR regarding the protection of property.[178]

Jørpeland Kraft AS protested, arguing first that the report from the NVE was not based on factually erroneous information.[179] With respect to the apparent mistakes that had been made, Jørpeland Kraft AS argued that these did not in any event undermine the quality of the report as a whole.[180] Moreover, it was argued that Måland had probably discussed the diversion of water with other affected owners, and that they had all probably agreed to support it.[181] Furthermore,

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176 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 5.

177 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 12.

178 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 07-08.

179 See *Jørpeland* (n 3) 16.

180 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 2.

181 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 2.

according to Jørpeland Kraft AS, all the procedural rules of the Watercourse Regulation Act 1917 had been observed. Other procedural rules might be relevant, but only if they were compatible with the rules in the Watercourse Regulation Act 1917.[182] It was also argued that it was not for the courts to subject the assessment of public and private interests to any further scrutiny, since this was a matter for the administrative branch.[183] Finally, Jørpeland Kraft AS argued that diverting the water did not represent a breach of the owners' human rights.[184] They argued for this by pointing to the fact that the procedural rules had been followed and that the material decision was discretionary. Moreover, Jørpeland Kraft AS argued that since the owners would be compensated financially for whatever loss they incurred, it was clear that no human rights issues were at stake in the case.[185]

5.6.3 The Lower Courts

The matter went before the district court in the city of Stavanger, which decided in favour of the owners on 20 May 2009.[186] The district court agreed with the local owners that the decision to grant the license was based on an erroneous account of the relevant facts.[187] Moreover, the court concluded that it was evident that allowing the applicants to use the water from Brokavatn in their own hydroelectric scheme would be the most efficient way of harnessing the hydropower potential.[188] This, the court noted, directly contradicted what the NVE had stated in their report.[189]

The court backed up its conclusion on the facts by giving several direct quotes from the report

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182 See *Jørpeland* (n 3) 16.

183 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 2.

184 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 2.

185 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 2.

186 See *Jørpeland Kraft AS v Ola Måland and others* (n 143).

187 See *Jørpeland* (n 3) 25.

188 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 22-23.

189 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 23.

made by the NVE. On the legal side, they relied on a well-established principle of administrative law: while the exercise of discretionary powers is usually not subject to review by court, a decision based on factual mistakes is invalid if it can be shown that the mistakes in question were such that they could have affected the outcome.[190] Since the small-scale alternative would in fact represent a more effective use of the water in question, the court was not in doubt that this principle applied here.[191]

Since the district court held that the license to allow diversion was invalid because it was based on factual mistakes, there was no need to consider claims regarding the legitimacy of the diversion with respect to human rights law. However, the district court did comment that the traditional procedure used to deal with diversion cases was inadequate and had to be supplemented by looking to the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967.[192]

Moreover, the court made a crucial statement about expropriation of riparian rights in general, regarding the duty of the water authorities to properly assess whether or not an expropriation license should be granted.[193] This duty, the court held, included a duty to properly consider negative effects on small-scale development potentials.[194] According to the court, this was the natural consequence of the increasing interest in small-scale development.

If the principle expressed by the district court on this point had been allowed to stand, it would have had significant implications for the water authorities more generally, as it would directly confront their traditional lack of interest in the expropriation question. However, it was not to be,

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190 See Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 407-410. For the requirement that the mistakes must have been such that they could have affected the outcome, see Public Administration Act 1967, s 41

191 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 25.

192 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 21.

193 The duty is a general principle of administrative law, expressed both in Expropriation Act 1959, s 12 and Public Administration Act 1967, s 16.

194 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 22.

as the court's decision was overturned on appeal.

The court of appeal approached the case very different than the district court. Specifically, its decision did not rely on any close assessment of the facts against the report made by the NVE. Instead, the court of appeal largely based its decision on the opinion that the rules in the Watercourse Regulation Act 1917 exhaustively regulate the administrative procedure in watercourse regulation cases.[195] According to the court of appeal, the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967 do not apply at all to diversions of water authorised under section 16 of the Watercourse Regulation Act 1917.[196]

This finding was based on the argument that the more specific rules of the Watercourse Regulation Act 1917 have priority under the so-called *lex specialis* principle, which applies in case of conflict between different sets of rules, giving priority to those that are more specific.[197] Apparently, the court thought that the procedural rules of the Expropriation Act 1959 and the Public Administration Act 1967 conflicts with the rules that apply specifically in hydropower cases.[198] With regard to the procedural rules of the Watercourse Regulation Act 1917, the concludes that the assessment made by the water authorities met all general requirements and was clearly adequate. Regarding the factual basis for the license, the court did not comment on most of the evidence presented to them. Moreover, the Court did not address those quoted segments of the report from the NVE that had formed the basis for the district court's decision.

Specifically, the court of appeal never mentions the objection to the transfer made by the municipality of Hjelmeland, nor does it mention the fact the small-scale alternative proposed by

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195 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 7.

196 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 7.

197 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 7.

198 The court also made a sweeping remark to the effect that the rules in the Watercourse Regulation Act 1917 conform to all "basic and general" procedural demands of administrative law. This, however, seems to be a reference to core unwritten principles, not specific provisions included in the Public Administration Act 1967 and the Expropriation Act 1959.

the municipality would use the contested water more effectively. Instead, the court of appeal points out that the NVE was well aware of the possibility of developing small-scale hydropower, was well-informed about such development, and had considered it during their assessment.[199] The court of appeal notes that the NVE's written assessment on this point was brief, but argues that this must be understood as a natural response to what the court of appeal describes as a lack of input from local owners.[200]

The owners appealed the court of appeal's decision to the Supreme Court, which decided to hear the juridical aspects of the case.[201]

5.6.4 The Supreme Court

The Supreme Court approached the case in much the same way as the court of appeal. Regarding the facts, the Court emphasised that the majority owner of Jørpeland Kraft AS had considered the possibility that a hydroelectric scheme could be undertaken by local property owners.[202] As mentioned, Lyse Kraft AS had indeed made a report on this, concluding that one small-scale plant would be unprofitable regardless of the diversion, while another one, further down in the river, could still be carried out.[203] As mentioned earlier, the report did not explain why anyone would want to build two consecutive small-scale plants in the same river.[204]

In any event, the most relevant question would be what the owners stood to loose when the water from Brokavatn was diverted away from Sagåna. Both the report and the Supreme Court remained silent on this point. Moreover, the Court does not mention that the report was never

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199 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 9.

200 See *Jørpeland Kraft AS v Ola Måland and others* (n 154) 9.

201 See *Jørpeland* (n 3) 8. Specifically, the Supreme Court would not engage in any independent fact-finding, but only consider legal questions, including how the law should be applied to the facts.

202 See *Jørpeland* (n 3) 53.

203 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 23.

204 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 16.

handed over to the applicants, nor that the details of the calculations were never independently considered by the NVE. Just like the court of appeal, the Supreme Court also neglects to mention that small-scale development would be a more efficient use of the water, according to the national survey of small-scale potentials carried out by the NVE itself.[205] Furthermore, no mention is made of the fact that the NVE claims that the opposite is true in the report to the Ministry, contradicting also the statement made by the municipality of Hjelmeland.

Regarding the legal questions raised by the case, the Supreme Court rejects the view that the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967 do not apply to the case.[206] However, the Court holds that these procedural rules do not imply a more extensive duty to assess the expropriation question, compared to established practices in hydropower cases.[207]

Moreover, there is no rule in the Watercourse Regulation Act 1917 which states that the authorities are required to consider specifically the question of how the regulation affects the interests of property owners. This is also not considered in practice, except perhaps to some extent if the issue is explicitly and forcefully raised during the hearing.[208] However, a rule explicitly demanding this is found in section 2 of the Expropriation Act 1959. This is not regarded as a procedural rule, as it pertains to the material considerations that the administrative branch is required to carry out in expropriation cases.

Indeed, according to the Supreme Court, the rule does not apply at all when expropriation takes

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205 See *Jørpeland Kraft AS v Ola Måland and others* (n 143) 16.

206 See *Jørpeland* (n 3) 32-34.

207 See *Jørpeland* (n 3) 51-52 (citing also the *Alta* case, *Alta* (n 77)).

208 See Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010). This is the water authorities' own guideline for the assessment of large-scale applications. The previous version of this guideline (which also fails to mention the interests of owners) was presented to the Supreme Court. The Court also refers to it explicitly when it comments that existing practices are beyond reproach. See *Jørpeland* (n 3) 51.

place on the basis of section 16 of the Watercourse Regulation Act 1917.[209] This is the conclusion despite the fact that section 30 of the Expropriation Act 1959 explicitly states that the provisions of that act apply to expropriations pursuant to the Watercourse Regulation Act 1917, in so far as they are compatible with the rules therein. It would appear to follow, by implication, that the Supreme Court does *not* think that directing more attention at owners' interests, as prescribed by section 2 of the Expropriation Act 1959, is compatible with the Watercourse Regulation Act 1917.

This is a clear rejection of the principled position taken by the district court, whereby the water authorities should generally be obliged to consider small-scale alternatives before allowing expropriation. According to the Supreme Court, no special procedural obligations arise at all in such cases, which can still processed exactly as they would have been if all the waterfalls already belonged to the applicant. In short, expropriation is allowed to remain a non-issue during the licensing process pursuant to the Watercourse Regulation Act 1917.

Formally, this implication of *Jørpeland* only applies to expropriations carried out on the basis of section 16 of that act. However, in practice, there is reason to believe that the impact will be the same for all cases involving large-scale hydropower development. Indeed, the water authorities themselves do not appear to make any significant distinction between large-scale applications based on whether or not a separate license to expropriate waterfalls is formally required.[210]

5.7 Predation?

How should takings of waterfalls be assessed according to the normative theory developed in the first part of this theory? In Chapter 3, I presented the Gray test, a set of key assessment points for determining whether a taking violates important property norms.[211] In the following, I briefly

[209] See *Jørpeland* (n 3) 30.

[210] See Flatby (n 2).

[211] See Chapter 3, Section 3.5.

assess takings of waterfalls against the criteria of the Gray test, to shed further light on the normative status of current practices observed in Norway.

5.7.0.1 The Balance of Power

In light of the presentation so far, it is safe to conclude that typical large-scale waterfall expropriations in Norway are marked by a severe imbalance of power between the taker and the owners. The economic and political power of local communities is clearly very limited compared to that of the large energy companies. Moreover, it is interesting to observe that this imbalance is accentuated by procedural arrangements and practices presided over by the water authorities. As demonstrated by the case of *Jørpeland*, the formal position of owners and local communities under administrative law is very weak in hydropower cases. Hence, in addition to shedding doubt on the legitimacy of current practices in Norway, assessing waterfall takings against the balance of power criterion also underscores that this criterion is related to administrative law.

Ideally, procedural rules should function so as to maintain an appropriate balance of power between the different actors involved in an administrative dispute. At least, the rich and powerful should not be allowed to dominate decision-making processes within the polity, at the expense of those most intimately affected by the decisions reached. If the administrative branch fails in this regard, or acts in such a way that existing imbalances are worsened, this is surely a cause for additional criticism with respect to the balance of power criterion. I believe the case study so far shows that the framework for management of Norwegian hydropower is deserving of such criticism.

5.7.0.2 The Net Effect on the Parties

The immediate financial effect that a taking for hydropower has on the owners depends on how the compensation is calculated. As discussed in Section 5.4.3, the law on this point has been in turmoil in recent years. In the late 2000s, there were signs that a commercially realistic valuation method might become dominant, leading in turn to a dramatic increase in compensation compared

to earlier practice based on the natural horsepower method. But this trend now appears to have been reversed, as the energy companies have successfully argued that a license for large-scale development counts as proof that owner-led projects would not in any case have been 'foreseeable' (because the necessary licenses would not have been granted). For this reason, the argument goes, owners suffer no actual loss when their resources are taken from them.[212]

The local owners are in an even weaker position when it comes to indirect financial effects, as well as social and political effects, such as harms done to the cohesion and prosperity of the local community. In this regard, losses are not only under-compensated, they are typically not acknowledged at all, neither by the executive nor by the courts. The effects that go unnoticed range from the concrete, such as losses incurred because the expropriation proceedings drag out in time, to the abstract, such as the damage that is done to democracy when owners and local municipality governments are replaced by energy companies as the primary resource managers in the local district.[213]

5.7.0.3 Initiative

It follows from the regulatory framework that almost all cases involving expropriation for hydropower development originate from applications submitted by commercial companies.[214] The energy company draws up the plans and initiates the expropriation proceedings, by submitting a request for a development license to the water authorities. The main purpose, which is usually acknowledged by both the applicant and the water authorities, is to make money. Hence, it is usually hard or impossible to argue that takings of waterfalls for hydropower development in Norway are

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212 See *Otra II* (n 130).

213 In *Smibelg* (n 138), the owner submitted an application for small-scale hydropower in 2005 which the water authorities refused to process on account of a pending large-scale application. In 2015, compensation was awarded based on the natural horsepower method, with no compensation for, or even acknowledgement of, the owners' loss in the 10 year period where the water authorities refused to process their applications.

214 See especially Chapter 4, Section 4.4 and Chapter 5, Section 5.3.

motivated by any direct public interests.

Exceptions to this are possible, in so far as the energy companies themselves embody public service functions. In some cases one might argue that they do, but such arguments are becoming increasingly unconvincing due to the fact that most energy companies have been reorganised as for-profit enterprises whose activities are largely unconstrained by institutions of local government.[215]

5.7.0.4 Location

Compared to notorious US cases such as *Kelo* and *Poletown*, the stakes for the owners appear lower in hydropower cases from Norway.[216] However, as mentioned in Chapter 4, riparian rights are often of great importance to Norwegian farming communities and the subsistence of its members.[217] Indeed, the taking of riparian rights from a local community might well contribute significantly to depopulation, although indirectly rather than by physical displacement.[218] Moreover, in many rural communities, small-scale hydropower appears to be the only growth industry, as farming is becoming increasingly unprofitable and communities are threatened by stagnation and decline.[219]

Hence, the location criterion suggests that takings of waterfalls merit heightened critical scrutiny, especially due to the importance of the property that is taken to the subsistence of the local communities forced to give it up.

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215 See, e.g., the EFTA Court's description of the industry, *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Court Report 164.

216 See *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (1981); *Kelo v City of New London* 545 US 469 (2005).

217 See especially Chapter 4, Sections 4.2, 4.4 and 4.5.

218 Today, it is very unlikely that the Norwegian government would sanction physical displacement of people from their homes in order to facilitate hydropower development. However, this state of affairs cannot be taken for granted; the current political attitude on this point appears to have arisen in large part due to extensive and forceful anti-development activism during the 1970s, especially in relation to the *Alta* case (which initially involved plans to physically displace a local Sami community). See (n 81).

219 For an example, I refer again to the case of the Gloppen municipality, discussed in Chapter 4, Section 4.4.

5.7.0.5 Social Merit

There is no shortage of electric energy in Norway, and electricity prices are very low compared to the rest of Europe.[220] Indeed, development projects such as *Jørpeland* are not motivated by any particular need to supply more energy to the Norwegian people or local industry, but openly pursued as commercial endeavours.[221] Hence, they do not appear to have any particular social merit.

On the contrary, waterfall takings can contribute to creating social ills. In south-western Norway, for instance, where *Jørpeland* is located, the average income for a sheep farmer corresponds to about half of the minimum wage that farmers are required to pay to full-time farm workers.[222] During harvesting season, sheep farmers wishing to hire 16 year old vacation workers are required to pay the kids about 30 % more per hour than they themselves can expect to earn from running their own farms. In short, sheep farming communities in western Norway, such as that affected by the taking in *Jørpeland*, are struggling.

In this context, it seems that the social harm created by expropriation, whereby disadvantaged rural communities are deprived of the opportunity to manage their own water resources, should be a pressing concern. Because of the traditional approach to hydropower, focusing solely on environmental harms, the social merit of maintaining local ownership and control over resources receives little or no attention from the water authorities in expropriation cases. This in itself suggests that typical cases of waterfall expropriation in Norway will tend to fail the social merit

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220 See Chapter 4, Section 4.1.

221 See Chapter 5, Section 5.6.

222 According to the Norwegian Bioresearch Institute, the average sheep farmer could expect to earn NOK 65 per hour from working at their farm in 2012. See Anna Smedsdal and Heidi Knudsen, *Økonomien i jordbruket på Vestlandet: Trendar og økono- misk utvikling* (techspace rep, Norsk institutt for landbruksøkonomisk forsking 2014) 50. The minimum wage for unskilled farm workers during the same time was NOK 123.15 per hour. The minimum wage for 16-17 year old vacation workers was NOK 83.75 per hour. See 'Tariffnemndas vedtak 27. november 2012 om videreføring av forskrift om allmenngjøring av tariffavtale i jordbruks- og gartnerinæringene' (*Arbeids- og Sosialdepartementet*, 7th December 2012) ⟨https://www.regjeringen.no/no/dep/asd/org/nemnder-styrer-rad-og-utvalg/permanente-nemnder-rad-og-utvalg/tariffnemnda/vedtak/2012/protokoll-fra-tariffnemndas-mote-27-nove/id709433/⟩ accessed 6th September 2015.

test.

5.7.0.6 Environmental Impact

It is clear that hydropower development can have negative environmental impacts. Hence, it is important that the value of development is appropriately balanced against environmental interests. To ensure this is a core aspect of the regulatory system. As discussed in Chapter 4, local initiatives for small-scale hydropower are now typically scrutinized quite intensely in this regard, particularly after reforms in recent years. By contrast, large-scale projects appear increasingly likely to receive preferential treatment.

Moreover, the large companies are clearly in a better position to exert pressure on the regulator and to invest in lobbying in order to overcome regulatory hurdles. The fact that large-scale solutions continued to receive priority, despite it being official government policy for a decade that no more large-scale plants should be built, is an indication of the severity of this effect. Hence, while the debate continues regarding the comparative environmental merits of different kinds of hydropower, it appears safe to conclude that the dynamics of power on display in relation to environmental issues raise further doubts about the legitimacy of waterfall takings.

5.7.0.7 Regulatory Impact

When waterfall rights are expropriated, they also become a separate commodity, divorced from the surrounding land rights. They are also typically removed from the sphere of municipal control on land use, falling instead under the regulatory jurisdiction of the centralised water authorities. Hence, the regulatory context shifts from one emphasising holistic resource management and local community needs to one which focuses mainly on facilitating hydropower development.

Moreover, the fact that the takers of waterfalls are powerful actors might make it harder for regulators to do their job. After expropriation, the parties who stand to loose from increased regulation are the state-supported energy companies. They are therefore likely to oppose stricter

standards, and to do so in a manner that is much more forceful than any lobbying one might expect from local community owners of waterfalls. Hence, takings in this sector appear likely to cause systemic imbalances and a push for less intrusive government control, or government regulation on terms dictated by the major market players. A sign of this effect can be found in recent controversial decisions made with regard to the national grid, where the interests of the electricity industry appears to have completely overshadowed broad public opposition against further environmental intrusions in valuable nature areas in the west of Norway.

5.7.0.8 Impact on Non-Owners

Non-owners can exercise some influence during the licensing procedure. However, this requires them to be organised or aligned with special interest groups. Organisations, rather than individuals, are entitled to the greatest protection under the Watercourse Regulation Act 1917. The non-owners most directly affected by hydropower development are usually local residents, from the same community as the waterfall owners. These owners have little chance of being heard in the process, except if they find that their interests are aligned with those of more powerful stakeholders, such as national or regional environmental groups. In general, the means available for local non-owners to partake in the decision-making do not appear commensurate with the local stakes in hydropower cases.

The transfer of property to a large-scale owner, moreover, changes the dynamic of interaction between owners and non-owners. Formally, the transfer of riparian rights away from the jurisdiction of municipal governments is particularly significant, since it significantly reduces the level of (local) democratic control over the use of the water resource. In addition, one should again consider the informal effect of transferring property away from local community members to large corporations. Unlike local owners, corporations that take waterfalls appear highly unlikely to interact with local non-owners on equal terms.

5.7.0.9 Democratic Merit

Following *Jørpeland*, it seems that owners' right to participate in decision-making processes regarding the use of their rivers and waterfalls is extremely limited under Norwegian law. The regulatory system effectively negates private property rights by making expropriation an automatic consequence of any large-scale development license granted to any non-owner. The original justification for this might be found in the idea that the regulatory power of the state should take precedence over private proprietary entitlements. However, after the liberalisation of the energy sector, this idea has transformed completely into a practice of systematic prioritisation of powerful commercial interests at the expense of local communities. This has happened despite the political commitment to end large-scale development, which remained official government policy for over a decade.

In light of this, it is especially hard to see any democratic merit in the practice of taking waterfalls for profit, to the benefit of large-scale development companies. Overall, it seems clear that according to the Gray test, current rules and practices regarding takings for hydropower render such takings highly suspect with regard to the question of legitimacy.

5.8 Conclusion

This chapter has explored expropriation of waterfalls, focusing on the legitimacy issue. The presentation has focused on making the case that property rights have effectively been rendered subservient to the management framework set up by the sector-oriented water resource legislation. Specifically, the chapter tracks a transformation of the regulatory framework whereby the licensing authority is now used by the government to exercise *de facto* proprietary control over water resources, unconstrained by the fact that these resources remain in private ownership.

As such, this chapter has shed further light on the tension identified at the beginning of the

previous chapter, between hydropower as private property and hydropower as a national asset. Importantly, however, the flavour of this particular "national asset" is strongly influenced by the liberalisation of the electricity sector. In particular, this chapter has made the case that takings of waterfalls today are pure takings for profit. Moreover, the government itself does not even feel the need to argue otherwise, since expropriation simply follows automatically from large-scale development licenses.

The chapter used the case of *Jørpeland* to shed light on the effect that this can have in practice, showing how owners desiring to carry out alternative projects can be completely marginalised in the decision-making process, regardless of the merits of their proposals. In light of this, based on a combination of concrete and general observations about the Norwegian system, I concluded that this system fails to deliver on legitimacy in the sense of the word explored in Part I of this thesis.

This chapter has thus identified a legitimacy problem, raising the question of how to resolve it. This is addressed in the next chapter, where I consider the institution of land consolidation and how it is used as an alternative to expropriation in Norway.

6 Compulsory Participation in Hydropower Development

6.1 Introduction

Traditional narratives of property tend to direct attention at owners and their choices, while traditional narratives of sustainable development tend to direct attention at resources and their uses. Perhaps the solution to the legitimacy challenge is to come up with a narrative that will allow these two perspectives to meet up, before expropriation becomes necessary or – as in the case of large-scale hydropower in Norway – automatic.

The Norwegian system of land consolidation courts is arguably just such a meeting place between property ideas and ideas of sustainable resource management. In recent years, consolidation has been used extensively to facilitate hydropower projects. So far, it has been used almost exclusively for small-scale development projects organised by local owners. In these situations, expropriation orders are rarely sought and rarely authorised, even if some owners object to the plans. Instead, various consolidation measures are used, including the practically important "use directives", serving to set up organisational frameworks for compulsory implementation of a development plan, possibly against the owners' own wishes.

Essentially, a use directive can be used to take some of the holdout power away from the owners, without depriving them of their property. Instead, owners are compelled to cooperate and

participate in a decision-making process that has economic development as an overarching, binding, aim. Some argue that because of the compulsion involved land consolidation can leave owners in a precarious position by weakening their private property rights.[1] By contrast, this chapter sets out to make the opposite case, namely that the use of consolidation for economic development can be used to strengthen property as an institution, particularly when use directives replace traditional expropriation proceedings. The chapter starts by clarifying the basic proposal and its building blocks, before going on to demonstrate how it works in practice, in the context of hydropower development. It concludes with a more in-depth discussion of possible objections to the legitimacy of consolidation, the worry that the procedure can give rise to abuses of its own, and the possibility of exporting the Norwegian consolidation model to other jurisdictions.

6.2 Land Consolidation as an Alternative to Expropriation

The notion of land consolidation is widely used on the international stage, but it is somewhat ambiguous. Often, it refers to mechanisms whereby boundaries in real property are redrawn to reduce fragmentation, without affecting the relative value of the different owners' holdings.[2] However, it is also common to use consolidation to refer to mechanisms for pooling together small parcels of land to create larger units.[3] There is a tension between these two notions of consolidation, with some claiming that consolidation in the latter sense is sometimes used to surreptitiously bestow benefits on powerful property owners, at the expense of weaker groups.[4]

In light of this, I should stress at the outset that I will use the term land consolidation in a

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1 See, e.g., Geir Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' [2007] Tidsskrift for Eiendomsrett 293.

2 See, e.g., the entry on *land consolidation* in Susan Mayhew, *A Dictionary of Geography* (Oxford University Press 2009).

3 See, e.g., Zvi Lerman and Dragoş Cimpoieş, 'Land Consolidation as a Factor for Rural Development in Moldova' (2006) 58(3) Europe-Asia Studies 439.

4 Michael Lipton, *Land Reform in Developing Countries: property rights and property wrongs* (Routledge 2009) 237-239.

very broad sense in this chapter, much wider than *both* of the interpretations mentioned above. Land consolidation, as I use the term, refers to any mechanism by which the state intervenes, at the request of some interested party, to (re)organise property rights and uses in a local area. Hence, a consolidation measure might as well involve *increased* fragmentation of property, if this is deemed a rational form of consolidation of the property *values* involved. Importantly, I also use land consolidation to refer to efforts directed at *managing* property, not just redrawing boundaries.

Some might argue that this terminology is strained, but I adopt it for a reason. It is motivated by the fact that in Norway, the institution known as "jordskifte", which is officially translated as land consolidation, has exactly such a broad meaning.[5] Since land consolidation measures in Norway can be used to interfere with property rights quite extensively, one may ask about the legitimacy of consolidation, held against rules that protect private property owners.[6]

There is a shortage on case law on this regarding the Norwegian system, but legitimacy issues have been raised before the ECtHR regarding the Austrian system of land consolidation, which is also equipped with broad powers to interfere with private rights. Specifically, the Austrian system has been found to offend against the property norm in P1(1) of the ECHR in cases when the consolidation procedure has dragged out in time, while severely restricting the owners' use of their property.[7]

In some situations, it may be argued that a land consolidation measure *is* a form of expropriation, even if it is not recognised as such by the legislature or the executive. In the US, for instance,

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5 See, e.g., Magne Reiten, 'Avgjerd om fremme av jordskiftesak' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009); Jørn Rognes and Per Kåre Sky, 'Intervention methods in land disputes' (2003) 11(8) European Planning Studies 965. The notion of consolidation at work in Norway appears to be quite unique, but I note that land consolidation also has a relatively broad scope in many other jurisdictions of continental Europe, as well as in Japan and in parts of the developing world. See generally Per Kåre Sky, 'Internasjonalt perspektiv på jordskifte' in Øyvind Ravna (ed), *Areal og eiendomsrett* (Universitetsforlaget 2007); Arvo Vitikainen, 'An overview of land consolidation in Europe' (2004) 1(1) Nordic journal of surveying and real estate research.

6 For an analysis of the Norwegian land consolidation process held against the provisions of the ECHR, I refer to Karl Arne Utgård, 'Jordskiftedomstolane og Den europeiske menneskerettskonvensjonen' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (2009).

7 See *Erkner and Hofauer v Austria* (1987) Series A no 61; *Poiss v Austria* (1987) Series A no 103.

a land consolidation provision ordering escheat (to Native American tribes) of fractional property interests in Native American reservations was struck down as an uncompensated taking by the Supreme Court.[8]

In relation to the legitimacy issue, the Norwegian system stands out in two important respects. First, the consolidation procedure is managed by judicial bodies, namely the land consolidation courts.[9] Second, land consolidation is largely seen as a service to owners, not a tool for increased state control and top-down management.[10] In particular, a case before the land consolidation courts is almost always initiated by (some of) the affected owners themselves and the court often acts as a "problem-solver", aiming to facilitate dialogue and cooperation among owners.[11] Finally, the so-called no-loss requirement is a core principle of consolidation law, serving to ensure that no consolidation measure can take place unless the benefits make up for the harms, for all the properties involved.[12] Indeed, this remains one of the key principles of land consolidation in Norway.[13]

The combination of a judicial procedure that emphasises owner-participation and a no-loss criterion that ensures local benefits means that, arguably, land consolidation in Norway *strengthens* property as an institution. Moreover, land consolidation can serve as an effective countermeasure against two of the most widely discussed challenges to any property regime.

First, consolidation can serve to protect an egalitarian distribution of property rights against the

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8 See *Hodel v Irving* 481 US 704 (1987).

9 See generally Tor Langbach, 'Jordskiftedomstolene og de alminnelige domstoler – likheter og ulikheter' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009). The fact that the land consolidation process is administered by a judicial body appears to be unique to Norway, see Per Kåre Sky, 'Jordskifte i andre land – organisering og prosess' [2001] Kart og Plan 43, 45.

10 See generally Per Kåre Sky, 'Jordskiftets ulike effekter' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009).

11 See generally Jørn Rognes and Per Kåre Sky, *Mediation in the Norwegian Land Consolidation Courts* (Working Papers, 12808, University of Wisconsin-Madison, Land Tenure Center 1998) ⟨http://EconPapers.repec.org/RePEc:ags:uwltwp:12808⟩; Rognes and Sky, 'Intervention methods in land disputes' (n 5); Kjell Jørn Rognes and Per Kåre Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' [2007] (Øyvind Ravna ed 511.

12 See the Land Consolidation Act 1979, s 3 a).

13 See generally Ola Rygg, 'Jordskiftelova § 3 a)' [1998] Kart og Plan 179.

deleterious effect of inefficiency and underdevelopment that might otherwise arise from fragmentation.[14] Importantly, it can do so without disturbing the underlying property structure and without bestowing disproportionate benefits or harms on certain owners or other select groups (assuming egalitarian property rights and/or legal standing for local property dependants in consolidation proceedings). In particular, land consolidation can ensure commercial development without pooling together property rights and without handing property over to powerful market actors.

Second, land consolidation can be used to manage jointly owned property, to tackle problems of over-exploitation and under-investment arising from how harms and benefits may be insufficiently targeted among members of a potentially large group of resource users.[15] Specifically, land consolidation can ensure sustainable management of jointly owned resources without necessarily forcing an enclosure process (enclosure *can* be the result of land consolidation, but it is only one of many measures in the consolidation toolbox).

In short, land consolidation can be used to address both anti-commons and commons problems, in a way that protects, and possibly enhances, desirable social functions of property, through a judicial system that combines participatory and adversarial decision-making. Furthermore, land consolidation is based on a conceptual premise that – potentially – offers increased protection to owners and their properties, by recognising them as members of a community that are mutually dependent on each other. In this way, the form of property protection offered in the context of land consolidation is distinct from the protection offered in the context of expropriation. But it is not necessarily weaker.

The vision of land consolidation at work here is one that sees it as a means for setting up a mini-democracy on demand, to organise decision-making processes in a way that grants those

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[14] See generally Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) Harvard Law Review 621.

[15] See generally Garrett Hardin, 'The Tragedy of the Commons' 162(3859) Science 1243; Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) The American Economic Review 347.

most intimately affected – the owners and (possibly) other property dependants – a say that is proportional to their stake in the matter at hand. Importantly, since land consolidation can be used to impose specific uses of property, it can also be an *effective* alternative to expropriation, a compulsory measure that can obviate the need for depriving owners of their property rights.

Depending on the compensation regime, the costs associated with eminent domain can also be much higher than those associated with land consolidation. Hence, consolidation might be a more efficient approach also from a purely financial perspective. Using consolidation is particularly natural in the context of economic development. This is because the no-loss criterion will generally be possible to fulfil in these cases, through benefit sharing. Moreover, it becomes the responsibility of the land consolidation court to *ensure* that a sufficient degree of benefit sharing results, so that consolidation measures may be applied in accordance with the law.[16]

Interestingly, it is usually also assumed that the benefits resulting from consolidation should be distributed among the affected properties in accordance with their relative value prior to the consolidation measure.[17] Indeed, the principle of benefit sharing at work in consolidation is usually not compensatory at all, but rather one that sees the owners as active participants in the development project, also when it takes place against their will. This is a highly interesting shift of attention, particularly from the point of view of social obligation and human flourishing conceptions of property. According to these ideas, it makes good sense to impose obligations on owners to participate in the fulfilment of public interests, particularly when they themselves also stand to benefit from doing so.[18]

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16 For a detailed discussion of the extent of the court's duties in this regard, also discussing recent changes in the law that might indicate a weakening of the no-loss guarantee, see Katrine Broch Hauge, 'Erstatningsnivået ved tvangsovertaking av fallrettar' (PhD Thesis, 2015).

17 This principle is not as strictly encoded as the no-loss criterion, but is formulated as an "ought"-rule. See the Land Consolidation Act 1979 s 31. In my opinion, this is a weakness of the current framework. I mention that for the special case of consolidation to implement a zoning plan, the rule is absolute, see Land Consolidation Act 1979, s 3 b). See also Hauge (n 16).

18 See the discussion on the social function theory and human flourishing in Chapter 2, Sections 2.4 and 2.5.

The fact that consolidation implies benefit sharing and owner participation means that commercially motivated developers may have an *incentive* to favour eminent domain over consolidation. Hence, the question becomes whether or not owners should be able to use land consolidation as a *defence* against expropriation. If owners are granted such a right, it would become a very powerful version of what is known in some jurisdictions as the "self-realisation" mechanism, a rule whereby owners can sometimes preclude a proposed taking by proposing to implement the required development themselves.[19] Even in the absence of any legislation explicitly granting owners the right to rely on consolidation as a self-realisation argument, one might ask whether owners can already achieve the desired effect in practice. Can owners preclude expropriation by asking the court to organise the desired development as a consolidation measure?

As long as the expropriation application is still pending a final decision, the owners could theoretically hope to achieve this. Moreover, consolidation measures to implement economic development would generally fulfil the no-loss criterion. Hence, the land consolidation courts should in fact be *obliged* to take on such a case, even if there were also plans for expropriation. However, I am not aware of any case where the consolidation courts have actually intervened in this way, and I imagine that they would hesitate quite a bit, particularly if the proposed development is large-scale. Moreover, even if the consolidation courts did decide to get involved, it is not clear how the expropriation authorities would react. In principle, an ongoing consolidation case, or even a formally valid use directive, would not in itself prevent expropriation from taking place. However, it might then become harder to justify an economic development taking as being in the public interest.

After an expropriation order has been granted, things are very different. The law as it stands leaves no room for a consolidation defence in these cases. Quite the contrary, the land consolidation

[19] Rules to this effect are found in several jurisdictions in continental Europe (including a very limited rule to this effect in Norway, pertaining to housing projects), see **sluysmans15**

courts would have to respect a valid expropriation order and might even be called on to implement it, by awarding replacement land or financial damages to affected owners.[20]

In the future, if the consolidation alternative to expropriation is to develop successfully, it seems that the owners' right to request consolidation in place of expropriation must be strengthened. So far, there are no signs of this happening in Norway. However, the use of consolidation as an alternative to expropriation has received attention from a different angle, as a potentially valuable service to developers who seek a more efficient way to deal with property owners.[21]

Following a change in the law that takes effect in 2016, private developers without established property interests will be granted the right to bring a case before the land consolidation courts, to seek help in implementing projects that would otherwise necessitate expropriation.[22] Developers might well be motivated to do so, since this could result in reduced administrative costs and (cheaper) compensation in kind replacing the need for paying monetary compensation.

In light of this, one must ask the following: will land consolidation remain a service to owners, or will it become a service to developers who seek cheap access to property owned by others? This question is about to become pressing in Norway, as the scope of land consolidation continually broadens, making it interact with expropriation law to a greater extent than before.[23]

The idea that consolidation can serve as an alternative to expropriation also raises practical questions regarding how it would work in practice. Here there is already much interesting empirical data available, arising mainly from situations when some owners wish to undertake economic development projects on jointly owned land against the will of other owners, possibly also in

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20 See Land Consolidation Act 1979 s 6.

21 See Prop. 101 L (2012-2013) , 84.

22 See Land Consolidation Act 2013, s 1-5(3).

23 In addition to the new rules granting developers a formal standing in certain consolidation disputes, this development is also strongly felt in the move to apply land consolidation also in the context of urban development, outside the traditional scope of agricultural pursuits. See generally Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' (n 1).

cooperation with external developers.

In the context of hydropower development, using land consolidation in this way has become very important in recent years. In 2009, the Court Administration reported that land consolidation had helped realise 164 small-scale hydropower projects with a total annual energy output of about 2 TWh per year.[24] Moreover, in the Supreme Court case of *Kløvtveit*, discussed briefly in the previous chapter, the importance of land consolidation was recognised also in the context of expropriation.[25] Specifically, the presiding judge pointed to the prevalence of consolidation in the context of hydropower as a justification for requiring a commercial taker to pay additional compensation to the owners. According to the Court, it would have been possible for the taker to cooperate with the owners rather than expropriate from them. Increased compensation was then required because the taker should not be allowed to benefit financially from choosing not to cooperate.[26]

To set the stage for a more in-depth presentation of consolidation for hydropower development, I will now give some further details about the Norwegian system, focusing on the system of use directives.

6.3 Land Consolidation in Norway

Rules regarding land consolidation have a long history in Norwegian law. The first known consolidation rules were included already in King Magnus Lagabøte's *landslov* (law of the land) from 1274, the first piece of written legislation known to have been introduced at the national level in

[24] See **gevinst09** For the scale, I mention that 2 TWh per year is roughly what it takes to supply Bergen with electricity, the second largest city in Norway with around 250 000 inhabitants.

[25] See Chapter 5, Section 5.5.3.

[26] See *BKK Produksjon AS v Austgulen and others* Rt-2011-1683.

Norway.[27] The earliest rules targeted jointly held rights in farming land, giving owners and rights holders on that land an opportunity to demand apportionment that would give them exclusive rights on a single parcel.[28] The land consolidation courts still provide this function, but additional rules were introduced during the 19th century. At this time, the main use of land consolidation was to pool together fragments and divide up jointly owned land, to create larger single-owner parcels that could facilitate higher-intensity farming.[29] However, it was noted that complete individuation of property rights was not necessarily required or desirable. Rather, collective-action mechanisms was introduced, to facilitate economic development without disturbing the established governance structures associated with agrarian property rights.[30]

Today, consolidation measures can be roughly grouped into the following three categories:[31]

- *Apportionment of land*: Rules that empower the court to dissolve systems of joint ownership by apportioning to each estate a parcel corresponding to its share, or by reallocating property through exchange of land.[32]

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27 See Chapter 4, Section 2 of Jordskifterettens stilling og funksjoner, 'NOU 2002:9' (Report to the Ministry of Agriculture from special committee appointed by the King in Council 10 October 2000,).

28 The share in joint rights belonging to each individual farm was historically determined based on the amount of rent ("skyld") that each farmer paid to the landowner (a figure that was also used to determine the level of taxation). However, following the union with Denmark and especially after the advent of enlightened absolutism, tenant farmers in Norway increasingly bought their land from their landowners. Indeed, tenant farming became relatively uncommon in Norway after the 18th Century. But the notion of "skyld" was kept as a measure of the share each farm had in the now jointly owned larger estates. The notion is still important, for instance in apportionment proceedings, as discussed in Øyvind Ravna, 'Skiftegrunnlaget i sameier' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009).

29 The fragmented system of land ownership that was consolidated at this time served an interesting function in the earlier agrarian economy, to promote governance through a combination of scattered individual rights and property held in common. See generally Henry E Smith, 'Semicommon Property Rights and Scattering in the Open Fields' (2000) 29(1) The Journal of Legal Studies 131; Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) The Journal of Legal Studies S453.

30 This idea was behind a range of provisions introduced during the 19th century, not all pertaining to land consolidation. For instance, a special management structure was set up to govern forestry on common land, to avoid overexploitation and ensure rational management without necessitating enclosure. See generally Geir Stenseth, 'Bygdeallmenningenes rettshistorie og dens møte med fremtidens landbruk' in Kirsti Strøm Bull (ed), *Natur, Rett, Historie* (Oslo Studies in Legal History 5, Akademisk Publisering 2010).

31 I consciously omit the compensatory function that a consolidation court can serve by acting as an appraisal court, e.g., in expropriation cases, see Land Consolidation Act 2013 s 1-4(d). This is arguably not a consolidation power at all, but rather an additional function that distracts from the uniqueness of consolidation.

32 This is the traditional form of land consolidation in Norway and the main legislative basis for it is provided in the

- *Delimitation of boundaries:* Rules that empower the court to determine, mark and describe boundaries between properties and the content and extent of different rights of use attached to the land.[33]

- *Directives for use*: Rules that empower the court to prescribe rules for the use of land that can benefit from joint management, including setting up organisational units for carrying out specific development projects.[34]

In all cases, the consolidation court can only employ these tools when they are called on to do so by someone with legal standing.[35] This was traditionally limited to the owners and those holding perpetual rights of use.[36] Today, the government also has legal standing in many kinds of consolidation cases, but most cases (about 90 %) are still initiated by owners.[37] From 2016, when the Land Consolidation Act 2013 comes into force, legal standing will be granted to a larger class of actors, including development companies that could otherwise obtain an expropriation licence.[38] Moreover, legal standing will be granted to all rights- and ground leaseholders.[39]

After a case has been brought before the court, the consolidation court can implement consolidation measures in so far as they are needed to alleviate problems and difficulties preventing rational use of the affected land.[40] To determine whether or not this requirement has been met, the court

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Land Consolidation Act 1979, s 2 a)-b).

33 The main legislative basis for this form of consolidation is found in the Land Consolidation Act 1979, s 88.

34 These rules are found in the Land Consolidation Act 1979, s 2 c).

35 See Land Consolidation Act 1979, s 5.

36 See Land Consolidation Act 1979, s 5.

37 See, e.g., Øystein Jakob Bjerva, 'Jordskiftedomstolene og forvaltningsmyndighetene – to kokker og ingen oppskrift?' 72 Kart og Plan 130, 135.

38 See Land Consolidation Act 2013, s 1-5(3).

39 See Land Consolidation Act 2013, s 1-5(1).

40 See the Land Consolidation Act 1979, s 1.

will look to the prevailing economic and social situation, as well as predictions for the future.[41] In this regard, the court is also influenced by what it regards as the prevailing public interests in property use. The role of the perceived public interest is gaining importance; recent reforms have underscored that considerations based on the common good should inform the decisions made by the consolidation courts.[42]

The procedural rules of consolidation closely mimics those that pertain to regular civil courts. This ensures that consolidation measures are only applied by the court following a public hearing where all involved parties are given an opportunity to present their case, give supporting evidence, and contradict each others' testimony. In the following section, I briefly elaborate on the consolidation process step by step.

6.3.1 The Consolidation Process

A consolidation case is usually initiated by an owner or someone holding use rights.[43] The request for consolidation measures is to be directed at the relevant district consolidation court, one of the 34 district courts for land consolidation that have been set up by the King in accordance with section 7 of the Land Consolidation Act 1979. The request is meant to include further details about the affected properties, the owners and rights holder involved, as well as the specific issues that consolidation should address.

However, this requirement is not usually interpreted very strictly, meaning that the consolidation court will often be inclined to take steps to clarify further what the case should encompass, more so than in regular civil disputes.[44] However, the court may reject the consolidation request

41 See generally Reiten, 'Avgjerd om fremme av jordskiftesak' (n 5).

42 See generally Prop. 101 L (2012-2013) (n 21) (proposal from the Ministry of Agriculture to the parliament regarding the Consolidation Act 2013).

43 See section 5, paragraph 1 of the Land Consolidation Act 1979.

44 Langbach (n 9) 39.

if it finds that it suffers from formal shortcomings, pursuant to the same rules as those that apply to civil disputes.[45]

If the court decides that the request is well-formed and that it includes sufficient detail to permit material consideration, they go on to prepare public hearings, following the rules set out in Chapter 3 of the Land Consolidation Act 1979. These rules mirror those that are in place for civil hearings, including the duty to inform affected parties, the parties' right to present their claims, as well as their duty and right to give testimony and provide evidence supporting it.[46] As in civil cases, a decision is usually made only after at least one oral hearing where the parties may present and comment on the evidence and the issues raised by the case.

Unlike in civil cases, the main hearing typically takes place on the disputed land itself and often revolves around practical rather than legal issues. Moreover, a consolidation case will usually not take the form of a two-party adversarial process, but rather present as a multi-party discussion where the court interacts with a large number of persons who may have both common and conflicting interests in the outcome. The typical case involves 5-10 people, but in some cases there can be hundreds of parties involved.[47] In addition, it is quite common that the parties are not represented by legal counsel.[48] And even if they are, the owners themselves are typically expected to take an active part in the proceedings.[49]

The request for consolidation will be the court's point of departure when assessing the case. However, the court is not bound by the claims put forth by the parties. This again marks a differences with most civil disputes. With a few exceptions explicitly listed in statute, the consolidation

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45 See section 12, paragraph 2 of the Land Consolidation Act 1979, which refers to section 16-5 of the Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes.

46 See the Land Consolidation Act 1979, s 13.

47 Langbach (n 9) 39.

48 Kjell Jørn Rognes and Per Kåre Sky, 'Megling i domstolene, særlig i jordskifteretten' [2000] Lov og Rett 101, 109-111.

49 See generally Rognes and Sky, 'Megling i domstolene, særlig i jordskifteretten' (n 48).

court may decide to use any measure that it deems suitable to ensure a favourable structure of rights and ownership for the future. However, there is some restriction placed on the court in that the measures taken must be regarded as *necessary* in light of considerations based on the original request.[50] In short, the court should remain focused on the issues raised by the parties, but is free to address these issues using the tools they deem most suited for the job. The consolidation court, in particular, is meant to be a 'problem solver', more so than an ordinary civil court.[51]

When a decision is reached, the parties are notified and the decision is presented and argued for in keeping with the rules of the Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes.[52] The appropriate format for the decision depends on its content. A regular civil ruling is the form used for decisions that only involve ascertaining the boundaries between properties, while a special "consolidation decision" is used to implement apportionment and directives of use. The difference in form affects the appeals procedure; while civil rulings are dealt with by the regular courts of appeal, the consolidation decisions can only be appealed to one of 4 designated consolidation courts of appeal.[53]

The procedural rules remain largely the same before the consolidation court of appeal, who provide an entirely new consolidation assessment.[54] The decision of the consolidation court of appeal can only be appealed on the grounds that it is based on an incorrect understanding of the law, or that procedural mistakes were made. The ordinary appeal courts hear the case in the first instance, while the Supreme Court is the last instance of possible appeal.[55]

In general, consolidation cases are different from other civil cases mainly in that they have a

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50 See sections 26 and 29 of the Land Consolidation Act 1979.

51 See generally Rognes and Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' (n 11).

52 See the Land Consolidation Act 1979 s 7.

53 See the Land Consolidation Act 1979, s 61.

54 See section 69 of the Land Consolidation Act 1979.

55 See s 71 of the Land Consolidation Act 1979.

fundamentally different scope. A consolidation case is not primarily concerned with deciding the merits of individual claims, but focuses on introducing structures of ownership and rights that will prove favourable to the community of owners. In this respect, the process has an administrative character. However, the fact that it is organised similarly to a civil dispute means that the affected parties can arguably expect to contribute more to the decision-making process than they do when decisions are made by administrative bodies.

Given the special context of arbitration, it is not surprising that the judges appointed to the consolidation courts are required to have a special skill set, different from that of regular civil law judges. In fact, consolidation judges are required to have successfully completed a special master level degree in consolidation. This is not a law degree, but a distinct form of professional education.[56]

The consolidation court also relies on the participation of lay people who sit alongside the specialist judge.[57] These lay judges are appointed by the specialist judge from a committee of lay persons that are elected by the local municipalities.[58] Ideally, the appointed laymen should have special knowledge of the issues raised by the case. However, they are drawn from the general population.[59]

Summing up, the consolidation process has both administrative, adversarial and participatory characteristics. While the content and scope of the court's decision will often have an administrative flavour and is not primarily directed at settling any specific dispute, the process is judicial. Hence everyone is entitled, and to some extent even *obliged*, to have their voice heard and to partake in the process. Moreover, while the process is guided and overseen by the court, the decisions made

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56 See section 7, paragraph 5 of the Land Consolidation Act 1979. The degree in question is currently offered only at the Norwegian College of Life Sciences and Agriculture.

57 See section 8 of the Land Consolidation Act 1979.

58 See section 8 of the Land Consolidation Act 1979 (the appointment itself is regulated in the Courts of Justice Act 1915, Act No 5 of 13 August 1915 relating to the Courts of Justice, s 64).

59 See section 9, paragraph 5 of the Land Consolidation Act 1979.

will be based on considerations arising from the interests of the properties involved, usually as expressed by the parties in their own words.[60]

However, the court is obliged to book beyond the narrow self-interests of the individual owners. The question on the agenda is to determine what is best for the land as a productive unit in the local community, in light of all relevant economic, social and political facts.[61]

To flag the dual nature of the consolidation process it is tempting to designate it as a process of judicially structured *deliberation*. The final decision-making authority is granted to the court, but the court is required to act on behalf of the rights holders, on the basis of their wishes, but always also in the best interest of their properties and their community.

For this reason, land consolidation is perfectly situated for providing an additional institutional layer between the planning stage and the implementation stage of a development plan, a layer of management devoted to translating public interests and public-private plans into concrete action on private property. In the next section, I present the rules pertaining to use directives in more detail, to elaborate on how consolidation can be used to replace expropriation.

6.3.2 Organising the Use of Property

Traditionally, use directives targeted property rights that were owned jointly or for which some form of shared use had already been established.[62] However, in the 1979 Act, the power of the courts to issue use directives was extended, so that directives could also be issued when there was no prior connection between the rights and properties in question. The requirement was that *special reasons* made this desirable.[63] Traditional examples include directives for the shared use of a private road which crosses several different properties, or regulation of hunting that takes place

60 See generally Rognes and Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' (n 11).

61 See generally Reiten, 'Avgjerd om fremme av jordskiftesak' (n 5); Sky, 'Jordskiftets ulike effekter' (n 10).

62 In accordance with s 2 c) of the Land Consolidation Act 1979.

63 See s 2 c), para 2 of the Land Consolidation Act 1979.

across property boundaries.

The rules pertaining to use directives emerged as an alternative to apportionment of jointly owned property, a more subtle and less invasive measure that could often give rise to the same positive effect as a full division of ownership, without leading to unwanted fragmentation or excessive pooling of resources. Hence, in the now repealed Land Consolidation Act 1950 it was stated that use directives should be the *primary* mechanism of consolidation, such that apportionment could only take place if such directives were deemed insufficient to reach the goal of creating more favourable conditions for the use of the land.[64] In the Land Consolidation Act 1979, the two mechanisms were formally put side by side, but the intention behind this was to ensure greater flexibility of the system, not to reduce the scope of use directives. Quite the contrary, the 1979 act explicitly intended to promote the increased use of such directives, also in conjunction with other measures.[65]

Since the act was introduced, there has been a gradual increase in the willingness of the courts to rely on use directives to facilitate *new development* on the land, not just as a means to regulate an existing activity.[66] The Land Consolidation Act 1979 lists a range of different circumstances in which such directives can be applied.[67] But the list is not understood to be exhaustive. Hence, as the notion of agriculture has broadened to include activities such as small-scale hydropower development, the scope of use directives has followed suit.

In the Land Consolidation Act 2013, the list has been replaced altogether by a general rule which makes it clear that the consolidation courts have the authority to give directives whenever they regard this to be favourable to the properties involved.[68] The new act maintains the principle

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64 See section 3 no 3 and 4 of the Land Consolidation Act 1950 and the discussion in Revisjon av jordskifteloven, 'NOU 1976:50' (Report to the Ministry of Agriculture from a special committee appointed by the King in Council 12 May 1972,) 30-37.

65 See the discussion in Revisjon av jordskifteloven (n 64) 35-37 and Ot.prp. nr. 56 (1978-1979) , 47-48.

66 Ot.prp. nr. 57 (1997-1998) , 103.

67 See section 35 of the Land Consolidation Act 1979.

68 See section 3-8 of the Land Consolidation Act 2013.

that directives regarding joint use of properties with no prior connection can only be given if there are special reasons for it. However, this requirement is not intended to be very strict and the Ministry of Agriculture was initially inclined to remove it.[69] However, it was eventually decided that it should be kept in order to flag that two distinct questions arise in such cases. First, the court must consider whether or not joint use is in fact desirable, before moving on to the question of how it should be organised.

In addition to giving directives prescribing how joint use is to be organised, the consolidation court can give rules compelling owners to take joint action to realise potentials inherent in their land. Rules to this effect were novel to the Land Consolidation Act 1979. According to this act, joint action can only be prescribed in circumstances covered by one of the points in a concrete list of conditions.[70] Moreover, joint action directives can only be directed at *in rem* property owners, not other parties.[71] Following the new Land Consolidation Act 2013, however, the consolidation courts will be authorised to prescribe joint action also to groups of use right holders. In addition, the existing list of circumstances that warrant joint action will be replaced by a general joint action rule, potentially increasing the scope of such directives.[72]

When commenting on this change in the law, the Ministry noted that the joint action rules currently in place have been widely used. Indeed, applying them is now one of the core responsibilities of the consolidation courts.[73] Joint action directives can even include prescriptions for joint investments.[74] On the one hand, this means that such directives can be used to facilitate capital-intensive new development, making consolidation a more effective tool to implement economic

69 For a discussion on this see Prop. 101 L (2012-2013) (n 21) 140-141.

70 The rules are given in the Land Consolidation Act 1979, s 2 e).

71 See the Land Consolidation Act 1979, s 34 a).

72 See section 3-9 of the Land Consolidation Act 2013.

73 See Prop. 101 L (2012-2013) (n 21) 146.

74 See section 3-9 of the Land Consolidation Act 2013.

development. On the other hand, questions arise regarding the extent to which it is legitimate to rely on compulsion in this regard, when the current owners are required to contribute financially or put themselves at financial risk.

The magnitude of investments required to undertake complex projects can soon become quite burdensome for individual owners. The Land Consolidation Act 1979 attempts to resolve this by a rule stating that if a development project will involve "great risk", the court must set up two *distinct* organisational units to undertake it.[75] First, the rights needed to undertake the scheme will be pooled together and managed by an owners' association. Then, to undertake the scheme itself, a separate development company will be set up on behalf of the owners.

In this way, the risk is diverted away from the individual owners onto a company controlled by them. This company will be entitled to the profit from the scheme, but it will also be required to pay rent to the owners' association on terms agreed on by the parties with the help of the court.[76] The owners are entitled to shares in the development company proportional to their share of the relevant rights in the land, as determined by the consolidation court. However, they are not obliged to acquire any such shares if they do not wish to do so. If they do not, they will still benefit from membership in the owners' association.

This two-tier system provides a mechanism that can also empower owners to undertake large-scale projects, possibly by setting up partnerships with external commercial actors. Moreover, the owners' association is not always obliged to lease out the development rights to a specific owner-controlled development company. The exact rules depend on the statutes of the association, as determined by the consolidation court, but typically it will be possible for a majority of owners to lease out the development rights to an external developer, should they choose to do so. In this regard, conflicts may arise, if some of the owners wish to undertake development themselves, while

75 See the Land Consolidation Act 1979, s 34 b).

76 See s 34 b) of the Land Consolidation Act 1979.

others wish to strike a deal with an external company. The challenge for the consolidation court, illustrated concretely in the next section, is to organise the owners' association in such a way that the chance of later conflicts is minimised.

After the new consolidation act takes effect in 2016, both planning authorities and commercial developers may be granted legal standing in the consolidation process. This might prove particularly useful in connection with large-scale industrial development, as it might otherwise be hard to implement such projects successfully. In these cases, the consolidation courts can now function as an arena for interaction and deliberation between the three main groups of stakeholders: the public, the local owners, and the commercially motivated developers.

To sum up, use directives are highly versatile tools that may be used to organise extensive projects of land development on behalf of local owners. This form of development organisation makes it possible for original owners to maintain their interest in the land, obviating the need for expropriation, while giving the public a greater opportunity to influence and control how their planning decisions are implemented in practice.

In the next section, I consider in depth the particular case of hydropower, where the consolidation courts have recently started to make use of a wide arsenal of its tools to facilitate owner-led development.

6.4 Compulsory Participation in Hydropower Development

In this section, I look at four recent cases in detail, all of which involved directives of use for hydropower development by local owners. The waterfalls and rivers dealt with in these cases are all located in the county of *Hordaland*, in south-western Norway. Three of the cases involved small-scale hydro-power which some of the owners wanted to develop themselves, while the fourth was a case when the owners were also considering a development plan which would involve cooperation with an external energy company. The cases are particularly useful because we have access to data

on how the process of consolidation was perceived by the owners themselves.[77]

In the following, I present each case separately, focusing on the organisational issues, the solutions prescribed by the court, and the reception among the parties.

6.4.1 *Vika*

The case was brought before the consolidation court in 2005, by riparian owners who had all agreed to pursue hydropower development.[78] The owners disagreed on how to organise the owners' association, and on how the shares in this association should be divided among the properties involved, 15 in total.[79] However, a consensus had formed regarding the main organisational principle, namely that the owners would rent out their waterfall to a separate development company which every owner would have a right (but not a duty) to take part in.

The parties in *Vika* were closely involved in the consolidation process and the statutes for the owners' association were based on suggestions made by the owners themselves. The main point of disagreement concerned how the shares in this association should be allotted, a question that was made more difficult by the fact that some owners benefited from old water-mill rights in the river.[80]

In the end, the consolidation court held that these rights were tied to the form of use relevant at the time they were established. Hence, the rights were not regarded as having any financial value and could therefore be extinguished without compensation.[81]

There was also some disagreement about whether the voting rights in the owners' association

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77 This material is due to Sæmund Stokstad, who conducted interviews for his master thesis on land consolidation, devoted to the study of how consolidation measures can be used to facilitate hydropower development. See Sæmund Stokstad, 'Bruksordning ved Jordskifte i Samband med Utbygging av Småskalakraftverk' (Master Thesis, 2011).

78 *Vika* 1210-2005-0014, [2005] Haugalandet og Sunnhordland jordskifterett.

79 See Stokstad (n 77) 25-28.

80 See Stokstad (n 77) 26.

81 As provided for in the Land Consolidation Act 1979, s 2.

should be tied to the number of shares belonging to each owner, or if the owners should simply be allotted one vote each, irrespectively of their share of the relevant riparian rights. The consolidation court went for the first option.[82] However, the way shares where allotted deserves special mention. In particular, the court decided to take into account that some additional water entered the main river from smaller rivers where only a sub-group of the owners held riparian rights.[83] These owners' share in the association was increased accordingly. This is surprising in light of Norwegian water law, as ownership of riparian rights usually arises from ownership of land along the relevant riverbed, regardless of where the water itself comes from.[84] Hence, this is an illustration of how the land consolidation court can opt for organisational solutions that seem rational given the concrete circumstances, even if they do not follow from any generally recognised principles of law.

The statutes of the owners' association in *Vika* also contains a second interesting provision, based on a suggestion made by the owners.[85] This provision states that all rights in the association are to be tied to the underlying agricultural properties so that they can not be sold separately. In Norway, a division of agricultural property requires permission from the local municipality.[86] In recent years, however, this protection of farming communities has grown weaker in practice. It is interesting, therefore, that the owners in *Vika* decided that a dissociation of water rights from the underlying agricultural properties should be expressly forbidden.

According to Stokstad, a general consensus had developed among the parties whereby the land consolidation procedure was seen as a great success.[87] It allowed for an orderly and fair decision-making process regarding the conflicts that had arisen. The resolution of the case followed

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82 See Stokstad (n 77) 26.

83 See Stokstad (n 77) 26.

84 See the Water Resources Act 2000, s 13.

85 See Stokstad (n 77) 26.

86 See section 12 of the Land Act 1995.

87 See Stokstad (n 77) 39-41.

continuous interaction between the owners and the court, where everyone felt they had been given an opportunity to have their voice heard.

Initially, the situation had been tense, but the consolidation process had resolved all conflicts. Some owners also pointed to the fact that the main hearing had been physically conducted in the local community, in a meeting hall that was neutral yet familiar to the owners. This also gave them a feeling that they were meant to actively partake in the decision-making process.

When the interviews were conducted, 5 years after the case was concluded, the owners also appeared to agree that the association was working as intended and that the climate of cooperation among the owners was good. The hydropower scheme itself had been completed in 2008, yielding an annual production of around 15 GWh per year, providing enough energy for around 700 households.[88]

Moreover, following the experience of land consolidation, a culture of deliberation towards consensus had developed among the owners. The owners now emphasised the search for a common ground, aiming to reach agreement on important issues. This was reflected, for instance, in the fact that the owner who contributed the land for the power station was given a generous annual fee, in addition to his compensation as a riparian owner.

According to Stokstad, this fee exceeds what he might have gotten if this decision had been left to the discretion of the consolidation court.[89] Hence, it reflects a premium that the owners were now willing to pay to ensure agreement and a continued good climate for cooperation.

In light of this, the case of *Vika* serves as an excellent example of how land consolidation can empower local communities and enable them to embark on substantial development projects.

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88 See Stokstad (n 77) 41.

89 See Stokstad (n 77) 40.

6.4.2 *Oma*

The case of *Oma* was brought before the courts in 2006.[90] The case involved four properties. The owners of three of them, A, B and C, wanted to develop hydropower, while the fourth owner, D, was opposed to the plans.[91] Rather than attempting to expropriate the necessary rights from owner D, owners A, B and C took the case to the consolidation court. They argued that development would benefit all the properties involved. Moreover, they pointed out that an alternative project which would not make use of owner D's rights would be less profitable. Hence, in their view, the consolidation court should compel D to cooperate in a joint scheme. Owner D protested, arguing that the project would not economically benefit him, and that it would also be to the detriment of his plans to build holiday cottages in the same area.

The case of *Oma* differs from that of *Vika* since the question of whether it was appropriate to use compulsion was more prominent. In the end, the court agreed with the majority that an owners' association with compulsory membership should be set up.[92] To justify the use of compulsion against D, the court commented specifically on owner D's plans for building holiday homes, noting first that he was unlikely to be given planning permission, and secondly that a hydropower plant would not adversely affect such plans in any significant way.[93] Moreover, the court noted that while owner D's rights were relatively minor, they were quite crucial for the profitability of the project, particularly because owner D controlled the best location for the construction of a dam to collect the water used in the scheme. Overall, the court's conclusion was that a joint hydropower scheme would be a better option for everyone than a project that did not include owner D's property.

The question then arose as to how the shares in the owners' association should be divided

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90 *Oma* 1200-2006-0015, [2006] Nord- og Midthordaland jordskifterett.

91 See Stokstad (n 77) 36-39.

92 In doing so, the court relied on s 2 c) of the Land Consolidation Act 1979.

93 See Stokstad (n 77) 36-37.

among the owners and their land. In regard to this question, the court departed significantly from one of the basic principles of Norwegian hydropower law. This is the principle stating that no right to hydropower can be derived from being in possession of land suitable for the construction of dams or other facilities necessary to exploit riparian rights.[94] The land consolidation court broke with this principle in the case of *Oma*, deciding instead to set the value of the land designated for construction of a dam and a power station at 6% of the total value of the rights that went into the owners' association.[95]

The proportion of financial benefit and decision-making power awarded to the unwilling owner *D* thus increased accordingly, since these rights were all held by him. In fact, his share went from 1.75% to 7.75%, so the consolidation process itself led to a situation where he would have a far greater incentive for supporting the development. Hence, the decision in *Oma* was more to the benefit of owner *D* than any other among the involved parties. If the rights in question had been expropriated, *D* would have been given next to nothing in compensation and would lose his rights forever. Instead, the solution prescribed by the consolidation court gave him a lasting and substantial interest in local hydro-power.

According to Stokstad, interviews conducted with the parties show how the process and outcome of consolidation served to create a much better climate for further cooperation.[96] Indeed, when the interviews where conducted, 4 years after the courts' decision, owner *D* had changed his mind and was now in favour of the development. Moreover, he had also decided that he wanted to take part in the development company. He was not obliged to do so, but his right to take part was ensured by the agreement with the development company, regulated by the statutes of the owners'

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94 The principle is well-established in expropriation law, going back to the Supreme Court decision in *Hosanger, Haus og Hamre kommunale kraftverk v Askild Fusesen Vare and others* Rt-1922-489. The principle was challenged unsuccessfully following the increased scale of development after the Second World War, as discussed in Chapter 5, Section 5.4.2.

95 See Stokstad (n 77) 36.

96 See Stokstad (n 77) 44-45.

association.[97]

The owners all reported that the consolidation process had been very successful and that the court had listened to them, allowing everyone to have their voices heard. Moreover, some owners reported that the court had cleverly maintained a bird's eye view on the best way to develop the land in question, ensuring both long term benefits to all involved properties as well as creating an improved climate for cooperation and mutual understanding. The consensus was that making concessions to owner *D* was appropriate and had been in the interest of everyone involved. In 2011, the hydropower project was completed and today its output is roughly 5 GWh per year.[98]

Oma serves as a good illustration of how consolidation can be an effective instrument for facilitating locally controlled development, also in cases when this requires the use of compulsion against some owners. Interestingly, in this case the successful outcome appears to be partly due to the fact that the consolidation court actively used its discretionary powers when deciding how to organise joint use. This power allowed them to deviate from established rights-based legal doctrine and adopt a more context-dependent approach, pursuing solutions that better suited the situation. Interesting legal questions arise in this regard, particularly regarding the extent to which the consolidation court can deviate from sector-based doctrines when organising development.

For instance, one may ask what would have happened if the majority owners in *Oma* had appealed the decision to the regular courts on the basis that *D* was awarded too many shares in the owners' association. Would this be regarded as a question of the court's interpretation of the law regarding the owners' *rights*, or would it be regarded as a discretionary decision regarding the best way to organise development? If a rights-based perspective was adopted, the decision would almost certainly be overturned. If not, it would seem beyond reproach, as an exercise of the

97 The owners' right to take part in the development company is obligatory in some situations, pursuant to Land Consolidation Act 1979, s 34 b) no 3.

98 See Stokstad (n 77) 45.

consolidation courts' discretionary power.[99]

A second interesting question that arises is whether or not consolidation can work as well as it did in *Oma* in cases where conflicts run more deeply, or where the parties favouring development are a minority among the owners. The next two cases I consider shed some light on this issue.

6.4.3 *Djønno*

This case was brought before the courts in 2006, by a local owner A who wanted to develop hydropower in a small river crossing his land, the so called *Kvernhusbekken*.[100] A wanted the court to help him implement a hydropower project, by compelling the other owners, B, C and D, to rent out their share of the waterfall on terms dictated by the court.[101] The starting point for the other owners was that they did not want hydropower development. Hence, they were not willing to rent out their rights to owner A or any other developer. There was also a dispute regarding the ownership of the waterfall rights, with A believing initially that he controlled a large majority. It soon became clear that this was not the case. As it turned out, owner A's share of the riparian rights was only 5%, so his financial interest in hydropower was in fact very limited compared to the owners who did not want any development.

On the other hand, the land rights needed for the necessary physical constructions were predominantly held by owner A alone. For this reason, A maintained that the court should compel the other owners to allow him to go ahead with his development plans. The court agreed that hydropower would be a rational use of the waterfall, and they initially assessed the case against the rules relating to compulsory joint action.[102] This could have resulted in concrete directives

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99 Recall from the discussion in the previous section that consolidation decisions can only be appealed to the regular courts on procedural grounds or on the ground that the law has been applied incorrectly.

100 *Djønno Indre Kaland* 1230-2006-0010, [2006] Indre Hordaland jordskifterett.

101 See Stokstad (n 77) 28-31.

102 See the Land Consolidation Act 1979, s 2 e).

regarding how the hydropower development should be carried out, including at the level of specific investments and building steps.

However, the court eventually held that this approach would place too much of a burden on the owners opposing hydropower. Hence, they chose to resolve the case using directives for joint use. By doing so, the court also restricted the scope of their decision to the establishment of an owners' association that would be responsible for renting out the rights.

The model used for the owners' association was similar to the one the court adopted in *Oma*. This included allocating shares in the owners' association in a way that took into account the special importance of land needed for physical constructions. In total, this land was held to correspond to 6% of the shares in the association. Since these rights were held by owner A alone, his share in the association doubled. In addition to this, owner A purchased the shares from owner B, so that his total share ended up amounting to 22%. Still, for the majority, membership in the association was imposed on them against their will.

The wording of the statutes for the association took into account that it would be run by a majority of unwilling shareholders. In particular, it was stated clearly that the association was going to rent out the rights in the waterfall such that hydropower could be developed. In *Oma* and *Vika*, by contrast, the statutes only stated that this was the *purpose* of the association, leaving the shareholders with the freedom to determine whether or not to go through with development.

In interviews, those who were compelled to take part in the association against their will expressed dissatisfaction and surprise at the result. Moreover, while the association had apparently tried to be loyal to the wording of the statutes, by looking for interested developers, there had been no willingness among the majority to engage actively with this work. No deals had been made, no separate development company had been set up, and the conflict among the owners was ongoing. Hence, while the case of *Djønno* is an example that consolidation can be used even when it involves compulsion against the majority of owners, it also serves to illustrate that the chance

of a successful outcome may be more limited.

The question arises as to how such cases should be dealt with by courts in the future. According to owner *A*, the problem was that the directives of use were not specific enough. In his opinion, the directives should not have been restricted to merely setting up an owners' association for renting out the rights. In addition, the court should have actively engaged also with the question of how the development company should be organised. Among the majority owners, on the other hand, the prevailing feeling was that the development in question, which they would be required to partake in against their will, was more or less doomed to fail from the start.

Hence, the case of *Djønno* illustrates that when the courts are not prepared to actively organise the development company, compulsory participation might fail in practice unless a majority already agrees that development should take place.

6.4.4 *Tokheim*

This case was brought before the consolidation court in 2008, by the owners of *Tokheimselva*.[103] The five involved owners all agreed that development should take place, but they disagreed about how it should be done and about the proportion of each owners' share of the riparian rights.[104] Some owners argued that development should be organised by the owner community, while other owners thought it would be best to rent out the rights to an external developer. The case was further complicated by the fact that the proposed development was so substantial that it might require a transferral concession pursuant to the Industrial Licensing Act 1917. As discussed in Chapter 4, such a concession can only be given to a company in which the state controls at least $\frac{2}{3}$ of the shares.[105]

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[103] *Tokheim* 1230-2008-0020, [2008] Indre Hordaland jordskifterett.

[104] See Stokstad (n 77) 34-36.

[105] See the discussion in Chapter 4, Section 4.3.

The consolidation court eventually decided to set up an owners' association. However, unlike in the previous cases I have considered, there was no adjustment made for land that would be needed for physical constructions. Instead, the statutes state that owners will be entitled to a lump sum estimated on the basis of the damages and disadvantages that a concrete hydropower project will bring. This marks a different kind of departure from established practice in expropriation law; specifically, it rejects the established principle that owners can be compensated on the basis of *either* the value of their waterfalls *or* the damages and disadvantages caused by the project, not both.[106]

In other respects, the statutes for the owners' association are similar to those adopted in the previously considered cases. Specifically, the statutes do not resolve the controversial question of how to carry out development. Moreover, nothing is said about the extent to which interested owners should be given a right of first refusal with respect to the development rights held by the owners' association. This was an important issue raised by the case, but the consolidation court explicitly decided not to address it.

In interviews, the owners expressed that they were happy with how the case was dealt with by the court.[107] Everyone was heard and the owners' association was set up in consultation with the parties. However, the main issues were still unresolved after the case concluded. Some of the owners expressed criticism against the court for not engaging more actively with the most pressing issue.

The case of *Tokheim* serves to illustrate that established practices of consolidation, while being well received and understood by local owners, face some new challenges in relation to hydropower, challenges that consolidation courts might be reluctant to take on. It seems that the court in

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106 See for instance the case of *Endre Vange and others v Fellesskapet Vikfalli* Rt-1971-1217. See also the discussion in Chapter 5, Section 5.4.2.

107 See Stokstad (n 77) 43-44.

Tokheim felt that it was not in a position to assess the question of what kind of development would be best. The court was particularly cautious about expressing an opinion about the legal status of the project with respect to the relevant licensing legislation. The court did not, in particular, form an opinion about whether it would be possible for local owners to carry out their own large-scale development in a waterfall subject to the Industrial Licensing Act 1917.

It remains to be seen whether such an agnostic attitude can be maintained by the consolidation courts, as local owners increasingly turn to them for help in resolving disputes regarding hydropower. Moreover, it will be interesting to see how the new Land Consolidation Act 2013 will influence case law in this area. It seems that a case like *Tokheim* could benefit from the court taking a broader view, possible even by including government bodies as parties in the case, to clarify the licensing status of the proposed development.

6.5 Assessment and Future Challenges

The cases discussed in the previous section show that the system of land consolidation can indeed work as an alternative to expropriation in the context of hydropower development. At the same time, the cases suggest that the land consolidation courts may find it hard to deliver effective directives if owners disagree fundamentally about how their water resources should be managed. In addition, one may question the effectiveness of land consolidation courts in contexts when rules and regulations from other areas of law come into play. It seems, in particular, that the land consolidation courts might be overly cautious about implementing solutions that they fear will contradict sector-specific provisions. In so far as sector-specific rules disadvantage owners and benefit external commercial interests, as in the case of hydropower, the worry is that land consolidation courts will become impotent as soon as they notice a potential conflict with large-

scale interests.[108]

Paradoxically, the potential weaknesses of the land consolidation courts in this regard may be enhanced by the fact that they are not authorised to make use of appropriate forms of compulsion against owners, on pain of interfering too much in property as an individual right. A lack of power to compel threatens to undermine the effectiveness of the land consolidation court, thereby making it possible to argue that the public interest in development cannot be realised through the use of consolidation measures. Hence, one may decide to fall back on expropriation, to the detriment of all owners, including those that oppose development by consolidation.

In fact, there is reason to think that the consolidation framework is currently quite vulnerable to this mechanism. The clearest indication is the Supreme Court case of *Holen v Holen*, concerning a conflict between a small quarry and a neighbouring farmer.[109] In order to continue extracting his minerals, the owner of the quarry would have to interfere with the property of a neighbouring owner, who was using his land for more traditional forms of agriculture. The farmer was unwilling to reach an agreement with the quarry owner, so the latter brought a case before the land consolidation court. The court noted that it would be possible to reach an accommodation that would benefit both parties and issued directives of use that would allow the quarry to continue its operations.

The directives gave the quarry owner access to the farmer's land, who was in turn granted replacement property from the quarry owner. The consolidation court also noted that the quarry would, in the future, be likely to extract minerals that belonged to the farmer. Hence, a directive of use was issued that gave the quarry owner a right to extract these minerals, provided he paid market value for them.

Hence, not only was the farmer awarded replacement property for agricultural purposes, he was also granted a share of the benefits that would result from the continued operation of his

[108] As far as I am aware, there is not yet any case law on this issue.

[109] *Holen v Holen* Rt-1995-1474.

neighbour's quarry. This was clearly beneficial to his property, economically speaking. The owner himself, however, objected to the arrangement. The Supreme Court found in his favour. This was not because they sanctioned his right to block the continued operations of the quarry, or because they thought the replacement property or the payment model was inappropriate. Instead, the Court held that the right to extract the farmer's minerals could not be transferred to someone else by a consolidation measure, even if the farmer was ensured payment. This, the Court held, was a form of compulsion that fell outside the scope of use directives in land consolidation.[110]

The perspective underlying this decision is interesting, because it underscores a reluctance to use land consolidation in what would otherwise be a fairly typical economic development scenario. However, *Holen v Holen* was decided in 1995, and as I have already mentioned, the law has developed in recent years in the direction of increased use of land consolidation as an alternative to expropriation. However, I think *Holen v Holen* reminds us that critics might still be able to raise convincing formal objections against compulsion in land consolidation, on the basis of earlier case law. More generally, the exact relationship between land consolidation and expropriation law, including the constitutional property clause, appears to be an increasingly relevant open question that awaits further clarification.

Some argue that land consolidation can offer less protection to owners than administrative expropriation.[111] Admittedly, the property protection offered in the context of land consolidation has a different flavour. But that is not to say that it is weaker. Granted, an administrative expropriation procedure can offer more extensive administrative safeguards. A range of procedural rules must be observed, pertaining to notification to the owners, impact assessments, a duty to provide guidance and reasons for the decision, and a possibility (sometimes several) for administrative appeal.[112]

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110 See *Holen* (n 109) 1481.

111 See Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' (n 1) 318-319.

112 See **dyrkolbotn15b**

Then, after an expropriation order has been granted, the owner can still challenge it before the appraisal courts, in principle at the expropriating party's expense.[113]

In practice, however, the administrative expropriation procedure often leaves the owners marginalised, as they are overshadowed by more powerful stakeholders. This is particularly clear in situations when expropriation arises as a result of more comprehensive planning or licensing procedures, such as in the context of hydropower development.[114] In addition to this, the possibility of raising validity objections before the courts in expropriation cases is mostly a theoretical one in Norway.[115] It is very unusual for such objections to be made successfully, as the courts typically defer to the discretion of the administrative decision-maker in expropriation cases.

More generally, the narrative of expropriation is one where the owners may have to endure a loss in the public interest, for which they must be compensated as individuals. By contrast, the narrative of consolidation is one where the owners themselves are tasked with making a *contribution* to the development project, in the best interests of both the local community and greater society. In particular, the owner's role is no longer than of a passive *obstacle* to development, but is transformed to that of an active *participant*, one who might have to be nudged to fulfil their potential. In addition, the properties as such receive recognition as important research units, independently of the interests of their current owners. Moreover, the owners as a *group* come into focus, as the process is meant to facilitate rational *collective* action.

This is achieved by placing owners in a partly deliberative, partly adversarial, context, which not only tolerates but also presupposes and critically depends on their active input to the decision-making process. In addition, the *grounds* for imposing compulsory measures that interfere with

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113 See **dyrkolbotn15b**

114 See the discussion in Chapter 5. See also **dyrkolbotn15b**

115 For a discussion on this with further references, see Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015) 384-386.

property rights need to be anchored explicitly in the social functions of the affected properties. A measure is warranted only when it enhances property values, possibly also in the sense of improving conditions for the communities that takes their livelihoods from the affected properties. Clearly, this broader sense in which consolidation serves to protect property is not matched by any administrative safeguards in expropriation law.

Hence, I conclude that land consolidation is highly attractive, even when it involves compulsion directed against owners. In a system based on private property rights, it seems only reasonable that owners and their communities retain their position as primary stakeholders, even if the development is large-scale, takes places in the public interest, and is imposed by compulsory means.

It should be noted that the positive assessment of consolidation as an alternative to expropriation is premised on the fact that property in Norway is distributed in an egalitarian manner among the members of local populations, especially in rural areas. In so far as land consolidation is used outside of this context, even in urban Norway, the question is whether the processes empowers the community as opposed to merely the landowners.

As long as consolidation is used to complement other organs for land use planning and local decision-making, without coming into direct conflict with such organs, it is tempting to see this mainly as a worry that land consolidation is an incomplete solution. It might give owners enhanced protection, specifically by facilitating a practical alternative to expropriation, but it does so in a way that neither weakens nor strengthens the position of non-owners.

However, this 'neutral' position might be oversimplified. Specifically, the use of land consolidation can have important indirect effects, for instance because it makes implementation of public policies more difficult in practice. Or it could undermine local democracy by giving owners an incentive to use land consolidation in order to remove certain property issues from the broader political agenda.

On the other hand, it also seems wrong to assume that increased protection of owners cannot

possibly benefit non-owners. As long as the owners are themselves members of the local community, the fact that they are offered increased protection through land consolidation should positively affect the community as a whole. As I discussed at length in Chapter 2, the social function theory of property asks us to recognise this effect. Indeed, a local community represented by a handful of its own property owners might be in a much better position to participate in decision-making than a local community represented by non-local politicians, expert planners, or judges.

In addition to this comes the fact that the land consolidation process already includes participation from the latter category of non-locals. Moreover, the judge is required to consider what is best for the properties, not the owners. Hence, on a human flourishing account of which functions property should fulfil, the interests of non-owners need to be taken into account. This not only emphasises that broader community interests are relevant, it also reinforces the idea that the owners participating in the process are in fact representatives of something more than their own self-interest.

That said, it seems that if the scope of consolidation is broad, or the community representation is narrow, consolidation might itself come to lack legitimacy. Hence, in some contexts, it would perhaps be advisable to further extend the class of persons that can be recognised as having legal standing in consolidation disputes, to include non-owners without formally recognised property rights (e.g., neighbours, tenants or employees). However, there are reasons for caution in this regard.

First, there are obvious pragmatic concerns related to the increased cost and complexity of the procedure. From the Norwegian experience, it seems that a few hundred parties would be manageable, but more than that takes us to uncharted territory. Second, moving away from property as a basis for legal standing in consolidation might make it easier for powerful external actors to unduly influence the process. Indeed, it seems that the presence of new actors, even local ones, might make consolidation a less effective instrument for protecting those that are most intimately

affected and most in risk of marginalisation.

This too can be an indirect effect, arising also from good intentions. For instance, if a large-scale development involves razing an impoverished part of town, it will not be a good idea to give full legal standing in consolidation to the employees of the development company that stands to benefit. This would be so even if the employees could be classified as "locals" under some imprecise standard for determining legal standing, not based on property.

The overarching question is how to ensure that land consolidation courts remain respectful towards owners and their communities, while providing a good basis for equitable and participatory decision-making with a broader focus. In Norway, any legal person with a right to expropriate may now act as a party to a consolidation dispute, so this challenge is becoming increasingly pressing. What will the role of the new parties be? Will they be embedded in the legal framework in such a way that they become potential partners that owners can rely on to implement projects in the public interest, or will they be regarded as the main stakeholders, whom the land consolidation courts should assist so that they may successfully impose their will on recalcitrant owners? It will be very interesting to follow this development further, to see if the promise of using land consolidation to regain legitimacy for economic development under compulsion can be fulfilled.

How this story will unfold in Norway might also shed interesting light on the question of whether the Norwegian system of land consolidation for economic development could work well in other jurisdictions. In small-scale rural settings where property is distributed evenly among local people, the procedure might be expected to work well. However, in other contexts, the challenges that now face the Norwegian system might be even more acute. Even so, the underlying idea and premise of consolidation as a means to organise compulsory development seems to have great potential.

Specifically, these ideas tie in nicely with the theoretical argument made in Chapter 3, in favour of alternatives to expropriation based on local institutions for self-governance. As noted by Ostrom and others, congruence with local conditions is crucial to the success of such institutions.

Hence, no single institutional framework is likely to work in all cases. However, the idea of having a designated institution to interface between formal organs of state and decision-making taking place in communities might have wide applicability. At a high level of abstraction, this appears to be the key idea of the Norwegian system of land consolidation.

The consolidation procedure is temporary, but consolidation leave a lasting effect on how decision-making takes place within the affected area. A consolidation court could even set out to *design* a local institution for self-governance. This institution can then subsequently be tasked with resource management after the judicial proceedings come to an end. When the consolidation courts in Norway set up owners' associations to manage local water resources, this represents an instance of such an idea.

More generally, the consolidation procedure is invariably interacting with (informal) frameworks for decision-making at the local level, by modifying them, reinforcing them, or replacing them altogether. Hence, the consolidation procedure also serves to give formal recognition to a level of governance that might otherwise go unnoticed. Applied more generally, this can become a way for the law to approach the theory of common pool resource management, to establish a mechanism for formal integration of its insights into the legal order. At this level of abstraction, the idea of judicially administered consolidation of local property could potentially have a very wide range of applications, across a range of different jurisdictions and property contexts.

These observations are preliminary at this stage, but I think they point to a promising direction for future work. The intuitive appeal of the consolidation idea is significant, especially because of its potential as a means to enlist the help of a judicial body to build and improve democracies from the ground up - starting with people in their communities, and their link to the properties they rely on for their subsistence and well-being.

6.6 Conclusion

The Norwegian institution of land consolidation is a very broad one. Specifically, it also includes measures seeking to compel owners to use their property in the public interest. This procedure is conceptualised as a service to owners, with a no-loss guarantee in place to ensure that consolidation measures are only implemented when the benefits make up for the harms for all the involved properties individually. As such, consolidation can be a powerful alternative to a taking for economic development, in the public interest and carried out with the active support of the owners themselves.

In practice, however, land consolidation works best when there is a basic agreement among the owners that development is desirable, or at least tolerable. The procedure as it currently exists in Norway can be much less effective when there is deep disagreement about whether or not development should proceed at all. Hence, to make the proposal even more suited to replace expropriation for economic development, it might be necessary to enhance the power of the land consolidation court, also in the direction of extending its authority to compel owners to engage with development projects that they fundamentally disagree with.

If this is done, it is important to simultaneously ensure that land consolidation remains a service to the owners. That it will cannot be taken for granted. Indeed, recent changes in the law grant developers the right to act as parties in consolidation cases and to bring cases before the courts themselves, if they favour it over expropriation. On the one hand, this will enhance the power of the land consolidation court, making it more effective in dealing with cases that involve external parties. On the other hand, there is a possibility that the presence of new and powerful stakeholders will change the nature of the land consolidation process itself, so that it transforms from a property-enhancing institution for self-governance into a planning and implementation instrument for developers.

Despite this, I believe this Chapter has demonstrated that the land consolidation regime in Norway functions in a way that sheds interesting light on collective-action alternatives to expropriation. Moreover, land consolidation has been shown to be a highly versatile framework, much more so than other suggestions, such as the land assembly districts proposed by Heller and Hills.[116] Specifically, it seems that the institution of land consolidation can provide a useful kind of democracy-on-demand for decision-making about economic development, in a way that ensures some balance between the autonomy and interests of owners, local communities, and society as a whole. In this vision, external commercial actors are at worst going to be partners in crime, at best partners in progress. They will not, however, be allowed to dictate the terms of development.

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

7 Conclusion

This has been a thesis in two parts, each of which approached the issue of economic development takings, but which have done so in two very different ways. The first part took a theoretical approach, starting from the notion of property itself, to answer the question of *why* it should be protected. This, in turn, gave rise to a framework for assessing the legitimacy of economic development takings, and for formulating alternatives to it that could obviate the need for dispossessing current owners.

The second part of the thesis approached the issue of legitimacy concretely, by giving a case study of takings of waterfalls for hydropower development in Norway. The political, social and economic context was also analysed, leading to an application of the Gray test formulated in the first part of the thesis. Moreover, the case study considered the possibility of alternatives to expropriation, by assessing the Norwegian institution of land consolidation, which is now used extensively by local owners who wish to undertake hydropower development themselves.

To conclude the thesis, I will now take a step back to consider two broader threads that I believe runs through my work, pertaining to the nature of property and how to maintain it as force for good in the world.

7.1 Property Lost – Takings and Exclusion

The law is rightly sceptical of allowing things to get too theoretical. After all, the law is not in the business of settling philosophical debates. Rather, its main responsibility is to deliver effective management of disputes, involving concrete legal persons or governments. Arguably, this has played a significant role in shaping the traditional approach to the legitimacy issue in the law of takings.

It is clear that by focusing on the individual losses of owners following a takings, the law makes things easier for those called to administer it. Moreover, by assuming that all losses can be quantified in financial terms, the law's standard can be at least partly automated. The potentially broad question of legitimacy has been reduced to the question of how to award compensation, for which the ostensibly neutral idea of "market value" appears to provide an obvious starting point. A large chunk of the remaining work, in turn, can be delegated to the appraisers, allowing the courts to get on with other business. In addition to being effective, this also comes with the added bonus of allowing the courts to distance themselves very clearly from the political undertones of the legitimacy question.

This simplified approach to legitimacy is prevalent, but I believe it needs to be rejected. The reason, as argued in the first part of this thesis, is that property itself cannot be drawn up as narrowly as the compensation approach presupposes. The legitimacy of property interference cannot be understood in mechanical terms, as a matter for the appraises, regardless of how much weight we want to place on the value of efficiency and the ideal of deference to political decision-making. Specifically, unless the issue of legitimacy is recognised as being far more complex than pertaining solely to the question of calculating market values, there will be a significant mismatch between what property is and what the law pretends it to be.

In a setting were takings are rare and happen only in extraordinary situations, such a mismatch might be tolerable. Arguably, the strong commitment to the sanctity of property by early writers

such as Blackstone, apparently conflicting with historical records about takings practice in their day, could be sustained precisely because takings were regarded as the exceptions that made up the norm. Blackstone's claim to accuracy could be simply this: that expropriation took place seldom enough to permit certain concessions to expediency when it did happen, without this detracting from the greater picture of property as a sacred right.

Such a narrative is no longer plausible in a world where the state has expanded its activities so much that interference in private property, rather than being the exception, has become the norm. Hence, it now seems necessary to also let the complexities of property as a social phenomenon enter the narrative of property in the law, especially in the law of takings. This is particularly important if the idea of property as a fundamental right is to have a future. If the law continues to insist that property is nothing more than a form of entitlement protection, there is perhaps even a case to be made that the notion might as well be done away with in its entirety.

In the first part of this thesis, I presented a theory of property which I think suggests that this would be a tragedy, particularly for marginalised groups who are in need of protection against economic and social elites. Importantly, while international law and human rights conventions offer important clarification and protection at the level of principles, what property provides is an imperfect, yet very powerful, framework for implementing such principles at the local level. This is property's promise, which it can only keep if it is recognised as having social functions going well beyond the protection of individual entitlements.

Arguably, principles of human rights should even be recognised as inhering in property as such, not only as mediated by the power of states. A worry often voiced as a counterargument for direct horizontal application of human rights is that it can serve as an excuse for the state to do nothing. Therefore, it is worth emphasising that if the owners fail to deliver on basic rights, the state is still responsible. However, the converse is equally true: if states fail, then owners still have obligations.

If there is no distinction between owners and states, by contrast, failure in one is also failure in

the other. This is dangerous, particularly if proprietary power is exercised only by a small group of people, be they commercial leaders or powerful government officials. Property should therefore be widely distributed among the population, to be rendered as a provider of basic rights and an anchor of democracy.

The first chapter of this thesis explored this idea in depth and argued that a broader notion of property needs to be acknowledged also by the law, particularly in the law of takings.[1] If property serves a broad social function by sustaining a community and aiding in the delivery of basic rights to all its members, transferring that property to a non-local commercial owner is not merely a redistribution of entitlements from those who have few to those who have many. It is also the destruction of property, as it undermines property's most significant functions in relation to the norm of human flourishing. In such cases, therefore, the property is not only taken, it is lost.

Arguably, takings of this kind are currently being carried out in Norway, to the benefit of large energy companies. Waterfalls are still nominally considered private property, belonging to members of the rural communities in which the water resources are found. However, as shown in Part II of this thesis, the practice of taking waterfalls from local communities has become so insensitive to the plight of owners that the law itself is ambiguous about whether private ownership of water resources have much real content at all.

Even so, it is not as if proprietary power is no longer exercised over water resources. Quite the contrary. The commercial companies that acquire waterfalls are quick to turn them into commodities whose primary purpose is to turn a profit. However, the water resources have now been encapsulated in development licenses; today, licenses from the government, not waterfalls as such, are the key assets in the hydropower production sector. The nature of property has thus transformed; ownership of hydropower has become a legal fiction, arising from a bundle of papers with

[1] This is so not only because it can block takings that are offensive to social functions. It is also true because it can help increase the legitimacy of takings and other property interferences that serve such functions because they are grounded in fundamental norms of property rather than the politics of power groups.

numbers on them, not from physical and social proximity to the underlying natural resource.

The result is that the notion of property backing up this regime is now so thin that it arguably cannot be distinguished at all from the raw political and economic power that backs it up and redistributes it more or less at will. As such, it is also no wonder that narratives of local property give way to narratives based on thinking about water resources as "belonging to the public". This is a politically defensible way of talking, to mask the reality that water resources are managed according to the logic of markets and powerful interest groups, both striving to protect their dominion over the fruits of the land. For these owners, no doubt, property primarily consists of a right to exclude.

Due to this dynamic, the case of Norwegian waterfalls is perhaps an example of how illegitimate takings can do more harm than simply deprive some owners of valued resources. If legitimacy is not ensured and takings become systematic to the point of automation, property will eventually also be destroyed, stripped of all social functions except those serving the commercial and political interests of its powerful proprietors. Such a system might well leave us with the impression that property is indeed little more than theft, maintained in the law only as a fraud.

7.2 Property Regained – Givings and Participation

The converse of a taking is a *giving*. In the US, this term is used to refer to situations when private property owners benefit from state actions involving property. For instance, it might be characterised as a giving if the state allows someone to purchase property cheaply, or if regulation makes some property appreciate in value. Arguably, and analogously to the case of takings, there is a case to be made that private owners should normally be obliged to pay for givings from the state.

The issue of when this is appropriate, if at all, will not be discussed here. Instead, I wish to direct attention at the terminology itself, and its subtle conceptual commitment to a top-down

way of thinking about both takings and givings. Indeed, consider what happens if we turn the terminology on its head. This is not an implausible conceptual shift. After all, if the state takes property, the current owners will have to give it up.

The owners' act of giving, however, is rarely if every given any recognition or attention in the way we approach takings. Plainly, the owners' active participation as a giver – not merely an injured party – is considered irrelevant. Why is that? The obvious answer is that since the giving takes place under compulsion, it does not express any intention to give. However, there are many situations in life where actions are compelled, but where the person taking that action still gets some credit for it.[2] Moreover, the owners can clearly decide to be more or less cooperative when faced with the government's wishes for their property.

By shifting attention towards the choices that the owners have in this regard, we can arguably also find a path towards legitimacy that does not involve giving up all the state's power to compel owners in the public interest. Indeed, even a purely symbolic recognition of the owners' role and the importance of their choices in dealing with a takings request, can serve to enhance subjective legitimacy. However, quite apart from recognising the constructive role that owners can play in the existing system, thinking about takings as givings also suggests the possibility that owners should be granted more choices and asked to take part more actively in the proceedings.

In cases of economic development, this way of thinking seems particularly appropriate. As they contribute to the project by giving their property, it seems only fair that the owners should have a stake also in the planning and the continued use of their property for economic gain. For instance, it might be appropriate to offer owners shares in the development company, or to make sure that the property is taken under a leasehold rather than by a full transfer of title. Better yet, why not allow the owners themselves to deliberate on how they wish to honour their commitment to the public, to formulate their own plans and implement their own solutions, based on continued

[2] Paying taxes, for instance, is typically associated with being a good citizen.

interaction both among themselves and with representatives from the collective.

This is a vision of the role that owners can play that also arises quite naturally from the idea that contributing is an obligation. Plainly, the other side of this coin is that when owners respond to the public interest by committing their property to socially and economically productive uses, this should be recognised as a giving rather than a taking. Interestingly, as this thesis has shown, this abstract and highly idealistic idea is in fact (partly) implemented through the system of land consolidation that we find in Norway.

The case study conducted on this point was linked specifically to the institutional alternatives to expropriation considered in the first part of the thesis. There it was argued that local self-governance is a good way to obviate the need for expropriation altogether. This is also usually the premise in the context of land consolidation. However, as noted in this thesis, the land consolidation proposal also leaves room for the public to *compel* owners to come together and participate in specific endeavours. If a proposed development is judged as being beneficial to their properties, the owners may be stripped of their holdout power, not only as individuals but even as a group.

In light of this, land consolidation can indeed replace expropriation, provided our understanding of what property is, and should be, is broad enough to say that the purpose is also in the interest of the properties involved. This limitation, expressly encoded in the law of consolidation in Norway, is interesting also as the theoretical level, because it makes the conceptual content of property directly relevant to determining the extent of the government's power to interfere with it. However, in the context of economic development, the restriction is rarely going to raise problems. If development is both economically beneficial and represents a sustainable use of resources, the land consolidation courts should have no difficulty justifying consolidation measures on the basis that development is also in the interest of the properties involved. At the same time, the context of land consolidation, with its emphasis on problem solving and owner participation, means that the process will be far more inclusive towards owners than traditional expropriation proceedings.

If property is in the hands of the few, while many property dependants are without formal ownership rights, the consolidation model might not be appropriate. However, in these cases, it might be possible to adapt it by allowing a larger group of local people to partake in the proceedings. In complex cases, many people might still be unable to participate effectively in the process. However, a consolidation approach will still serve an important function in that it gives marginalised groups new opportunities for engaging with the democratic process.

The system can also serve an empowering and educational role. Local elites might dominate the process in practice, but the fact that the procedure is judicial in nature means that abuses can be curbed and the disadvantaged can be raised to more fruitful forms of citizenship. At least, access to the decision-making process will be ensured for those who wish to challenge the local leadership.

More generally, the flexible, issue-focused, and transient nature of a consolidation court might have significant advantages. Specifically, static patterns of power and participatory fatigue is unlikely to take hold, as the context of decision-making shifts from case to case; the group of people involved, the area covered, and the agenda to be deliberated on, will all change from situation to situation. This, in itself, is likely to serve as a diffusion of power, minimizing the risks of elite tyranny and default expert rule arising from how an apathetic majority undermines the participatory interests of the minority who are most strongly affected by the decisions reached.

Further exploration of the transferability of the consolidation framework to other contexts will have to be left for future work. What this thesis has hopefully shown is that fully fledged institutional alternatives to expropriation for economic development already exist and that they can work in practice. This can hopefully inspire more work in this direction both at the theoretical and empirical level. In my opinion, the ideas underlying the land consolidation system found in Norway might well be worth exploring further, also in other jurisdictions that rely on expropriation as a tool to facilitate economic development. In this context, more than any other, is would be a

great victory for both property and equity if public interests could be communicated to owners so that they may give rise to givings in the future, clearly distinguished from the takings of the past.