**12 ON BENEFIT SHARING AND THE COMPENSATORY APPROACH TO ECONOMIC DEVELOPMENT TAKINGS**

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* 1. **Introduction**

I will address the compensatory approach to the legitimacy of economic development takings. Such takings occur when commercial companies benefit from the state’s power to expropriate private property.[[2]](#footnote-2) In recent years, takings of this kind have been subjected to increased critical scrutiny, particularly in the United States, where many have argued that they are not takings for a public use and therefore not legitimate.[[3]](#footnote-3)

As a response to this, some scholars have suggested that the best way to regain legitimacy is to introduce rules and mechanisms that facilitate higher compensation payments for economic development takings.[[4]](#footnote-4) My overarching aim is to shed new light on this idea, by asking how well it can be expected to work in practice. I will approach this question by carrying out a comparative study, informed by compensation law and practices in the United Kingdom and Norway. One of the key questions I address is whether benefit sharing with owners can be reconciled with the ‘no-scheme’ principle, according to which the expropriation scheme itself is not supposed to influence the level of compensation awarded for the property that is taken.[[5]](#footnote-5)

I begin in Section 12.2 by briefly presenting the US debate on the legitimacy of economic development takings. I discuss various compensatory proposals and single out a suggestion made by Lehavi and Licht for special consideration, since I believe it is the most interesting in the literature so far.[[6]](#footnote-6) Then in Section 12.3, I present the no-scheme principle in more depth. I choose to focus on the United Kingdom, where I believe recent developments in case law suggests a new take on the relationship between the no-scheme principle and the idea of benefit sharing.[[7]](#footnote-7) In particular, I argue that recent clarifications in UK law illustrate that, despite appearances, the no-scheme principle can be interpreted in a way that makes benefit sharing theoretically possible in economic development cases.

But is it possible to achieve adequate benefit sharing *in practice*, by following the compensatory route? I shed light on this question by looking to compensation procedures in Norway, where systematic attempts have been made to ensure benefit sharing in relation to takings that facilitate hydropower projects. In Section 12.4, I provide background information and a brief comparative assessment of Norwegian law relating to expropriation and compensation. Then, in Section 12.5, I present a case study of expropriation of riparian rights for the purpose of hydropower development.

My conclusion is somewhat pessimistic. In particular, I believe the situation in Norway illustrates inherent weaknesses of the idea that benefit sharing can be achieved through compensation. Hence, I finish the article in Section 12.6 by arguing that the best way forward is to move beyond compensatory viewpoints. In particular, I use my concluding remarks to highlight the idea that institutional alternatives can obviate the need for expropriation altogether in many economic development situations.

12.2 **The Compensatory Approach to Economic Development Takings**

Arguably, a distinguishing feature of economic development takings is that they give takers the opportunity to profit at the expense of owners and their communities.[[8]](#footnote-8) For the taker, business motives tend to dominate, while the public benefits at most indirectly through potential economic and social ripple effects. The upshot is that the public interest in an economic development taking can appear very limited compared to the commercial interests of the taker.

In the United States, this becomes especially controversial because of the public use requirement in the takings clause of the Fifth Amendment to the US Constitution. Indeed, most of the academic work done on economic development takings in the United States addresses the issue from this angle. From a European perspective, by contrast, it is important to note that the question of legitimacy can arise independently of public use/interest restrictions, if a taking for profit is seen as a disproportionate interference with the rights of property owners.[[9]](#footnote-9)

The issue of compensation also arises, with an additional dimension that is often particularly troublesome in economic development situations. In the absence of expropriation, owners will normally be entitled to a share of the profit resulting from commercial activity on their property. This right typically forms part of their ‘property bundle’.[[10]](#footnote-10) However, benefit sharing is rarely achieved following an economic development taking.[[11]](#footnote-11) Instead, a no-scheme rule typically kicks in, resulting in compensation based on the pre-project value of the property that is taken.[[12]](#footnote-12)

The primary policy reason for no-scheme rules is that the public should not have to pay extra when it has a special want for some property. In particular, one of the main purposes of eminent domain is to solve the holdout problem, which arises if owners use their monopoly position to inflate the price of their property. However, when the expropriation project itself is a commercial undertaking, there appears to be a shortage of good policy reasons for disregarding the commercial value when compensating the owner. This value, after all, is not created by any holdout strategy on part of the owner.

Yet for economic development backed up by eminent domain, no-scheme rules tend to ensure that all the profit goes to the taker. In light of this, some US authors have argued that failures of compensation are at the heart of the legitimacy issue. Some go as far as to suggest that worries over the public use restriction in the US Constitution can be seen as responses to a concern about the ‘uncompensated increment’ of takings.[[13]](#footnote-13)

In addition to the question of benefit sharing, at least two additional compensation concerns have been identified. First, the problem of the ‘subjective premium’ has been raised, pointing to the fact that property owners often value their own land higher than the market value, for personal reasons.[[14]](#footnote-14) For instance, if a home is condemned, the homeowners will typically suffer costs not covered by market value, such as the cost of moving, including both the immediate ‘objective’ logistic costs as well as more subtle costs, such as the cost of having to familiarize themselves with a new local community. Second, the problem of ‘autonomy’ has been discussed, based on concerns arising from the fact that eminent domain deprives the owners of their freedom to decide how to manage their property.[[15]](#footnote-15)

In this article, I only consider the challenge of achieving fair benefit sharing. I note, however, that achieving fairness in relation to other aspects seems even more difficult. Hence, setting up a framework for benefit sharing is an important first step towards a successful compensatory approach to economic development takings.

In my opinion, the most interesting framework suggested so far is due to Lehavi and Licht.[[16]](#footnote-16) They propose a new kind of institutional structure, called a *Special Purpose Development Corporation* (SPDC). The idea is that owners affected by eminent domain should be able to choose between standard pre-project (market) values and shares in an SPDC.[[17]](#footnote-17) This company will exist only to implement a specific step in the implementation of the development project, namely the transaction of the land rights.[[18]](#footnote-18)

The idea is that the SPDC will either choose to offer the property rights on an auction or else negotiate a deal with a designated developer.[[19]](#footnote-19) After completing the sale, the SPDC will divide the proceeds as dividends, before being wound up.[[20]](#footnote-20) This is meant to ensure that the owners receive the post-project value of the land. At the same time, since the owners are under an obligation to sell their property eventually, the holdout problem is avoided.

Lehavi and Licht’s proposal stands out because it has a dynamic, institutional, component. Other scholars have tended to propose static reforms, such as giving owners a fixed premium in cases of economic development, or developing mechanisms of self-assessment to ensure that compensation is based on the true value the owners attribute to their own land.

Merrill, for instance, discusses the idea that 150% of market value should be awarded for ‘suspect’ takings, including those for which the public use requirement raises doubts.[[21]](#footnote-21) Krier and Serkin propose a system that provides compensation for a property’s special suitability to its owner, alternatively a system where compensation is based on the court’s assessment of post-project value.[[22]](#footnote-22) Fennell proposes a system of self-evaluation of property for takings purposes with tax-breaks given to those who value their property close to market value (to avoid overestimation).[[23]](#footnote-23) Bell and Parchomovsky also propose self-evaluation, but rely on a different mechanism to prevent overestimation; tax liability is based on the self-reported value and no property can be sold by its owner for less than her reported value.[[24]](#footnote-24)

Compared to such proposals, I think Lehavi and Licht’s suggestion is at once more realistic, more subtle, and more challenging. To unpack their idea further, I think it is helpful to distinguish between the particularities of SPDCs and the underlying conceptual premise. In this way, one may address the latter without being sidetracked by practical objections.

To this end, I identify the core of the SPDC proposal as the idea that takings for economic development can be seen as a form of compulsory incorporation, a pooling of resources that is useful in overcoming market failures.[[25]](#footnote-25) In the words of Lehavi and Licht:

The exercise of eminent domain powers thus resembles an incorporation by the government of all landowners with a view to brining all the critical assets under hierarchical governance. Establishing a corporation for this purpose and transferring land parcels to it thus would be merely a procedural manifestation of the substantive economic reality that already takes place in eminent domain cases.[[26]](#footnote-26)

If we look at the rationale behind economic development takings in this way, we notice the lack of good policy reasons for granting the entire profit to the taker. Indeed, the justification provided for eminent domain in economic development situations often only extends to the necessary pooling of resources, without providing any justification for depriving owners of the commercial potential inherent in their land.[[27]](#footnote-27)

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

In particular, the fact that a development proposal has commercial potential does not by itself ensure that a market will form. Indeed, a typical case of eminent domain for economic development will arise from planning measures that set up a *de facto* development monopoly, e.g. by specifying the development project in such detail that only a specific party will be interested in carrying it out. This designated developer – the future beneficiary of the taking – might also have been active during the planning process, perhaps even as the primary author of the plans.[[28]](#footnote-28)

It seems largely unrealistic to think that other potential developers will be interested in competing for rights that are packaged to facilitate a specific development project undertaken by a specific party. Hence, to work in practice, it seems that the SPDC proposal needs to be accompanied by significant reforms in planning law. The overarching challenge is to organize planning so that it becomes market facilitating and owner empowering, not a tool for powerful special interests to assume control over property owned by weaker parties.

As an illustration of this challenge, as well as its subtle interaction with the takings issue, I think it is illuminating to look back in history, to the so-called *mill acts*, which were a source of great controversy in many US states throughout the 19th century.[[29]](#footnote-29) The typical mill act provided a framework for managing jointly owned water resources, in many cases also by empowering the government to sanction takings that would transfer water rights from one private party to another.[[30]](#footnote-30)

In some cases, the private takings arising from this were pure economic development takings, allowing a commercial company with little or no prior connection to the land the right to condemn essential water resources wanted for economic development, e.g. hydroelectric plants.[[31]](#footnote-31) However, in other cases, private takings were sanctioned to provide shared benefits to the affected property owners, as well as other water users, *as a community*, e.g. by preventing holdouts from blocking the construction of grist mills to serve local farming needs.[[32]](#footnote-32) In yet other cases, the use of eminent domain was meant to empower the owners of the most valuable water rights, by granting them access to ancillary rights, e.g. the right to flood their upstream neighbors by constructing dams.[[33]](#footnote-33)

In my opinion, it is inappropriate to group together all these kinds of property interferences and treat them as though they are the same. Indeed, only the first kind of interference mentioned here qualifies as a typical economic development taking as I use that term. Interestingly, state courts also varied greatly in their assessments of legitimacy with respect to different kinds of private takings empowered by mill acts.[[34]](#footnote-34)

Many scholars argue that the divergence in state jurisprudence on this point can be understood as a doctrinal difference based on whether the courts relied on a ‘narrow’ or a ‘broad’ understanding of the public use requirement.[[35]](#footnote-35) However, it seems to me that state courts also had something important in common, namely a contextual approach that allowed them to recognize important functional differences between different kinds of private takings.

A further exploration of this aspect must be left for future work. However, I would like to emphasize one particularly interesting strand of jurisprudence, developed by the Massachusetts state court during the 19th century. Here, it was consistently held that private takings in mill act cases were justified because they were not takings at all, but compulsory arrangements for cooperation among owners.[[36]](#footnote-36) This resonates nicely with the overarching point made by Lehavi and Licht, as we are asked to reconceptualize a private taking by thinking of it as a form of incorporation that benefits the owners as a group.[[37]](#footnote-37)

Later case law and scholarship appears to have ignored or ridiculed this early move toward the incorporation perspective. For instance, Meidinger describes it as an ‘artful’ argument used to justify a highly preferential treatment of the manufacturing industry in Massachusetts.[[38]](#footnote-38) Indeed, there might well be some truth to this claim, which then serves to illustrate the challenges involved in setting up and maintaining an efficient and fair system based on an incorporation approach.

I briefly return to this challenge towards the end of my article. For now, I focus on the conceptual premise and its main implication for the compensation issue, namely, that compensation should normally be based on commercial values when property is taken for commercial development. This idea appears to confront the no-scheme principle head on.

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

12.3 **The No-Scheme Principle**

The no-scheme principle is easy enough to comprehend when it is presented in general terms: the valuative effect of the expropriation scheme should not influence the compensation award. However, difficult questions arise as soon as this idea is to be applied in concrete cases. The principle is demanding on the appraisers, in particular, who must first specify a counterfactual situation without an expropriation scheme, and then proceed to calculate on this basis.

How should they determine what the relevant counterfactual world looks like? It is tempting to consider this a ‘question of fact for the arbitrator in each case’, as expressed by the Privy Council in *Fraser*, a Canadian case from 1917.[[39]](#footnote-39) However, as the history of the no-scheme rule in the United Kingdom has shown, this point of view is not tenable.[[40]](#footnote-40) The problem is that the nature of the no-scheme world cannot be determined without making many assumptions, several of which depends on how one understands the law.

The challenges that arise in this regard were discussed in detail by Lord Nicholls in the recent case of *Waters*.[[41]](#footnote-41) He described the task as ‘daunting’, noting also that some of the more recent statutory provisions in the United Kingdom “defy ready comprehension”.[[42]](#footnote-42)

In *Waters*, the Lords made a particular point out of resolving a tension that was identified between the principle relied on in the *Pointe Gourde* case from 1947 and the reasoning adopted in the so-called *Indian* case from 1939.[[43]](#footnote-43) In the *Indian* case, the scheme was given a very narrow interpretation, with Lord Romer interpreting the scope as follows:

The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value.[[44]](#footnote-44)

Importantly, this did not entail that the purchaser’s demand for the property was to be disregarded, since, as Lord Romer puts it, “the fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it”.[[45]](#footnote-45)

In *Pointe Gourde*, a different stance was adopted.[[46]](#footnote-46) The case concerned a quarry that was expropriated for the construction of a US naval base in Trinidad. The appraiser found that if the quarry had not been forcibly acquired, it could have supplied the US naval base on a voluntary basis, thereby increasing its profits. However, the value of this potential fell to be disregarded, with Lord MacDermott describing the no-scheme rule as follows:

It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value, which is entirely due to the scheme underlying the acquisition.[[47]](#footnote-47)

This was at odds with the position taken by Lord Romer in the *Indian* case. Indeed, if the US military had not been in possession of a compulsory purchase order, they would most likely have been ‘quite willing’ to pay for the quarry’s services.

In *Waters*, both Lord Nicholls and Lord Scott addressed this tension in detail. They then offered a reconciliatory interpretation, which narrows the no-scheme rule compared to how it has usually been understood following *Pointe Gourde*.[[48]](#footnote-48) Moreover, the Lords noted the need for reform and legislation, with Lord Scott describing the current state of the law as ‘highly unsatisfactory’.[[49]](#footnote-49)

To explain how a seemingly simple principle could become so troubling in practice, I believe it is useful to keep in mind the effect of extensive planning legislation, introduced in many western jurisdictions during the 20th century. Today, development of property tends to be contingent on governmental licenses. Moreover, the power to expropriate is often granted as part of comprehensive regulation, following land-use plans that encompass more than the particular project that will benefit from compulsory purchase. As a result, it has become increasingly difficult to ascertain what is meant by the ‘scheme’ in compensation cases. Does it include the complete planning history, some particular portion of it, or only the final act of compulsion?

To make this question easier to answer in concrete cases, it can help to look at underlying policy objectives. In this regard, is important to note that the no-scheme principle embodies two distinct purposes that can branch out and give rise to quite distinct rules.[[50]](#footnote-50) First, the principle has an important *positive* dimension, which serves to enhance compensation payments. Property owners should not only be compensated for the direct loss of their property, but also for any depreciation of their property’s value following the decision to expropriate.

This is easy to justify. It seems unreasonable if the deleterious effects of a threat of compulsion are permitted to result in reduced compensation payments. However, under the extensive planning regimes common today, it is not clear where to draw the line. When is the regulation leading up to the scheme a reflection of public control over property use, and when should it be regarded as a measure specifically aimed at compelling private owners to give up their property?

This question may be linked to the more general question of whether or not the state should be liable to pay compensation for regulation that adversely affects the potential for future development.[[51]](#footnote-51) In jurisdictions where such compensation is not usually awarded, including Norway and the United Kingdom, it is easily argued that the positive aspect of the no-scheme principle must be limited correspondingly. Why should a depreciation of value due to regulation imply compensation when the property is expropriated, but not otherwise?

In addition to its positive dimension, the no-scheme principle also has an important *negative* dimension, expressed in *Pointe Gourde* as the principle that an increase in value should be disregarded when it is “entirely due to the scheme”.[[52]](#footnote-52) This aspect has attracted more interest and controversy than the positive dimension, especially in the United Kingdom, as demonstrated by *Waters*.[[53]](#footnote-53)

It is not surprising that the negative aspect of the no-scheme principle can result in complaints. After all, property owners stand to lose whenever it is applied. However, on a traditional understanding of the public purpose of expropriation, the negative aspect of the rule is also easy to justify. In *Waters*, Lord Nicholls describes the main policy reason as follows:

When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to increase the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power. For the same reason there should also be disregarded the ‘special want’ of an acquiring authority for a particular site which arises from the authority having been authorised to acquire it.[[54]](#footnote-54)

This is a reasonable justification. Notice, however, that Lord Nicholls avoids using the word ‘scheme’. Rather, he speaks of what the owner could reasonably have obtained in the *absence of the power* to expropriate. In this way, he seems to prescribe a rather narrow interpretation of the negative dimension of the no-scheme rule.[[55]](#footnote-55) It is the power to expropriate that should not give rise to an increased value, nothing is said at this stage about the scheme that benefits from it.

It would appear, therefore, that nothing in principle prevents property from being compensated on the basis of its value in a scheme that differs from the scheme underlying expropriation simply in that it has not been granted a power to expropriate. Indeed, this seems crucial for the remainder of Lord Nicholls’ arguments, used to reconcile the *Indian* case with *Pointe Gourde.*

In my opinion, this reasoning also permits us to formulate a new take on the no-scheme principle and benefit sharing in the context of economic development. In the absence of a power to expropriate, commercial projects can still be successfully implemented, if they rely on cooperation with owners instead of compulsion.[[56]](#footnote-56) For the owners, therefore, the loss of a participation opportunity in such cases is a consequence of the taking. As such, the right to compensation for the corresponding loss should follow from the no-scheme rule itself, as formulated by Lord Nicholls in *Waters*.

Despite this, the issue of benefit sharing following compulsory purchase for commercial development does not appear to be resolved in UK case law.[[57]](#footnote-57) To my knowledge, the issue has not been addressed explicitly by any of the higher courts. However, the UK Supreme Court touched on it in the recent case of *Bocardo*.[[58]](#footnote-58) This case was decided under dissent, suggesting that the clarifications offered in *Waters* have not been as conclusive as hoped.

In *Bocardo*, conflict arose in relation to a reservoir of petroleum that could not be extracted without carrying out works beneath the surface owner’s land (the surface owner was not the owner of the petroleum). The first question that arose was whether the extraction that had already been carried out, without the surface owner’s permission, amounted to an infringement of property rights. This was answered in the affirmative. The second question that arose was how to compensate the owner. The Supreme Court, following some deliberation, found that the case should be decided based on an application of the no-scheme principle.

The crucial point of disagreement arose with respect to whether or not the special suitability, or key value, of the appellant’s land, *pre-existed* the petroleum scheme. In *Waters*, the House of Lords had cited and expressed support for the following passage, taken from Mann LJ’s judgement in *Batchelor*:

If a premium value is “entirely due to the scheme underlying the acquisition” then it must be disregarded. If it was pre-existent to the acquisition it must in my judgement be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence.[[59]](#footnote-59)

Relying on this distinction between the potentialities that are ‘preexisting’ and those that are due to the scheme, the minority in *Bocardo*, led by Lord Clarke, made the following observation:

Anyone who had obtained a licence to search, bore for and get the petroleum under Bocardo’s land would have had precisely the same need to obtain a wayleave to obtain access to it if it was not to commit a trespass. So it was not the respondents’ scheme that gave the relevant strata beneath Bocardo’s land its peculiar and unusual value. It was the geographical position that its land occupies above the apex of the reservoir, coupled with the fact that it was only by drilling through Bocardo’s land that any licence holder could obtain access to that part of the reservoir that gives it its key value.[[60]](#footnote-60)

The majority, led by Lord Brown, rejected this view and interpreted the notion of ‘preexistence’ quite differently:

To my mind it is impossible to characterise the key value in the ancillary right being granted here as ‘pre-existent’ to the scheme. There is, of course, always the chance that a statutory body with compulsory purchase powers may need to acquire land or rights over land to accomplish a statutory purpose for which these powers have been accorded to them. But that does not mean that upon the materialisation of such a scheme, the ‘key’ value of the land or rights which now are required is to be regarded as ‘pre-existent’.[[61]](#footnote-61)

The case was resolved in keeping with this view, but the dissent illustrates the difficulty of applying the no-scheme principle to an expropriation scheme that unlocks a commercial potential inherent in the land that is taken. Is it possible for government to grant the value of this potential to the taker, by granting all the necessary licenses, without regarding the potential itself as having been taken from the owner of the property?

This issue does not primarily depend on the scope of the scheme as such. In *Bocardo*, it was obvious that the scheme was the entire project aimed at extracting petroleum from the reserve, including the necessary works beneath the appellant’s estate. However, it was still unclear whether the special value of the appellant’s land could be said to exist independently of this scheme.

The deeper question that arises in these kinds of situations is ontological. When should we attribute a given value to an act of government, and when should we attribute it to nature, by regarding it as a fruit of the land? In more practical terms: when is a property value that is unlocked by a development scheme part of the original owner’s bundle of rights?

To answer this question, it is tempting to look for a causal link between scheme and value, to answer whether or not the value was preexistent. But as *Bocardo* illustrates, it is not obvious what counts as good evidence for such a link. Moreover, it seems that one’s perspective on this will tend to depend also on one’s point of view on the much more general question of what the ‘property’ in question consists of in the first place.[[62]](#footnote-62)

Lord Clarke remarked that the state, following nationalization in 1934, could have given the right to extract the petroleum to someone else.[[63]](#footnote-63) This is certainly true. Hence, it is hard to disagree with him that “the key value was not created by the 1934 Act or the grant of the petroleum license to Star”.[[64]](#footnote-64) But, then, whose value was it, and was it a commercially realizable value for which compensation should be awarded?

Here Lord Clarke appears to assume that the value belonged to the surface owner and that this owner would have been able to make a profit from it in the absence of the expropriation scheme. This, I believe, is a leap that requires further justification. The fact that some piece of land has preexistent value does not mean that the owner is entitled to that value, or that the value can ever be translated into a financial profit for them.

Even in the absence of a causal link between scheme and value, one might be entitled to conclude that the special value falls to be disregarded. This is so because it might already have been removed from the owner’s bundle through regulation (or because it was never part of the bundle in the first place).

In the case of *Bocardo*, I think this perspective can be used to make sense of Lord Brown’s argument that the value of the strata should not be regarded as preexistent. At first sight, his argument seems rather strained. After all, it was the physical conditions that gave the land its value, not the fact that a development license had been granted. However, by looking at the argument in more depth, it is tempting to rephrase the conclusion by saying that the special suitability of the strata was found to have no commercial value under the prevailing regulatory regime.

I am agnostic about the correct way to judge *Bocardo*. However, I think the main question in that case was whether Parliament intended to give petroleum developers a right to extract substrata resources without sharing the profits with key surface owners. As no clear answer was available, conflict resulted. At the same time, the question itself became obfuscated. It seems to me, in particular, that the focus on causality and the notion of ‘preexistence’ was not very helpful. Rather, I think attention should have been explicitly directed at the issue of benefit sharing, linked to the question of Parliament’s intentions in this regard.

Indeed, if courts engage with the question of benefit sharing surreptitiously, without being explicit about it, the lack of democratic accountability can become a worry. More generally, I think it is important to emphasize the political sensitivity of the range of complex rules found in compensation law. The underlying political question should not be rendered so inaccessible that it can only be engaged with in a meaningful way by legal professionals.

If this happens, those who stand to gain the most will be those who are in a good position to lobby and argue on technical points to shape the law according to their own interests. Hence, I think a conceptual shift might be appropriate here, to bring the politics of benefit sharing into the open, as a particularly crucial aspect of the compensation issue.

I believe this could prove especially beneficial in cases when the main development potential is subject to expropriation. If it is hard to deny benefit sharing in cases like *Bocardo*, I think it should be even harder in cases when the natural resource as such is owned by someone other than the developer. This is the situation for the cases considered in the next section, concerning expropriation of riparian rights for hydropower development in Norway. Here it is often impossible to identify any public interest in bestowing the commercial benefit on the taker, which is normally a limited liability company operating for profit.

In this regard, I would like to stress that I think compensation practices themselves should be tested against a public use/interest requirement. In jurisdictions that observe such requirements for the takings purpose, this might already follow, since the overall character of a taking is so strongly influenced by how compensation is calculated.[[65]](#footnote-65) However, it seems that compensation debates too often revolve around narrow technical questions when they should engage more actively with the overarching issue of legitimacy.

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

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

12.4 **Norwegian Compensation Law**

The right to compensation following expropriation is enshrined in simple terms in Section 105 of the Norwegian Constitution.[[66]](#footnote-66) Here it is stated that *full compensation* is to be paid in all cases when the public interest necessitates compulsory acquisition of property for public use.[[67]](#footnote-67) But what exactly does ‘full compensation’ mean? This question has been much debated and the discussion is ongoing.[[68]](#footnote-68)

At the same time, the judicial procedure in place to award compensation in concrete cases has a long tradition behind it, and appears to enjoy widespread support. It is also marked by several idiosyncrasies, some of which are not widely known, for instance, the special rules used to compensate the owners of riparian rights following expropriation for hydropower.

In the following, I begin by giving a brief overview of main principles and practices. Then, in Section 12.4.2, I present the legislation currently in place, which stipulates that compensation should be calculated based on the ‘foreseeable’ use of the property that is taken. This sets the stage for Section 12.5, where I discuss expropriation of waterfalls.

**12.4.1 Appraisal Courts and ‘Full Compensation’**

According to a long tradition in Norway, the discretionary aspects of property valuation are regulated by a special procedure, which relies on so-called *unwilling appraisers*. These are members of the public who have no special connection to the case at hand or the parties involved in it. They can be chosen specifically for their expertise, or can be drawn from a pool of local residents that are assumed to know the local conditions.[[69]](#footnote-69)

The appraisal procedure has a long history and the rules regulating it today are still found in the Appraisal Act 1917.[[70]](#footnote-70) Appraisal cases are organized similarly to civil disputes and are administered by the regular district courts.[[71]](#footnote-71) However, in appraisal disputes, the district court sits as a so-called appraisal court, usually as a panel consisting of one professional judge and four lay appraisers.

The panel decides the case jointly – by majority vote – both legal and technical aspects, usually on the basis of technical reports commissioned by the parties. These reports are presented during the main hearing and may be challenged by the parties in more or less the same way as the district court hears evidence in a regular civil dispute.[[72]](#footnote-72)

There is a possibility of appeal to the appraisal court of appeal, which is the regional court sitting as an appraisal court in accordance with the rules of the Appraisal Act 1917. The right to an appeal depends on the importance of the case, according to rules that correspond to those in place for civil disputes.[[73]](#footnote-73) The procedure at the appeals court closely resembles the procedure observed at the district level.[[74]](#footnote-74) Moreover, the decision made by the appraisal court of appeal is final as far the appraisal assessment is concerned. An appeal to the Supreme Court must be based on procedural rules or the court of appeal’s application of the law.

Because of this, the appraisal courts have been very important in interpreting and developing compensation law in Norway. Their importance was particularly great before 1973, when the meaning of ‘full compensation’ was not further clarified in statute. At this time, the practical viewpoint enforced by the procedural form also meant that questions of law often remained in the background in appraisal cases.

An example of the legal reasoning that emerged in this environment can be found in the writings of the prominent legal scholar Frede Castberg. He specifically addressed the no-scheme principle, based directly on a reading of the Constitution:

The owner is entitled to full compensation. The expropriation should not leave him worse off economically than other owners. Hence if the public has knowledge that an industrial undertaking is being planned, that a railway will be built, etc., and this affects the value of property generally in a district, then the increased value of the property that will be expropriated must be taken into account. If not, the owners of such property will be worse off than other owners from the same district. On the other hand, if the expectation of the scheme underlying expropriation leads to a general depreciation of value, then it is this new value – not the original value – that is relevant for calculating compensation. The crucial question is what the actual value is, when expropriation takes place.[[75]](#footnote-75)

Castberg’s intention is not to reject the no-scheme principle altogether, as shown by the following quote:

The situation is different if the property has increased value due to the expectation that it will be expropriated. The owner cannot demand that this increase is compensated since that would be the same as giving him a special advantage compared to those from whom no property is expropriated.[[76]](#footnote-76)

Hence, Castberg accepts a narrow version of the no-scheme principle, very similar to that presented by Lord Romer in the *Indian* case. Castberg’s views were influential, but at the same time, the nature of the system for deciding appraisal disputes gave the local appraisers great freedom in adapting the principles to ensure a just outcome.

Importantly, fairness was dealt with concretely on a case-by-case basis. The Supreme Court largely sanctioned this approach, by respecting the discretion of the appraisal courts. Moreover, it was expected that the appraisal courts would actively use their discretion. A particularly clear expression of this can be found in *Marmor*, a case from 1956. Here, the Supreme Court overturned a decision made by the appraisal court of appeal because the court had been *too* reliant on general principles.[[77]](#footnote-77)

The case involved expropriation of a private railway track for the construction of a public railway. It was clear that the track which was taken did not have any market value, as the expropriating party was the only interested buyer. Hence, the expropriating party argued, based on a no-scheme principle, the value of the tracks to the public railway should not be taken into account when calculating compensation. The appraisal court of appeal agreed, pointing to the standard teaching of the day.

The Supreme Court, on the other hand, struck down the decision because it felt that a standardized approach to the case was inappropriate.[[78]](#footnote-78) To justify this conclusion, the presiding judge directed attention to the wider *context* of expropriation, by making the following observations:

I also point to the fact that the case concerns an area of activity where the expropriating party has a *de facto* monopoly which makes it impossible for anyone else to make use of the property for the same purpose. This in itself makes it questionable to simply assume that the lack of financial value for other purchasers provides the appropriate basis for calculating compensation. When considering this question, it is also appropriate to take into account that we have lately seen a great increase in the use of expropriation to undertake projects such as this. Compulsion is becoming the primary mode for acquisition of property – replacing voluntary sale following friendly negotiations.[[79]](#footnote-79)

In my opinion, the importance of *Marmor* is not that it seems to endorse a narrow interpretation of the no-scheme principle. In fact, I think it is erroneous to read the judgment this way. Rather, I take *Marmor* to be an expression of skepticism towards uncritical obedience to *any* set of general rules for calculating compensation, especially if these limit the room for sound lay discretion. Moreover, I note that the contextual factors that the Supreme Court highlights here are particularly relevant in the context of economic development takings, much more so than for the construction of public railways.

The days of *Marmor* have passed, and there has since been a marked shift of attention towards ensuring governmental control over compensation levels. Legislation has been introduced to achieve this, by limiting the freedom of the appraisal courts. In the next subsection, I give a brief presentation of this more recent development.

**12.4.2 The Current Use Rule and the Foreseeability Test**

Following World War II, the social democratic *Labour Party* gained a secure grip on political power in Norway. As a result, many reforms were carried out that would significantly reshape Norwegian society. One of the most important reforms sought to bring land-use more firmly under the control of the government.[[80]](#footnote-80) At the same time, expropriation was being used more extensively to facilitate public projects, such as hydropower development for the supply of electricity.[[81]](#footnote-81) Because of this, many felt that a more uniform approach to compensation was needed. In addition, it became an explicitly stated political goal to bring compensation payments down.[[82]](#footnote-82)

In 1965, the so-called *Husaas committee* was appointed by the King in Council and charged with the task of assessing possible legislative solutions.[[83]](#footnote-83) Initially, there was some doubt about whether it was at all permissible to enact legislation on the issue of compensation, as the Constitution itself addressed the matter. However, the Husaas committee noted that some rules had already been introduced for specific case types, for instance, in relation to expropriation for hydropower development.[[84]](#footnote-84) In addition, legal scholars of the day were generally of the opinion that statutory compensation rules could be introduced, on the understanding that the courts would simply deviate from them if they seemed to go against the Constitution.[[85]](#footnote-85)

Following up on this, the Husaas committee formulated an overarching principle that has since become leading, namely, that owners are entitled to compensation based on the ‘foreseeable’ use of their property. The committee argued that this interpretation of ‘full compensation’ was already entrenched in case law, but thought it would be wise to encode it in statute.[[86]](#footnote-86)

Interestingly, the foreseeability test was taken to imply the no-scheme principle. In particular, it was assumed that the assessment of foreseeability would be made after first disregarding the scheme underlying expropriation.[[87]](#footnote-87) Here, the Husaas committee arguably extended the principle further than what followed from earlier case law, cf. my discussion in Section 12.4.1.

However, the view of the committee was eventually rejected by the government. Interestingly, it was considered too owner-friendly, as it was felt that it did not sufficiently limit the possibility for compensation based on potential future property uses. To further restrict the possibility of awarding compensation for future uses, the Ministry of Justice proposed an Act to parliament that deviated quite significantly from the proposals of the Husaas committee.

Instead of encoding what was thought to be existing principles, the Ministry pushed for the principle that compensation should be based on the value of the *current use* of the property.[[88]](#footnote-88) After considerable political tension and debate, this became the main rule of the Expropriation Compensation Act 1973.[[89]](#footnote-89)

Two exceptions were introduced, based on fairness considerations and constitutional law. The first, which received by far the most attention, was based on a desire to ensure some degree of equality between owners.[[90]](#footnote-90) This exception stipulated that the appraisal courts should be free to deviate from the current use rule if they felt this was needed to prevent affected owners from being significantly worse off compared to owners not affected by expropriation.[[91]](#footnote-91)

This exception would prove highly controversial, mainly because it was formulated only as rule that *could* be used to increase the compensation. In *Kløfta*, the Supreme Court eventually deviated from this and made clear that additional compensation was *obligatory* in a range of situations when the intention had clearly been that the rule should be used sparingly.

The second exception to the current use rule received far less attention, but in my opinion, it is the more interesting of the two. This exception was motivated by a desire to ensure equality between the taker and the owner. Moreover, the rule sought to address the situation that arises when the taker benefits commercially from expropriation. As explained by the Ministry:

The second modification we make has to do with the relationship between the property owner and the expropriating party. If the use of the property that the expropriation presupposes gives the property a value that is significantly higher than the value suggested by current use, this will entail a transfer of value from the property owner to the acquiring party. In some cases, this might be unreasonable. As an example of when this can become an issue, we mention an agricultural property that is expropriated for the purposes of industrial production. In such a case, it might be natural that the owner receives a certain share in the increased value that the new use of the property will bring about. [...] To establish a flexible system, the Ministry has concluded that it is practical that the King gives rules concerning the cases where an enhanced compensation payment, based on these principles, might be appropriate. This should not be decided by individual assessment, but governed by rules for special case types. Hence, the proposed Act states that the King can pass regulation concerning this matter.[[92]](#footnote-92)

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

Indeed, this particular aspect of the 1973 Act was largely overlooked and no rules to ensure benefit sharing were introduced. Arguably, this was regrettable, and also part of the reason why the Act failed to deliver stability in the law of expropriation. If the Act had pursued its political agenda in a temperate manner, for instance, by encouraging, the appraisal courts themselves to take a broader view on fairness, it could well have become a success. Instead, it caused an outcry, with attention shifting away from practical questions towards constitutional issues. The primary such question, and the most serious one, was whether the Act as such was in breach of the Constitution. This was the issue that came before the Supreme Court in the case of *Kløfta* in 1976.[[93]](#footnote-93) As I have already mentioned, the 1973 Act was significantly modified by this decision, to make it appear less offensive to the constitutional standard of full compensation. At the same time, however, the Supreme Court largely accepted the rationale behind the Act (in favor of lower compensation payments and greater predictability). As a result, the *Kløfta* judgment arguably led to a further undermining of the appraisal courts.

Not only were these courts now constrained by an Act that seemed to go against the Constitution, they were also ordered to deviate from its wording in select cases that met certain predefined criteria. In effect, the Supreme Court itself assumed greater control over how compensation law was to be applied, no longer merely in broad strokes, but increasingly also by developing more detailed rules for specific case types.[[94]](#footnote-94)

Eventually, some further legislative clarification was provided in the form of the Expropriation Compensation Act 1984, which is still in force today. This Act provides an encoding of the original foreseeability test proposed by the Husaas committee. Moreover, it makes clear that compensation is to be based on either the value of use or the market value of the property, whichever is highest.[[95]](#footnote-95) In addition, the Act provides some further details regarding how the assessment is to be carried out, including some disregard rules that encode aspects of the no-scheme principle.[[96]](#footnote-96)

However, the 1984 Act leaves many crucial questions open, and case law from the Supreme Court has since become increasingly detailed. The extent to which existing land use plans are binding on the compensation assessment is particularly thorny. In general, the Norwegian system stands out because such plans are usually *not* disregarded, even in situations when they are closely related to, or directly authorize, the expropriation measure.[[97]](#footnote-97)

In practice, when land use plans are not disregarded, the compensation usually ends up being based on current use assessments, reverting to the rule introduced by the 1973 Act.[[98]](#footnote-98) Hence, in Norwegian law there is a clear asymmetry between the negative and positive aspect of the no-scheme principle. In general, the positive aspect, leading to increased compensation, is applied narrowly, while the negative aspect, leading to reduced compensation, is applied broadly.

There are some exceptions to this general tendeny, and following *Kløfta*, the Supreme Court has continued to produce more and more specific rules for special case types. For instance, one class of rules targets certain kinds of roads and public buildings, so that an expropriation plan designating a property for such uses might fall to be disregarded for compensation purposes.[[99]](#footnote-99) The exact circumstances when a disregard must or may be applied are difficult to spell out exhaustively, but the Supreme Court now tries to do so, down to a questionable level of detail.

Two of the most recent decisions stipulate that a plan for a sports hall should be disregarded, while a plan for a public footpath should not.[[100]](#footnote-100) The distinction between the two seems rather arbitrary, however, particularly as this now sets a precedent, which will tend to apply to footpaths and sports halls in general. Moreover it seems that the development of an increasing number of special rules such as these threaten to undermine the core procedure used to decide appraisal disputes, which has a long history in Norwegian law.[[101]](#footnote-101)

With respect to some special kinds of takings, the appraisal courts are still able to play a more active role in ensuring just compensation. This has been demonstrated recently with respect to expropriation of riparian rights for hydropower development, where the appraisal courts have caused great upheaval by abandoning the customary approach, which strongly benefitted the large energy companies.

The changes of practice observed in this regard were made possible by the fact that for expropriation of riparian rights, the rules enacted through legislation do not readily apply. Specifically, the customary method used to compensate owners for rights taken for hydropower is based on precedent and theoretical calculations, not the principles encoded in the Expropriation Compensation Act 1984. Today, the customary method is perceived as deeply unjust by owners, who are often deprived of extremely valuable natural resources and paid only a fraction of their commercial value.[[102]](#footnote-102)

Interestingly, the customary method was originally based on a form of benefit sharing, pursued through (now outdated) theoretical methods for assessing the value of water rights to expropriating parties. Hence, the recent discontent with the method highlights the difficulty of attempting to ensure reasonable benefit sharing through compensation. Looking at compensation rules as they are applied to waterfalls today further underscores this, as the courts now grapple with the disintegration of the traditional method, and the question of what should replace it.

12.5 **Compensation for Waterfalls**

Until the early 20th century, Norwegian law did not contain a general expropriation authority covering riparian rights in streams and waterfalls. Instead, Norwegian water resources were regulated by rules similar to those found in many nineteenth-century mill acts in the United States, discussed in Section 12.5.2. The main legislative objective at this time was to facilitate owner-led development and cooperation, just as it had been in many US states.[[103]](#footnote-103) No one, not even the government, could expropriate the right to waterpower as such; the possibility of expropriation was strictly limited to ancillary rights.[[104]](#footnote-104)

However, at the beginning of the twentieth century, the public’s perspective on water resource management changed. Instead of being seen as a local, owner-led pursuit, the development of hydropower came to be seen as a task for the government. This led to the introduction of wider expropriation authorities, accompanied by a regulatory regime that made commercial development of hydropower difficult or impossible. The hydropower sector, which today contributes more than 95% of the annual domestic electricity supply in Norway, eventually came to be organized as a *de facto* government monopoly.[[105]](#footnote-105)

This meant that the market for riparian rights to undertake hydropower projects all but disappeared.[[106]](#footnote-106) In these circumstances, a strict application of the no-scheme rule could lead to no compensation being paid at all (except for damages). Indeed, streams and waterfalls had little or nocommercial value at this time, except to the public authority that acquired them. But the appraisal courts did not follow this to its logical conclusion. Instead, they introduced a theoretical formula for calculating compensation, to avoid a compensation regime that would have paid little or nothing to the local owners of water resources.[[107]](#footnote-107)

In effect, the theoretical method consisted in setting up an artificial market for waterfalls, with prices fixed by the appraisal courts, based on theoretical assessments and comparisons with previous appraisal cases. On top of this, additional benefit sharing was introduced in the form of legislation that compelled the expropriating party to pay a 25% premium in hydropower cases.[[108]](#footnote-108)

Hence, the traditional method for compensating waterfalls in Norway was based on ideas that are very similar to those that are now considered in the US debate on economic development takings, as discussed in Section 12.2. Moreover, these rules and practices have been in place for almost 100 years in Norway, giving us a good basis for assessing how well they work.

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

Initially, the artificial market created to compensate waterfall owners was modeled on the actual market that had existed prior to the regulatory reforms of the early 1900s. The key notion used to determine the price of streams and waterfalls on this market was that of a *natural horsepower*, a measure of electric effect.[[109]](#footnote-109) This notion was introduced to simplify calculations, as it provided a gross estimate of the stable effect that a hydroelectric plant could yield, based on a simple mathematical formula.[[110]](#footnote-110)

The lack of a national grid at this time meant that the value of a plant was largely determined by the stable effect it could deliver, not the total amount of electricity produced (peak production would go to waste). Hence, it was assumed that the value of streams and waterfalls could be approximated by simply setting an appropriate price per natural horsepower.

The use of this method to calculate compensation had no legislative basis. It arose simply as a result of the appraisal courts’ efforts to calculate market prices. Then, after the market disappeared because of monopolization, the method stuck and was applied customarily.[[111]](#footnote-111) To account for the lack of market prices, the courts would simply use their discretion to set a price per natural horsepower, usually based on what had been paid in previous appraisal cases.

The standard account of the natural horsepower method states that the number of natural horsepower in a waterfall is a measure of the ‘raw’ power in the waterfall.[[112]](#footnote-112) This is not accurate. Rather, the number of natural horsepower depends crucially on the details of the development project, especially the nature of the proposed watercourse regulation.[[113]](#footnote-113)

Today, many hydropower plants, particularly smaller ones, involve little or no regulation. Instead, such run-of-river schemes operate by harnessing energy from whatever water is present in the river at any given time. For these projects, the natural horsepower can be estimated at zero or close to zero, depending on what formula is used when performing the necessary calculations.[[114]](#footnote-114)

Today, the commercial value of a hydropower project has little or nothing to do with its natural horsepower. Rather, the income of a hydropower plant is a function of the price paid per kilowatt-hour and the total number of kilowatt-hours harnessed over the year (kWh/year). Due to the existence of a national grid, energy producers are paid for energy they deliver, *not* the effect they can maintain stably in their station over a long duration of time. Talking of natural horsepower therefore serves to give a skewed picture of the potential of a waterfall, especially for run-of-river projects (not involving regulation of the water-flow).

Within the ranks of the specialized water authorities, the inadequacies of the notion have long been common knowledge. The first statement I have found to this effect, made by the director of the national water directorate in an internal newsletter, dates all the way back to 1956.[[115]](#footnote-115) Here, it is made clear that compensation practices generally fail to reflect actual values of streams and waterfalls. Moreover, the director suggests that the appraisal procedure operates by exploiting local owners’ lack of knowledge regarding the true value of their natural resources.

The room for exploitation of this kind was particularly great with respect to the question of what the price should be per natural horsepower. After all, the price level was determined by judicial discretion, based on precedent and arguments from the parties. This, more than anything else, resulted in a system where compensation levels came to reflect the power balance between buyer and seller in the courtroom, not the economic value of streams and waterfalls.[[116]](#footnote-116)

Sometimes, owners would even enter into voluntary agreements (under threat of expropriation), thereby confirming the artificial price level maintained by the courts. Indeed, it was typical to present such agreements in court to back up the claim that the natural horsepower method was a market-based valuation principle after all. [[117]](#footnote-117) In this way, it became possible to legitimize a steadily increasing imbalance of power between owners and purchasers. In the end, this imbalance became extreme.

One example is the case of *Hellandsfoss*, which concerned waterfalls that currently yield 151 GWh/year in a run-of-river hydropower plant.[[118]](#footnote-118) In 1999, the appraisal court of appeal held that this corresponded to 7099 natural horsepower and that the unit price should be set at NOK 130.[[119]](#footnote-119) Hence, the value of the waterfall was estimated to be NOK 922 870. This sum, with an additional premium of 25%, formed the basis of compensation to the owners.[[120]](#footnote-120)

For comparison, in the case of *Sauda* from 2009, where an actual market value was calculated, several waterfalls that could be used in run-of-river schemes were valued at about NOK 1 per kWh annual production.[[121]](#footnote-121) If a comparable valuation had been used as the basis of compensation in *Hellandsfoss*, the owners would have received about 150 times more than they got under the natural horsepower regime.[[122]](#footnote-122)

The feedback effect on the ‘market’ was similarly striking. As an example, I mention a stream located in the rural community of Måren, in the municipality of Høyanger in Southwest Norway. This stream, which had previously been used in a small power plant to supply the local village, was apparently sold to the municipality in 2002 for the sum of NOK 45 000.[[123]](#footnote-123) Immediately afterwards, the waterfall was sold on to a commercial company and exploited in a hydropower plant with annual energy output of 21 GWh.[[124]](#footnote-124) If the *Sauda* price had been paid here, the compensation would have gone from NOK 45,000 to NOK 21,000,000. That is, the price would have been almost 500 times higher.[[125]](#footnote-125)

These examples illustrate a point of general interest, namely that when certain development purposes regularly benefit from expropriation, prices for property suitable for these purposes can be kept artificially low. Instead of competing for a deal with owners, developers can compete to be the first to acquire planning and expropriation licenses from the government. In this way, even if the system prescribes market value compensation with a premium, the prices paid on this market will be kept artificially low by the use of expropriation.[[126]](#footnote-126)

In my opinion, preventing such a mechanism from undermining the fairness of the compensation regime is an important challenge associated with regulatory systems that make expropriation orders widely available for commercial development. Failure to address this appropriately can create financial incentives for developers to favor expropriation over friendly negotiations or cooperation with owners. In this way, a vicious circle can form, making it hard to break out of the expropriation loop.

12.5.2 **New Methods for Compensating Waterfalls**

In the early 1990s, the Norwegian energy sector was liberalized and hydropower development came to be organized as a for-profit pursuit. At the same time, the monopoly system was dismantled so that any electricity producer could now sell electricity on the national grid. Making use of this opportunity, many owners of streams and waterfalls built their own hydroelectric plants. In addition, smaller hydropower companies emerged, specializing in small-scale development and owner cooperation.

Because of this, the natural horsepower method came under increasing pressure. In particular, owners began to argue that expropriation deprived them of an opportunity to make a significant commercial profit, a loss for which compensation should be paid. Eventually, after about ten years, legal professionals started taking this argument seriously.[[127]](#footnote-127)

A new market for waterfalls had already developed at this point, following increased interest in small-scale hydropower from commercial actors who could not rely on easy access to expropriation licenses. For transactions of rights to waterfalls on this market, the traditional method of valuation is not used. In fact, waterfalls are rarely sold at all. Instead, they are leased to the development company for an annual fee. The details of such agreements vary, but the fee usually corresponds to a percentage of annual gross income of the hydropower plant, often between 10% and 20%.[[128]](#footnote-128)

Since leasehold agreements tie compensation to the fate of the hydropower project, several questions arise when attempting to estimate the present-day value of streams and waterfalls on this market. The appraisers first have to determine what the most likely project looks like. Then they have to determine what the annual production will be. After this, they must assess the cost of constructing the plant, which will in turn make it possible to estimate the level of rent likely to be paid to the waterfall owners. Then, since this rent is set as a percentage of the income from sale of electricity and energy certificates, the appraisers must stipulate future prices, usually for 40 to50 years (the standard duration of a leasehold). Finally, a present-day value can be calculated based on future cash flows.

The appraisal courts began to use such a model around 2005 and the first case of this kind to reach the Supreme Court was *Uleberg*.[[129]](#footnote-129) The appraisal court of appeal, led by the lay appraisers (who overruled the professional judge), had awarded compensation based on the new method. The Supreme Court ordered a retrial, but commented that it supported the adoption of the new method whenever an *alternative* small-scale project was deemed a foreseeable use of the waterfall in the no-expropriation world. Since *Uleberg*, the new method has been used in several cases before the lower appraisal courts.[[130]](#footnote-130)

In these cases, the process of valuation can easily become quite protracted and expert-dominated. Moreover, given the many uncertain elements of the calculation, it is typical that the opposing parties produce expert witnesses with highly diverging opinions. In addition to such practical challenges, however, a fundamental *legal* challenge arises with respect to the no-scheme rule. Several questions arise, the most important of which have been the following:

1. Is it foreseeable that the waterfall would be developed for hydropower in the no-scheme world?
2. If so, what would such a hydropower project have looked like?
3. Is it foreseeable that this alternative project would have obtained all necessary licenses?
4. Does the no-scheme rule entail that all projects identical or similar to that benefiting from expropriation have to be disregarded, *i.e.*, have to be regarded as unforeseeable?
5. Are the development licenses held by the expropriating party evidence that alternative (inferior) projects would not have been granted all necessary licenses, even in the no-scheme world?
6. How should compensation be calculated if it is determined that no (alternative) hydropower scheme would have been foreseeable?

In some cases, for instance, when the project benefiting from expropriation is not commercially viable but is carried out for public purposes with the help of special state funding, one might have to conclude that hydropower would have been unforeseeable in the no-scheme world. However, in most cases, the project benefiting from expropriation already serves as an indication that the waterfall can be commercially harnessed for energy.

At this point, however, the no-scheme rule comes into play and creates difficulty once we begin asking about the counterfactual likelihood of obtaining the necessary licenses for an alternative development project. If the no-scheme rule is applied narrowly, in particular, it can be argued that the licensing authority would not have been willing to grant a development license to an inferior project, not even in the no-scheme world.

Indeed, the large energy companies have consistently advocated this argument, ever since the new method emerged.[[131]](#footnote-131) Moreover, the argument was recently given a stamp of approval in the recent Supreme Court case of *Otra II*.[[132]](#footnote-132) Here, the Court first concluded that the development plans of the expropriating party were indeed superior to the alternatives (unsurprisingly, since an expropriation order was granted in the first place). Then, because of this, all alternative development plans (of which there were several) were held to be unforeseeable.

After concluding in this way, the Court needed to come up with some alternative way of compensating the owners. One possibility would be to apply the no-scheme rule narrowly also along its negative dimension, by looking to the value of the waterfalls in a project corresponding to the expropriation scheme. Indeed, as the superiority of such a project had already been used to rule out compensation for lost alternatives, this approach would seem natural. However, at this point, the adherence to a ‘market value’ approach was to the great detriment of the owners. The presiding judge, in particular, reasoned as follows:

Based on the arguments presented to the Supreme Court, I find it safe to assume that there does not today exist any market for the sale and leasing of waterfalls for which alternative development is not foreseeable, but where the waterfalls can be used in more complex hydropower schemes. The appellants have not been able to produce documents or prices to document the existence of such a market.[[133]](#footnote-133)

But how could *such a market* ever develop? After all, all alternative purchasers had already been excluded from consideration because their development schemes were deemed inferior to the expropriation project. Taken to its logical conclusion, this line of reasoning leads to an offensive result: the commercial value of property taken for economic development should not be compensated *because* the expropriating party will make optimal commercial use of it. The Supreme Court stopped just short of explicitly endorsing this conclusion. Instead, they retreated to the traditional idea of benefit sharing, based on the natural horsepower method.

It seems clear to me that the alternative development schemes presented to the court in *Otra II* were in fact foreseeable. They only fell to be disregarded due to the lack of a well-behaved no-scheme principle in Norwegian law, cf. my discussion in Section 12.44. However, it remains an interesting theoretical question whether the natural horsepower method can be replaced with something less offensive in cases when alternative development is in fact unrealistic, e.g. because only the expropriation project is profitable.

Toward a possible answer, let us follow Lord Nicholls and reason based on what would have happened in the absence of a power to expropriate. In cases such as *Otra II*, an alternative project corresponding closely to the expropriation project could still be implemented. This alternative project, however, could be based on *actual* cooperation and benefit sharing with owners.

If we think like this, focus shifts from theoretical benefit sharing imposed through the natural horsepower method, towards trying to determine, under the foreseeability test, what would have been the actual mode of cooperation in a joint enterprise. This subtle change of perspective could make a dramatic difference. In particular, it would allow us to anchor the compensation assessment in a concrete, albeit counterfactual, benefit sharing scenario.

In *Otra II*, this line of reasoning was not considered in any depth, but mentioned briefly and rejected.[[134]](#footnote-134) However, in the Supreme Court case of *Kløvtveit*, in circumstances similar to those of *Otra II*, a similar argument succeeded.[[135]](#footnote-135)

In *Kløvtveit*, alternative development was not deemed foreseeable, but unlike in *Otra II*, the lay appraisers in the court of appeal decided to compensate the owners for the loss of a cooperation opportunity in the no-scheme world. That is, the appraisal court of appeal held that in the absence of the power to expropriate, the waterfalls would have been exploited in a similar way, but by cooperation rather than expropriation.[[136]](#footnote-136)

This meant that the court was free to replace the natural horsepower method by what they thought the parties would actually have done to set up a cooperation project. Here, the appraisal court found that a leasehold model similar to those used on the small-scale market would have been adopted, and compensated the owners on this basis.

In my opinion, the approach of *Kløvtveit* is far more sensible than that of *Otra II*. For commercial projects, it seems that in the absence of a power to expropriate, any rational buyer would want to cooperate with the owners.[[137]](#footnote-137) Hence, as *Kløvtveit* shows, the foreseeability test itself may be applied to arrive at compensation based on a more realistic form of benefit sharing.

*Kløvtveit* was discussed briefly in *Otra II*. However, the presiding judge chose to focus only on what he regarded as ‘practical problems’ associated with a possible cooperation project.[[138]](#footnote-138) As the cooperation model was not the centre of attention in the case, one can still hope that *Kløvtveit*, rather than *Otra II*, will become the influential precedent for the future.

At the same time, the outcome of *Kløvtveit* serves as a warning that the solution offered there is very frail. In the end, the expropriating party successfully argued that the following question had to be put to the appraisal court: if the owners had decided to cooperate with the expropriating party, when exactly would this joint endeavor have applied for a development license?

It was held that a no-scheme rule had to be applied, so that the actual timeline of the expropriation project had to be disregarded. Hence, the appraisal court was forced to ask whether a joint application for development would have been successful at a later point in time, when it would have been foreseeable for a cooperation project to have reached the application stage. As it turned out, the answer to this question, based on a concrete assessment, was that a license would probably not have been granted. Hence, the cooperation project was held to be unforeseeable after all. The case therefore concluded just as *Otra II*, with compensation based on the natural horsepower method.

Indeed, every single case where the Supreme Court has commented that the natural horsepower method could in principle be abandoned, have eventually been decided based on the natural horsepower method. The reason for this is that the expropriating parties have eventually always found ways to argue that alternative development would *not* in fact have been foreseeable in the no-scheme world.

In my opinion, this serves to illustrate a broader point, namely that it is exceedingly difficult to ensure fairness and benefit sharing through complicated counterfactual assessments of what *would have happened* if there had been no expropriation. As a result, the goal of meaningful benefit sharing can soon appear rather remote in practice, despite a seemingly sensible starting point.

In addition, the case of Norwegian waterfalls shows that ‘simple’ alternatives, such as awarding a fixed premium, or relying on theoretical assessment formulas, are unlikely to provide enhanced legitimacy in the long run. Indeed, if the base level of compensation is fixed at one hundredth of the commercial value of the property that is taken, a 25% premium will not make much of a difference.[[139]](#footnote-139)It should be mentioned that the appraisal courts in Norway have recently made some attempts at revising the natural horspower method, to compensate for the fact that it is based on a technologically outdated view on the economic value of water power. Specifically, some courts have begun calculating the natural horsepower of a waterfall using a new formula that does not depend on the level of regulation of the watercourse, relying instead on the *average* flow of water in the river.[[140]](#footnote-140)

This ‘new’ natural horsepower method received a favourable mention by the Supreme Court in Otra II, although it was not discussed at any length.[[141]](#footnote-141) Importantly, the new method is still based on fixing compensation per natural horsepower on the basis of comparison with previous appraisal decisions, not market values. Hence, the primary flaw in the natural horsepower method is not corrected. There has not been any systematic study of how the ‘new’ natural horspower method compares with actual commercial values of waterfalls, but my own preliminary survey indicates that the typical award based on the new method results in 10-20 times less compensation than what the owners could expect to get for their rights if these had not been expropriated.

Although more work should be done on assessing the new method, there is suffcient evidence to conclude that the discrepancy is still severe.[[142]](#footnote-142) Moreover, there is nothing in the new method that prevents the reemergence of the underlying mechanism that resulted in the extreme imbalances documented above, whereby the compensation level became more and more artifically deflated as a result of energy companies using expropriation as a means of acquiring property rights at an undervalue. In the end, therefore, recent developments do not restore much confidence in the idea that benefit sharing can be successfully achieved *post hoc* by courts. . Indeed, the Norwegian experience suggests that there might well be inherent limits to how far one can get when attempting to ensure legitimacy of economic development takings through compensation reform.

**12.6 Final Remarks and Future Work**

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

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

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

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

I think my conclusion points towards interesting avenues for future work. First, I note that my analysis can serve as an argument in favor of looking at alternatives to expropriation in cases involving economic development. This is a perspective that has already emerged in the US debate, particularly through the work of Heller and Hills, who have proposed a novel institution for collective action, the *land assembly district*, that they think can obviate the need for expropriation in many cases when economic development appears to be desirable.[[143]](#footnote-143)

I think this kind of work points to the future in the debate on economic development takings. Second, I would like to mention briefly that Norway has an entire legal framework in place that can shed further light also on this proposal. I am referring here to the system of so-called *land consolidation courts*, special tribunals that are empowered to organize development projects involving fragmented property rights.[[144]](#footnote-144) Importantly, this legal framework leaves room for *compelling* owners to cooperate and participate, in some cases also with external commercial actors. At the same time, it is a fundamental principle of land consolidation that measures can only be ordered if they create enough benefits to offset any losses for all the owners and properties involved.[[145]](#footnote-145)

In relation to hydropower development, this framework is already being put to use in an increasing number of cases.[[146]](#footnote-146) Moreover, there are forces in the Norwegian government that are pushing for land consolidation as an alternative to expropriation more generally.[[147]](#footnote-147) In my opinion, this points towards the future, as it promises to provide a highly flexible approach for dealing with property and economic development using varying degrees of compulsion. Moreover, it provides an interesting case study against which to judge other proposals, such as that put forth by Heller and Hills. A further study of this, however, must be left for another article.

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2. The standard example of an economic development taking is *Kelo v. City of New London* 545 US 469 (2005). *See*, *generally*, C.E. Cohen, ‘Eminent Domain after *Kelo v. City of New London*: An Argument for Banning Economic Development Takings’, *Harvard Journal of Law & Public Policy*, Vol. 29, 2006, p. 491. [↑](#footnote-ref-2)
3. Such arguments proceed based on the so-called ‘public use test’ in the Fifth Amendment of the US Constitution. For a small sample of US scholarship on this, *see* G.S. Alexander, ‘Eminent Domain and Secondary Rent-Seeking’, *New York University Journal of Law & Liberty*, Vol. 1, 2005, p. 958; L.S. Underkuffler, ‘Kelo’s Moral Failure’, *William & Mary Bill of Rights Journal*, Vol. 15, 2006, p. 377; I. Somin, ‘Controlling the Grasping Hand: Economic Development Takings after Kelo’, *Supreme Court Economic Review*, Vol. 15, 2007, p. 183. [↑](#footnote-ref-3)
4. *See*, *generally*, A. Lehavi & A.N. Licht, ‘Eminent Domain, Inc.’, *Columbia Law Review*, Vol. 107, 2007, p. 1704; J.E. Krier & C. Serkin, ‘Public Ruses’, 2004 *Michigan State Law Review*, p. 859; A. Bell & C. Parchomovsky, ‘Taking Compensation Private’, *Stanford Law Review*, Vol. 59, 2007, p. 871; L.A. Fennell, ‘Taking Eminent Domain Apart’, 2004 *Michigan State Law Review*, p. 957; B.A. Householder, ‘Kelo Compensation: The Future of Economic Development Takings’, *Chicago-Kent Law Review*, Vol. 82, 2007, p. 1029. *See also*, the discussion in T.W. Merrill, ‘The Economics of Public Use’, *Cornell Law Review*, Vol. 72, 1986, pp. 61, 90-93. [↑](#footnote-ref-4)
5. The no-scheme terminology is established in the UK, *see*, e.g. *Compulsory Purchase and Compensation: Disregarding the Scheme* (Discussion Paper, Law Commission 2001). In the UK, the basic no-scheme rule was developed by the courts, and the common law expression of it is also known as the *Pointe Gourde* principle, so named after *Pointe Gourde Quarrying & Transport Company Limited v. Sub-Intendant of Crown Lands (Trinidad and Tobago)* [1947] UKPC 71. Statutory no-scheme rules are found in the Land Compensation Act 1961, ss 5(3), 6, and 9 (*see also*, ss 14 to 17 regarding the planning permissions that may be taken into account when calculating compensation). In comparative literature, no-scheme rules are also sometimes referred to as *elimination* rules, *see* J. Sluysmans, S. Verbist & R. de Graaff, ‘Compensation for Expropriation: How Compensation Reflects a Vision on Property’ *European Property Law Journal*, 2014, pp. 3, 5, 21. [↑](#footnote-ref-5)
6. Lehavi & Licht, *supra*. [↑](#footnote-ref-6)
7. I believe my comparative approach is justified, as the core idea of the no-scheme principle seems to be largely the same across different jurisdictions. In fact, I am not aware of a single jurisdiction that does not include some rule corresponding to (aspect of) the no-scheme principle. In addition to the jurisdictions discussed in this article, I mention that no-scheme rules are also found in civil law jurisdictions like Germany and the Netherlands, *see* Sluysmans, Verbist & de Graaff, *supra*, pp. 5, 21. [↑](#footnote-ref-7)
8. Many US scholars have highlighted this aspect, e.g. Underkuffler, *supra*. [↑](#footnote-ref-8)
9. The importance of proportionality in relation to property as a human right has been emphasized by the European Court of Human Rights (ECtHR). *See*, e.g. *Lindheim and Others v. Norway* [2012] ECHR 985, Paras. 119-125 with further references. The European Convention of Human Rights (ECHR) also contains a public interest requirement (in the First Article of the First Protocol), but the ECtHR hardly ever use it, as they regard the member states as having a wide ‘margin of appreciation’ in this regard, *see*, e.g. *James v. United Kingdom* [1986] Series A No. 98, Para. 46. Similarly, in Norway, the constitutional property clause appears to prescribe a public use test, but most courts and legal scholars assume that this places no practical restriction on the takings power. *See*, e.g. J. Aall, *Rettsstat og Menneskerettigheter*, Fagbokforlaget, Bergen, 2004, p. 249. [↑](#footnote-ref-9)
10. For a presentation of the bundle theory of property, influential in both the UK and the US, *see*, e.g. J.E. Penner, ‘The “Bundle of Rights” Picture of Property’, *UCLA Law Review*, Vol. 43, 1996, p. 711. [↑](#footnote-ref-10)
11. *See*, e.g. Fennell, *supra*, pp. 965-966. [↑](#footnote-ref-11)
12. *See*, e.g. R.H. Freilich, ‘Condemnation Blight: Analysis and Suggested Solutions’ *in* A.T. Ackerman & D.W. Dynkowski (Eds.), *Current Condemnation Law: Takings, Compensation and Benefits*, 2nd edn., American Bar Association, Chicago, 2006, p. 81. [↑](#footnote-ref-12)
13. *See* Fennell, *supra*, p. 962. [↑](#footnote-ref-13)
14. Id., p. 963. [↑](#footnote-ref-14)
15. Id., pp. 966-967. For a general personhood-building theory of property law, *see* M.J. Radin, *Reinterpreting Property*, University of Chicago Press, Chicago, 1993. For a general economic theory of the subjective value of independence, *see* M. Bens & B.S. Frey, ‘Being Independent is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy’, *Economica*, Vol. 75, 2008, p. 362. For so-called ‘progressive’ property theories, *see*, *generally*, G.S. Alexander *et al.*, ‘A Statement of Progressive Property’, *Cornell Law Review*, Vol. 94, 2009, p. 743. [↑](#footnote-ref-15)
16. *See*, *generally*, Lehavi & Licht, *supra*. [↑](#footnote-ref-16)
17. Id., p. 1741. The claim (implicit in Lehavi & Licht’s work) that market value compensation is the standard approach cannot be maintained in a comparative setting. *See*, e.g. T. Allen, ‘Liberalism, Social Democracy and the Value of Property under the European Convention of Human Rights’, *International and Comparative Law Quarterly*, Vol. 59, 2010, p. 1055. Allen discusses a tension in Europe between ‘social democratic’ and ‘liberal’ approaches to compensation, where the former rejects market value as a starting point. I remark that the distinctions that arise here pertain mainly to the balancing of public and private interests in property. While highly interesting, these distinctions become less relevant in the context of studying economic development takings (where the main issue, arguably, concerns (im)balances between opposing private interests). [↑](#footnote-ref-17)
18. Id., p. 1741. [↑](#footnote-ref-18)
19. Id., p. 1735. [↑](#footnote-ref-19)
20. Id., p. 1741. [↑](#footnote-ref-20)
21. Merrill, *supra*, pp. 90-93. With further references to Berger, *supra*, pp. 243-245; R.A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, Harvard University Press, Cambridge, Massachusetts, 1985, pp. 173-175. Merrill is generally supportive of the proposal, but also discusses possible objections. [↑](#footnote-ref-21)
22. Krier & Serkin, *supra*, pp. 865-873. [↑](#footnote-ref-22)
23. Fennell, *supra*, pp. 995-996. [↑](#footnote-ref-23)
24. Bell &Parchomovsky, *supra*, pp. 890-900. [↑](#footnote-ref-24)
25. Lehavi & Licht, *supra*, pp. 1732-1733. [↑](#footnote-ref-25)
26. Id., p. 1734. [↑](#footnote-ref-26)
27. Id., pp. 1735-1736. It is important to note, however, that in some cases, the public purpose of a taking can be to deprive the owner of economic privileges that are considered undesirable from a societal perspective (I will not enter the discussion about the extent to which this is legitimate). This can also lead to private-to-private transfers, such as in the US case of *Hawaii Housing Authority v. Midkiff* 467 US 229 (1984). But cases like this are *not* economic development takings in the sense I am using that term in this article. I note, however, that the distinction between economic development takings and other kinds of takings can be hard to define. For instance, C.E. Cohen, who proposes a ban on economic development takings, briefly considers the difficulty of providing a clear definition, but in the end retreats to a proposal based on banning private-to-private transfers, with some explicit exceptions for non-profit undertakings, *see* Cohen, *supra*, at pp. 558-567. I am not convinced that this is the right approach, and I believe a further investigation into the best way to define economic development takings is an interesting avenue for future research. For instance, it would promise to shed new and interesting light on Justice O’Connor’s nuanced position on legitimacy (O’Connor delivered both the leading opinion in favor of private-to-private transfers in *Midkiff*, as well as the leading dissent, objecting against it, in *Kelo*). [↑](#footnote-ref-27)
28. For an example, I refer to the infamous case of *Poletown Neighborhood Council v. City of Detroit* 410 Mich. 616 (1981). In *Poletown*, around 1300 homes were condemned at the request of General Motors, who wished to set up a new car assembly plant where the homes had been. Although this was a taking for profit, it seems hard to imagine that any other developer would be interested in bargaining for the right to purchase the entire site in question, taking into account its scale and how it had been laid out especially so that it would suit plans formulated by General Motors. [↑](#footnote-ref-28)
29. *See*, e.g. L. Berger, ‘The Public Use Requirement in Eminent Domain’, *Oregon Law Review*, Vol. 57, 1978, pp. 203, 206-207. *See also*, E.E. Meidinger, ‘The ‘’Public Uses’’ of Eminent Domain: History and Policy’, *Environmental Law*, Vol. 11, 1980, p. 1, especially at pp. 23-25. [↑](#footnote-ref-29)
30. Id. [↑](#footnote-ref-30)
31. *See*, e.g. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.* 186 Ala. 622, 65 So. 287 (1913), at p. 288. This particular case later went to the Supreme Court, where Justice Holmes made his famous comment that “the inadequacy of use by the general public as a universal test is established”, *see* *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.* 240 US 30 (1916), at p. 32. I remark that the scope of the statutory rules under scrutiny in this case, which justifies viewing this as a mill act case rather than a case revolving around a public utility, is made clearer in the judgement of the Supreme Court of Alabama cited above, *see* particularly the dissenting opinion of Justice de Graffenried at pp. 296-297. [↑](#footnote-ref-31)
32. *See*, e.g. *Stowell v. Flagg* 11 Mass. 364 (1814). [↑](#footnote-ref-32)
33. *See*, e.g. *Head v. Amoskeag Mfg. Co.* 113 US 9 (1885). [↑](#footnote-ref-33)
34. *See*, e.g. Meidinger, *supra*, pp. 24-25. [↑](#footnote-ref-34)
35. Id., *see also*, Berger, *supra*, at p. 206. [↑](#footnote-ref-35)
36. *See*, e.g. *Murdock v. Stickney* 62 Mass. 113, p. 116 (“The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use.”) *See also*, *Fiske v. Framingham Mfg. Co.* 12 Pick. 68 (1831), pp. 72-73 (explaining that the Massachusetts Mill Act was meant as a solution to the problems that arise when no riparian owner can exercise his ‘full rights’ without interfering with the rights of other owners). *See also*, Meidinger, *supra*, at p. 25. [↑](#footnote-ref-36)
37. I also mention a close parallel to ideas underlying the proposal for institutional reform made by Heller and Hills, discussed briefly in Section 6. *See* M. Heller & R. Hills, ‘Land Assembly Districts’, *Harvard Law Review*, Vol. 121, 2008, p. 1465. [↑](#footnote-ref-37)
38. Meidinger, *supra*, at p. 24. [↑](#footnote-ref-38)
39. *Fraser v. City of Fraserville* [1917] AC 187, p. 194. [↑](#footnote-ref-39)
40. For a history of the rule in UK law, clearly illustrating the difficulty in interpreting it and applying it to concrete cases, I point to Appendix D of *Towards a Compulsory Purchase Code: (1) Compensation* (Report no. 286, Law Commission 2003). *See also*, *Compulsory Purchase and Compensation: Disregarding the Scheme*, *supra*. [↑](#footnote-ref-40)
41. *Waters and Others v. Welsh National Assembly* [2004] UKHL 19. [↑](#footnote-ref-41)
42. Id., p. 19. *See also*, the discussion on the relationship between statutory and common law no-scheme rules in *Transport for London v. Spirerose Limited* [2009] 1 WLR 1797. This case dealt with the situation that arises if, in the absence of the expropriation scheme, the original owner would have been in a good position to obtain planning permission for alternative development. The main question was whether this prospect should be reflected in the valuation in a manner proportionate to the probability of obtaining a license, resulting in a so-called ‘hope value’, or as a certainty, under the balance of probabilities rule of proof (resulting in higher compensation). It was clear that it was likely, but not certain, that planning permission would in fact have been granted in the absence of the expropriation scheme. However, the House of Lords rejected the approach of the lower courts, which had been to treat planning permission as a certainty. In doing so, the Lords also argued against a broad application of the *Pointe Gourde* principle (which could have encouraged more counter-factual thinking and a balance of probabilities approach). Instead, they preferred to focus on the statutory no-scheme rules found in the Land Compensation Act 1961, which made hope value seem more natural (antithetically, in the absence of statutory rules to suggest counterfactual assessment on this point). The Lords’ apparent support for statutory no-scheme rules, despite their complexities, complements (and contrasts) with the reasoning in *Waters*, but it remains to be seen whether *Transport for London* will become an important precedent outside the specific context of hope value calculations. For an argument that it should put the common law no-scheme principle ‘largely to an end’, *see* R. Gupta, ‘Ruling Rewrites Case Law on Compensation Terms’, 2009 (Dec) *Planning*, 2009, p. 9. For a contrasting view (much better argued, in my opinion), *see* R. Carnwath, ‘After Spirerose – Back to the Common Law?’, 2011 (May) *Journal of Planning & Environment Law*, p. 527. [↑](#footnote-ref-42)
43. *Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam* [1939] AC 302; *Pointe Gourde Quarrying & Transport Company Limited v. Sub-Intendant of Crown Lands* (Trinidad and Tobago), *supra*. [↑](#footnote-ref-43)
44. *See* Id., *Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam*, p. 319. [↑](#footnote-ref-44)
45. Id., pp. 316-317. [↑](#footnote-ref-45)
46. *Pointe Gourde Quarrying & Transport Company Limited v. Sub-Intendant of Crown Lands* (Trinidad and Tobago), *supra*. [↑](#footnote-ref-46)
47. Id., p. 572. [↑](#footnote-ref-47)
48. A. Baum *et al.*, *Statutory Valuations*, 4th edn., Routledge, Oxon, 2014, pp. 242-244. [↑](#footnote-ref-48)
49. *Waters and Others v. Welsh National Assembly*, *supra*, p. 164. [↑](#footnote-ref-49)
50. *See* *Towards a Compulsory Purchase Code: (1) Compensation*, *supra*, pp. 69-70. [↑](#footnote-ref-50)
51. In some jurisdictions, one will sometimes regard this as a taking in its own right, known as a regulatory taking in the US. For a comparative study of this issue, *see*, *generally*, R. Alterman (Ed.), *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights*, American Bar Association, Chicago, 2010. [↑](#footnote-ref-51)
52. *Pointe Gourde Quarrying & Transport Company Limited v. Sub-Intendant of Crown Lands* (Trinidad and Tobago), *supra*, p. 572. [↑](#footnote-ref-52)
53. *But see*, *Transport for London v. Spirerose Limited*, *supra*. [↑](#footnote-ref-53)
54. *Waters and Others v. Welsh National Assembly*, *supra*, p. 18. [↑](#footnote-ref-54)
55. *See* Andrew Baum *et al.*, *supra*, pp. 242-244; S. Crow, ‘Compulsory Purchase for Economic Development: An International Perspective’, 2007 (Aug) *Journal of Planning & Environment Law,* p. 1102. [↑](#footnote-ref-55)
56. It might be impossible to achieve development in practice if the owners refuse to cooperate. However, it would seem objectionable to conclude from this that the compensation to recalcitrant owners should be reduced, for what is an entirely subjective reason. [↑](#footnote-ref-56)
57. *See also*, Crow, *supra*, at p. 1114. Crow argues in favor of benefit sharing in case of economic development, and questions a broad application of the no-scheme principle in such cases. Moreover, he notes that some benefit sharing might already be achieved in the UK, under the current no-scheme principle (and related rules pertaining to planning presumptions), and flags this as a matter for ‘further research and consideration’. [↑](#footnote-ref-57)
58. *Star Energy Weald Basin Ltd & Anor v. Bocardo SA* (2010) 5 WLR 654 (UKSC). [↑](#footnote-ref-58)
59. *Batchelor v. Kent County Council* (1989) 59 P & CR 357, 361. Cited by Lord Nicholls in *Waters and Others v. Welsh National Assembly*, *supra*, p. 65. [↑](#footnote-ref-59)
60. *Star Energy Weald Basin Ltd & Anor v. Bocardo SA*, *supra*, p. 42. [↑](#footnote-ref-60)
61. Id., p. 83. [↑](#footnote-ref-61)
62. This also touches on philosophical debates regarding the correct way to conceive of property in the law, for instance the debate surrounding the bundle theory, *see*, *generally*, D.B. Klein & J. Robinson, ‘Property: A Bundle of Rights? Prologue to the Property Symposium’, *Econ Journal Watch*, Vol. 8, 2011, p. 193. For an interesting collection of articles on property and community, many of which appear relevant to bringing out the nuances of legitimacy, *see* G.S. Alexander & E. Peñalver (Eds.), *Community and Property*, Oxford University Press, New York, 2010. [↑](#footnote-ref-62)
63. *Star Energy Weald Basin Ltd & Anor v. Bocardo SA*, *supra*, p. 163. [↑](#footnote-ref-63)
64. Id., p. 163. [↑](#footnote-ref-64)
65. This point of view is clearly implicit in some work on legitimacy, e.g. the US scholarship cited in Section 2. However, I have not seen any principled discussion on the exact scope of public use/interests clauses as applied specifically to assess the legitimacy of compensation practices. I believe this is an interesting question for future work. [↑](#footnote-ref-65)
66. The Constitution of the Kingdom of Norway 1814, s 105. [↑](#footnote-ref-66)
67. The exact formulation seems to prescribe a public use test as well (arguably in clearer language than the US takings clause). But this has no practical significance, as both courts and legal scholars in Norway tend to reject the idea that the Constitution restricts the takings power in any way except with regards to compensation. *See* Aall, *supra*, p. 249. [↑](#footnote-ref-67)
68. For an illustration of this, I refer to a recent governmental committee report on compensation, NOU 2003:29. The strongly worded dissent of Professor Fleischer, advocating a more limited application of the *positive* aspect of the no-scheme principle, illustrates the heated debate on the compensation issue in Norway. [↑](#footnote-ref-68)
69. *See* the Appraisal Act 1917, s 11. [↑](#footnote-ref-69)
70. Act No. 1 of 1 June 1917 relating to Appraisal Disputes and Expropriation Cases. [↑](#footnote-ref-70)
71. *See* the Appraisal Act 1917, s 5. [↑](#footnote-ref-71)
72. *See* Id., s 22, with further references to the Civil Dispute Act 2005 (Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes). [↑](#footnote-ref-72)
73. *See* the Appraisal Act 1917, s 32. [↑](#footnote-ref-73)
74. *See* the Appraisal Act 1917, s 38. [↑](#footnote-ref-74)
75. F. Castberg, *Norges Statsforfatning Bind* 2, 3rd edn., Universitetsforlaget, Oslo, 1964, p. 268. The translation is mine, as are all other translated quotes from Norwegian sources that appear in this article. [↑](#footnote-ref-75)
76. Id., p. 268. [↑](#footnote-ref-76)
77. *A/S Den Ankerske Marmorforretning v. Norges Statsbaner*, Rt-1956-493 (*Marmor*). [↑](#footnote-ref-77)
78. Id., pp. 498-499. [↑](#footnote-ref-78)
79. Id., p. 499. [↑](#footnote-ref-79)
80. *See*, *generally*, Ø. Thomassen, *Herlege Tider: Norsk Fysisk Planlegging 1930-1965* (PhD Thesis), NTNU, Trondheim, 1997; T. Kleven, *Fra Gjenreisning til Samfunnsplanlegging: Norsk Kommuneplanlegging 1965-2005*, Tapir Akademiske Forlag, Trondheim, 2011. [↑](#footnote-ref-80)
81. *See*, *generally*, D.O. Skjold, *Statens Kraft 1947-1965: For Velferd og Industri*, Universitetsforlaget, Oslo, 2006; L. Thue & Y. Nilsen, *Statens Kraft 1965-2006: Miljø og Marked*, Universitetsforlaget, Oslo, 2006. [↑](#footnote-ref-81)
82. *See* Ot.prp.nr.56 (1970-1971), *supra*, pp. 19-20. [↑](#footnote-ref-82)
83. Appointed by the King in Council on 6 August 1965. [↑](#footnote-ref-83)
84. *See*, e.g. the Watercourse Regulation Act 1917, s 16. [↑](#footnote-ref-84)
85. *See* NUT 1969:2, pp. 136-137 (the report from the Husaas committee). [↑](#footnote-ref-85)
86. Id., p. 134. [↑](#footnote-ref-86)
87. Id., p. 142. Since this assumption was made quite generally, it also corresponds to a broader view on the no-scheme principle than that endorsed by Castberg, *supra*. [↑](#footnote-ref-87)
88. *See* NUT 1969:2, p. 142. [↑](#footnote-ref-88)
89. The argument used to justify the rule was that the public should not have to pay a financial premium to owners based on possible future uses that would be contingent on permission from the government, *see* Ot.prp.nr.56 (1970-1971), *supra*, pp. 19-20. [↑](#footnote-ref-89)
90. Id., pp. 17-20. [↑](#footnote-ref-90)
91. Id., p. 19. [↑](#footnote-ref-91)
92. Ot.prp. nr.56 (1970-1971), *supra*, p. 19. [↑](#footnote-ref-92)
93. *Johnsrud and Others v. Ullensaker commune*, Rt-1976-1 (*Kløfta*). [↑](#footnote-ref-93)
94. *See*, for instance, NOU 2003:29, pp. 7-9 (governmental report on compensation practices from a committee appointed by the King in Council). [↑](#footnote-ref-94)
95. *See* the Expropriation Compensation Act 1984, s 4. [↑](#footnote-ref-95)
96. Id., s 5-6. [↑](#footnote-ref-96)
97. *See* NOU 2003:29, pp. 7-9. [↑](#footnote-ref-97)
98. *See* B. Stordrange, ‘Reguleringsplaner og Ekspropriasjonserstatning’, *Lov og Rett*, Vol. 46, 2007, pp. 107-108. [↑](#footnote-ref-98)
99. In practice, this means that the appraisal court is free to compensate the owner on the basis that some other use would have been foreseeable in the absence of the expropriation, e.g. housing uses. [↑](#footnote-ref-99)
100. *See* Rt-2009-740 and Rt-2011-930 respectively. [↑](#footnote-ref-100)
101. One might ask if it has status of constitutional customary law, especially since it concerns the mechanism by which a constitutional rule is meant to be upheld. [↑](#footnote-ref-101)
102. *See*, *generally*, C. Sontum & E. Sofienlund, ‘Ekspropriasjon av Vannkraft – Hvorfor den Historiske Metoden fra Norsk Rettspraksis ikke er Relevant i Dagens Marked’, 4 *Småkraftnytt* 2007. [↑](#footnote-ref-102)
103. The narrative in Norway was very similar to that found in case law from the state of Massachusetts at this time, cf. my discussion in Section 2. [↑](#footnote-ref-103)
104. *See* O. Amundsen, *Lov om Vasdragsreguleringer av 14 December 1917 (nr. 17) med Senere Tillæg og Forandringer med Kommentar*, Aschehough, Oslo, 1928, p. 29. For the limited expropriation authorities that did exist (which were similar to those found in many US mill acts), *see* W.S. Dahl, *Den Norske Vasdragsret*, Den Norske Forlagsforening, Kristiania, 1888, pp. 58, 60, 69-85. I should remark that I am only talking about the right to harness energy from water. The right to make use of water in other respects, e.g. as drinking water, is regulated quite differently, based on a long tradition of communal rights (private property constructs play a role in some respects, but freely running water, as a substance, is not subject to private ownership in Norway). [↑](#footnote-ref-104)
105. Id., For the exact percentages in 2013, *see* Statistics Norway, <www.ssb.no/energi-og-industri/statistikker/elektrisitetaar>. [↑](#footnote-ref-105)
106. *See* the description given in the Supreme Court case of *Agder Energi Produksjon AS v. Magne Møllen*, Rt-2008-82 (*Uleberg*), Paras. 81-84. [↑](#footnote-ref-106)
107. Id. [↑](#footnote-ref-107)
108. *See* the Watercourse Regulation Act 1917, s 16. [↑](#footnote-ref-108)
109. A horsepower is an old-fashioned unit of effect which is still sometimes used, e.g. in relation to cars. In the context of electricity, it has been largely replaced by *Watt*. [↑](#footnote-ref-109)
110. The formula is 13.33 × H × Qreg, where H is the height difference (in meters) between the dam and the power station and Qreg is the regulated flow of water that can be maintained for at least 350 days every year (in m3). [↑](#footnote-ref-110)
111. *See* *Uleberg*, *supra*. [↑](#footnote-ref-111)
112. *See* I. Vislie, ‘Ekspropriasjon og Skjønn i Vassdrag’ *in* T. Falkanger & K. Haagensen (Eds.), *Vassdrags-og Energirett*, 2nd edn., Universitetsforlaget, Oslo, 2002. [↑](#footnote-ref-112)
113. Regulation of a watercourse can involve building a reservoir and/or installations that transfer water from one river to another. Then, if there is excess water, for instance due to flooding, water can be stored in the dam for later use. When there is no drought, the stored water can be released. In this way, it becomes possible to even out the water-flow over the year. [↑](#footnote-ref-113)
114. *See*, *generally*, Sontum & Sofienlund, *supra*. [↑](#footnote-ref-114)
115. *See* O. Rogstad, ‘Verdien av Rå Vannkraft’, 4 *Fossekallen* 1956. [↑](#footnote-ref-115)
116. In my opinion, this has become very clear after the (occasional) adoption of market based methods in recent years. *See* Section 12.5.2 below. [↑](#footnote-ref-116)
117. In a report made in connection with the *Bjølvo* case in 2002, a list of prices paid per natural horsepower was presented. Most of the prices had been set by the appraisal courts, but some were also taken from voluntary agreements. The author of the report suggested that the price level in 2002 was NOK 200-250 (GBP 20-25) per natural horsepower. *See* the decision from 03 June 2003, in case no. 01-00091B (THARD-2001-91) at the district court of Hardanger. [↑](#footnote-ref-117)
118. <www.bkk.no/om\_oss/anlegg-utbygging/Kraftverk\_og\_vassdrag/modalsvassdraget/article28961.ece?l=no>. [↑](#footnote-ref-118)
119. *See* RG-2000-459 (*Hellandsfoss*). [↑](#footnote-ref-119)
120. Id. [↑](#footnote-ref-120)
121. *See* LG-2007-176723 (*Sauda*). [↑](#footnote-ref-121)
122. The valuation in *Hellandsfoss* was said to be based on the value in 1992, when the expropriating party had taken possession of the waterfalls. If we compare with the price level in 2002, the natural horsepower method would perhaps result in just under NOK 2 million in compensation, so that ‘actual’ market value compensation, according to the price level identified in the *Sauda* case, would be ‘only’ about 75 times higher. In some later cases, influenced by the level of compensation paid in cases when the natural horsepower method has not been used, the unit price per natural horsepower has increased further and the number of natural horsepower has been calculated in a new way, typically resulting in a higher number (see the discussion below, at the end of Section 12.5.2). In the past few years, the unit price has typically been NOK 500-800. *See*, e.g. LG-2011-205374 (*Kløvtveit II*, appraisal court of appeal) and LA-2010-181441 (*Otra II*, appraisal court of appeal). Still, the imbalance is severe, with owners usually getting at least 10-20 times more in compensation when the natural horsepower method is not used. [↑](#footnote-ref-122)
123. Source: private correspondence. [↑](#footnote-ref-123)
124. Source: <www.bkk.no/om\_oss/anlegg-utbygging/Kraftverk og vassdrag/andre-vassdrag/article29899.ece>. [↑](#footnote-ref-124)
125. I also remark that the value awarded in *Sauda* was market value, not value of use. It was assumed, in particular, that the owners would have to cooperate with a ‘professional’ energy company to develop hydropower. This, in effect, halved the compensation awarded, since the Court’s decision was based on the premise that the professional company was willing to pay about 50 per cent of the profit as rent to the owners. [↑](#footnote-ref-125)
126. I mention that in a setting where the owners are politically powerful and can exert undue influence on the compensation process, it is easy to imagine that the effect could be reversed, so that the market-based approach leads to inflated compensation levels, including elements of holdout value. The general point is that the market approach can be turned to the advantage of the most resourceful and powerful groups, particularly in situations when such groups are in a position to influence the surrounding regulatory processes. In such cases, a market-based approach might be less politically neutral and ‘objective’ than it seems. [↑](#footnote-ref-126)
127. As early as in 1998, in connection with the *Hellandsfoss* case (RG-2000-459), waterfall owners had asked their legal counsel to challenge the natural horsepower method, pointing to the fact that an actual market for waterfalls had formed. At this time, however, most lawyers in Norway were unwilling to raise this issue before the courts. For more on the history of early challenges against the natural horsepower method, *see* O. Dyrkolbotn, *Ingen Rettsstat*, Randi Enger, Vikanes, 2014, pp. 249-250 (including a copy of a 1998 letter from one of the waterfall owners in *Hellandsfoss* to his legal counsel). [↑](#footnote-ref-127)
128. *See*, e.g. Sontum & Sofienlund, *supra*. [↑](#footnote-ref-128)
129. *Uleberg*, *supra*. For earlier discussion of this development by legal scholars, *see*, *generally*, U. Larsen, C. Lund & S.E. Stinessen, ‘Erstatning for Erverv av Fallrettigheter’, *Tidsskrift for Eiendomsrett*, Vol. 2, 2006, p. 175; U. Larsen, C. Lund & S.E. Stinessen, ‘Fallerstatning – Uleberg-dommen’, *Tidsskrift for Eiendomsrett*, Vol. 4, 2008, p. 46; U. Larsen, C. Lund & S.E. Stinessen, ‘Er Naturhestekraftmetoden Rettshistorie?’, *Tidsskrift for Eiendomsrett*, Vol. 8, 2012, p. 21, and K.B. Hauge, *Erstatningsnivået ved tvangsovertaking av fallrettar* (PhD Thesis), Oslo: Universitetet i Oslo, 2015. [↑](#footnote-ref-129)
130. *See*, *generally*, Larsen *et al.*, *supra*. It is interesting to note that it was often the lay appraisers that pushed for the new method, sometimes in opposition to juridical judges. This shows that the old system of lay judgement in appraisal disputes can still play a constructive role in Norway. [↑](#footnote-ref-130)
131. *See*, e.g. *BKK Produksjon AS v. Austgulen and Others* Rt-2011-1683 (*Kløvtveit*); *Otra Kraft DA*, *Otteraaen Brugseierforening v. Bjørnarå and Others* Rt-2010-1056 (*Otra* I); *Bjørnarå and Others v. Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612 (*Otra* II). The argument is often sugarcoated by pointing to the reasons underlying the decision to grant a license – typically energy efficiency – rather than by focusing on the formal license itself. In this way, one arrives at an interpretation of the no-scheme rule whereby the scheme can perhaps be said to have been disregarded in some sense even though crucial weight is attached to the reasons why it should be preferred over alternatives. [↑](#footnote-ref-131)
132. *Otra II*, *supra*. [↑](#footnote-ref-132)
133. *Otra II*, *supra*. [↑](#footnote-ref-133)
134. Although this may in part have been due to the fact that the point was not raised before the court of appeal. [↑](#footnote-ref-134)
135. *Kløvtveit*, *supra*. [↑](#footnote-ref-135)
136. Hence, the court effectively adopted a compensation approach based on the same conceptual premise as that of Lehavi & Licht’s SPDC proposal, as discussed in Section 2. [↑](#footnote-ref-136)
137. This would not necessarily be a safe assumption to make for non-commercial projects. Such projects may fail to provide the necessary incentives for cooperation, even though they should nevertheless be carried out in the public interest. [↑](#footnote-ref-137)
138. *See* *Otra II*, *supra*, Paras. 68-71. [↑](#footnote-ref-138)
139. It is interesting, for instance, to contrast the Norwegian case study with Epstein’s argument (based in part on US mill act takings) that a 150 per cent premium would be ‘far from arbitrary’. *See* Epstein, *supra*, pp. 173-175. [↑](#footnote-ref-139)
140. In addition, one relies on the gross height of the waterfall rather than the difference in elevation actually exploited by the hydropower project of the expropriating party. This new approach was first used in LG-2007-176723 (*Sauda*). [↑](#footnote-ref-140)
141. See *Otra II, supra.* [↑](#footnote-ref-141)
142. See also the discussion in Hauge, *supra*, p. 284. [↑](#footnote-ref-142)
143. Heller & Hills, *supra*. [↑](#footnote-ref-143)
144. Land Consolidation Act 1979. [↑](#footnote-ref-144)
145. *See*, *generally*, Ø. Ravnå, *Perspektiver på Jordskifte*, Gyldendahl, Oslo, 2008. [↑](#footnote-ref-145)
146. The compensation issues that arise when land consolidation is used to implement compulsory hydropower development has been discussed at length in Hauge, *supra,* pp. 290-372. Importantly, Hauge concludes that land consolidation provides a much better starting point than expropriation when it comes to achieving adequate benefit sharing with owners. For an in-depth discussion of concrete examples where land consolidation has been used to facilitate hydropower development, see also S. Stokstad, *Bruksordning ved Jordskifte i Samband med Utbygging av Småskalakraftverk* (Master Thesis), Ås: Universitetet for miljø og biovitskap, 2011. [↑](#footnote-ref-146)
147. A new Land Consolidation Act will take effect in 2016, and in this Act any party who is authorized to expropriate property is also authorized – as an alternative or complementary measure – to initialize and act as a party to a land consolidation dispute that seeks to organize the development project. [↑](#footnote-ref-147)