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

2 See generally Thomas W Merrill, “The Economics of Public Use” (1986) 72 Cornell

Law Review 61; Lee Anne Fennell, “Taking Eminent Domain Apart” (2004) 2004 Michigan

State Law Review 957; James E Krier and Christopher Serkin, “Public Ruses” (2004) 2004

Michigan State Law Review 859; Amnon Lehavi and Amir N Licht, “Eminent Domain, Inc.” (2007) 107(7) Columbia Law Review 1704; Abraham Bell and Gideon Parchomovsky, “Taking Compensation Private” (2007) 59(4) Stanford Law Review 871; Benjamin A Householder, “Kelo Compensation: The Future of Economic Development Takings” (2007)

82 Chicago-Kent Law Review 1029.

3 I believe my comparative approach is justified, as the core idea of the no-scheme principle seems to be largely the same across different jurisdictions. In fact, I am not aware of a single jurisdiction that does not include some rule corresponding to (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 Jacques Sluysmans, Stijn Verbist, and Regien de Graaff, “Compensation for Expropriation: How Compensation Reflects a Vision on Property.” (2014) 2014(1) European Property Law Journal 3, 5,21.

4 For a small sample of US scholarship on this, see Gregory S Alexander, “Eminent

Domain and Secondary Rent-Seeking” (2005) 1(3) New York University Journal of Law

& Liberty 958; Laura S Underkuffer, “Kelo’s moral failure” (2006) 15(2) William & Mary Bill of Rights Journal 377; Ilya Somin, “Controlling the Grasping Hand: Economic Devel- opment Takings after Kelo” English (2007) 15(1) Supreme Court Economic Review 183; Ilya Somin, “The Limits of Backlash: Assessing the Political Response to Kelo” (2009) 93

Minnesota Law Review 2100.

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

6 See, e.g., Robert H Freilich, “Condemnation Blight: Analysis and Suggested Solu- tions” in Current Condemnation Law: Takings, Compensation and Benefits (American Bar Association 2006) 81.

7 See Fennell (n 2) 962.

8 ibid, 963.

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

10 Lehavi and Licht (n 2).

11 ibid 1735.

12 ibid, 1741.

13 ibid, 1741.

14 Merrill (n 2) 90-93.

15 Krier and Serkin (n 2) 865-873.

16 Fennell (n 2) 995-996

17 Bell and Parchomovsky (n 2) 890-900.

18 Lehavi and Licht (n 2) 1732-1733.

19 ibid, 1735-1736.

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

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

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

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

24 ibid, 19.

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

26 Vyricherla Narayana Gajapatiraju v Revenue Divisional officer, Vizagapatam (n 25)

319.

27 ibid, 316-317.

28 Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown

Lands (Trinidad and Tobago) (n 25).

29 Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown

Lands (Trinidad and Tobago) (n 25) 572.

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

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

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

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

34 Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown

Lands (Trinidad and Tobago) (n 25).

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

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

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

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

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

40 ibid, 83.

41 Star Energy Weald Basin Ltd & Anor v Bocardo SA (n 37) 163.

42 See ibid, 163.

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

44 See Appraisal Act 1917, s 11.

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

46 Appraisal Act 1917, s 5.

47 See particularly ibid, s 22, with further references to the Civil Dispute Act 2005 (Act

No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes).

48 See Appraisal Act 1917, s 32.

49 See Appraisal Act 1917, s 38.

50 Frede Castberg, Norges Statsforfatning, Bind 2 (3rd edn, Universitetsforlaget 1964)

268.

51 Castberg (n 50) 268.

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

53 Tuddal (n 52) 111.

54 A/S Den Ankerske Marmorforretning v Norges Statsbaner Rt-1956-493.

55 ibid, 498-499.

56 ibid, 499.

57 See generally Ø Thomassen, “Herlege Tider: Norsk Fysisk Planlegging 1930–1965” (PhD Thesis, 1997); T Kleven, Fra Gjenreisning til Samfunnsplanlegging: Norsk Kom- muneplanlegging 1965–2005 (Tapir Akademiske Forlag 2011).

58 See generally Dag Ove Skjold, Statens Kraft 1947–1965: For Velferd og Industri (Uni-

versitetsforlaget 2006); Lars Thue and Yngve Nilsen, Statens Kraft 1965-2006: Miljø og

Marked (Universitetsforlaget 2006).

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

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

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

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

63 ibid, 134.

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

65 Report Regarding Appraisal Procedures and Compensation following Expropriation

(n 62) 142.66 Ot.prp.nr.56 (1970-1971) (n 59) 19-20.

67 ibid, 17-20.

68 ibid, 19.

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

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

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

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

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

73 Expropriation Compensation Act 1984, s 4.

74 ibid, s 5-6.

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

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

77 One might ask if it has status of constitutional customary law, especially since it

concerns the mechanism by which a constitutional rule is meant to be upheld.

78 See generally Christian Sontum and Einar Sofienlund, “Ekspropriasjon av vannkraft

– hvorfor den historiske metoden fra norsk rettspraksis ikke er relevant i dagens marked” (2007) 2007(4) Sm˚akraftnytt.

79 See Watercourse Regulation Act 1917, s 16.

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

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

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

83 See Ingolf Vislie, “Ekspropriasjon og Skjønn i Vassdrag” in Vassdrags- og energirett

(2nd edn, Universitetsforlaget 2002).

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

85 See generally Sontum and Sofienlund (n 78).

86 See Sontum and Sofienlund (n 78).

87 See Olaf Rogstad, “Verdien av R˚a Vannkraft” [1956] (4) Fossekallen.

88 See generally Ulf Larsen, Caroline Lund, and Stein Erik Stinessen, “Erstatning for erverv av fallrettigheter” (2006) 2006 Tidsskrift for eiendomsrett 175; Ulf Larsen, Car- oline Lund, and Stein Erik Stinessen, “Fallerstatning – Uleberg-dommen” (2008) 2008

Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund, and Stein Erik Stinessen, “Er naturhestekraftmetoden rettshistorie?” (2012) 2012(1) Tidsskrift for eiendomsrett 21.

89 Source: Private correspondence.

[90 http://www.bkk.no/om](http://www.bkk.no/om) oss/anlegg-utbygging/Kraftverk og vassdrag/

andre-vassdrag/article29899.ece

91 LG-2007-176723.

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

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

94 Larsen, Lund, and Stinessen, “Erstatning for erverv av fallrettigheter” (n 88).

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

96 Uleberg (n 82).

97 See generally Larsen, Lund, and Stinessen, “Erstatning for erverv av fallrettigheter” (n 88); Larsen, Lund, and Stinessen, “Fallerstatning – Uleberg-dommen” (n 88); Larsen, Lund, and Stinessen, “Er naturhestekraftmetoden rettshistorie?” (n 88), a series of Nor- wegian papers discussing the new method.

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

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

102 Kløvtveit (n 98).

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

2.

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

105 Michael Heller and Rick Hills, “Land Assembly Districts” (2008) 121(6) Harvard Law

Review 1465.

106 Land Consolidation Act 1979.

107 See generally Øyvind Ravn˚a, Perspektiver p˚a Jordskifte (Gyldendahl 2008).

108 Sæmund Stokstad, “Bruksordning ved Jordskifte i Samband med Utbygging av

Sm˚askalakraftverk” (Master Thesis, 2011).

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