



Draft concept paper entitled

The Context, Criteria and Consequences of Expropriation Law

for colloquium to be held at the *Koninklijk Nederlands Instituut*, Rome
25-27 September 2014

1 Introduction

The Expropriation Law Project grew from an initial gathering of law scholars from around the world in September 2013. The meeting was hosted by the Groningen Centre for Law and Governance (GCLG) and the University of Cape Town's Programme for the Enhancement of Research Capacity. The outcomes of that discussion are currently being prepared for publication as a collection of essays, the editorial team consisting of Hanri Mostert, Leon Verstappen, Jacques Sluysmans, Ernst Marais and Björn Hoops.

The success of the pilot gathering spurred the initiative to arrange a follow-up meeting, to deal with some of the topics that could not be covered during the 2013 event, which focused exclusively on *rethinking public purpose / public interest in expropriation law*. The organising committee of the Expropriation Law Project proposes the focus of the 2014 event, to be held in Rome from 25 to 27 September, to be the **Context, Criteria and Consequences of Expropriation Law**. Funding has been made available by the Groningen Centre for Law and Governance and the *Koninklijk Nederlands Instituut Rome*, both hosted by the University of Groningen. Further sponsorships are being sought.

2 Context, Criteria and Consequences of Expropriation Law

During the closing round of the 2013 session, several suggestions were made for ways in which to focus a follow-up event. It was suggested, for instance, that there was room to focus on a comparative study of the methodology of expropriation in different legal traditions. Suggestions were made relating to the relationship between expropriation and regulation of property and the different types of expropriation. It was also thought that a stronger focus on the connection between the different steps in the expropriation process would be prudent. These themes are interrelated and in our view can be accommodated well during a follow-up gathering focused on the *context* in which expropriation occurs.

Another issue raised was the impact of international guidelines and best practice recommendations on expropriation. The Voluntary Guidelines on the Responsible Governance of Tenure (“Voluntary Guidelines”),¹ the Land Governance Assessment Framework (LGAF) of the World Bank and Working Paper I of the Global Land Tenure Network (GLTN), relating to evictions, acquisition, expropriation and compensation. Support was also expressed for incorporating concerns from international investment law in our deliberations. This is addressed under the heading *criteria*.

Further support was expressed for engaging with the political and social consequences of expropriation: to scrutinise the impact of expropriation on existing communities and the creation of new communities. We were advised to pay attention to the political economy of expropriation. These themes we wish to combine with reference to the *consequences* of expropriation.

Under the broad title ‘Context, Criteria and Consequences of Expropriation Law’, we envisage that the following themes could be addressed by different panels at the 2014 gathering in Rome:

2.1 Context of Expropriation

Under this theme, we hope to combine historical and comparative analyses on expropriation, looking backwards at all of the existing legal traditions in search of understanding and looking sideways, between comparable jurisdictions, in search of insight. On the one hand, we are interested in the origins of the power to expropriate, be it in the context of civil law, common law or other legal traditions, and how such powers were exercised and tempered over time.

On the other hand, we need to engage with challenges posed by terminological and structural differences between jurisdictions. We posit that challenges in this regard result from historical divergences between e.g. the common law and civil law traditions. It is necessary, for instance, to scrutinise the terminology of state power by looking at differences in the meaning attached to expropriation.² Are different concepts of expropriation discernable? Varying descriptions for the state’s power to acquire property compulsorily denote differences in meaning, which can be retraced to the origin of the state’s power.

¹ On May 11th, 2012, the Commission on Food Security endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. They can be retrieved from: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>. The guidelines are non-binding recommendations.

² Certain civil-law countries, such as Germany and Switzerland, refer to “expropriation” in their property clauses. See Article 14.3 GG and Article 26(2) of the Constitution of the Swiss Confederation 1999 (*Bundesverfassung der Schweizerischen Eidgenossenschaft* 1999). Both Article 14.4 and Article 26(2) use term “*Enteignung*,” which is the German equivalent of expropriation. Section 17 of the French Declaration of the Rights of Man and the Citizen 1789. However, not all countries with a civilian background use this term – French law uses the term “deprivation” for what is described as expropriation in the countries just mentioned. Compare the second rule of Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms 1950, which also uses the term “deprivation” in this context. Common-law jurisdictions also do not employ a universal term: English, Australian and Zimbabwean law refer to this state power as “compulsory acquisition.” Compare Section 226 of the Town and Country Planning Act 1990, section 51(xxxi) of the Commonwealth Constitution 1900 and Section 16(1) of the Constitution of Zimbabwe 1980. US law knows it as a “taking” while Irish law uses the unique terminology of “unjust attack.” Compare Article V of the Fifth Amendment to the Constitution of the United States of America 1787; Article 40.3.2 of the Constitution of Ireland 1937.



Another aspect that we hope to cover with this theme, is the tension between expropriation and other forms of regulation of property. It is posited that this tension results from possible misunderstandings about the different sources of power permitting expropriation and regulation of property. We are interested in analyses and case studies illuminating or challenging the idea of expropriation as invasive state action³ as opposed to the lesser intrusions embodied by the state's regulation of property; and the different purposes for which such actions may be legitimised.⁴ Cases involving taxation or forfeiture may be particularly interesting to show that the distinction between these forms of state interference should not be oversimplified,⁵ as may be instances of loss of ownership to another private party (as would be the case with acquisitive prescription).⁶ In this context it will also be necessary to consider problems posed by the recognition of constructive expropriation / regulatory takings.

Issues of constructive expropriation/regulatory takings normally arise where the state neither intends to expropriate property formally, nor acquires the affected property, but where the state action has such an excessively unfair or severe impact on one or some owners that compensation is awarded. We seek to understand whether expropriation law can be indirectly applicable by exploring where the constructive expropriation is employed;⁷ how its ambit is determined; and what it implies.⁸

2.2 Criteria of Expropriation Law

Ideally, a fair, transparent and participatory procedure should precede a decision to expropriate. The different legal systems of the world have very different approaches as to the elements of this

³ Normally involving state acquisition of property without the co-operation of the private holder of the property, for a public purpose against payment of compensation.

⁴ Whereas public interest or public purpose broadly is normally expected to be served by an expropriation, the purposes that legitimise regulation are generally more strictly limited to those relating to the protection of public health, safety and morals of the community.

⁵ Although the state forcibly acquires the affected property in both these instances, which might appear like expropriation, it would be senseless to argue that the affected parties (ie taxed persons or convicted criminals) should be compensated under these circumstances.

⁶ As illustrated by the Fourth Chamber of the European Court of Human Rights judgment in *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3.

⁷ Not all jurisdictions recognise constructive expropriation. German law is a prime example of a legal system where it is not possible. Cf *BVerfGE* 58, 300 (1981) (also known as the *Nafauskiesung* case). US law, on the other hand, has the greatest volume of reported case law and academic scholarship on this topic, perhaps because of its unique wording in its property clause. The Fifth Amendment to the Federal Constitution of the United States of America 1787 does not require compensation for "expropriation" or "acquisition of property," but rather for "takings" of private property for public use, a term wide enough to include both the narrower category of formal expropriations as well as instances where a police-power regulation of property is unfairly excessive (ie "go too far") and therefore amounts to a taking.

⁸ Compensation for constructive expropriations or regulatory takings should not be confused with what is known as so-called equalisation or administrative payments in some jurisdictions. The possibility of paying equalisation payments offers an interesting solution in constitutional property cases where the state wants to prevent the challenged law from being declared unconstitutional because of its harsh effect on one or a small number of property owners. Compare the unique position in *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd and others* 2005 (5) SA 3 (CC), where the South African Constitutional Court awarded something similar to equalisation payments in terms of section 172(b) of the Constitution of the Republic of South Africa, 1996.



procedure. Legal (and empirical) research serves to compare these different approaches, and may help to improve expropriation procedures in targeted legal systems, through a process of comparison and reception.

We are ultimately interested in modern developments that impact on how the practice of expropriation will evolve. In this context, the Voluntary Guidelines may be mentioned. The result of widespread consultation,⁹ these Guidelines mean to influence how access to resources is regulated to promote security of tenure, and by doing so hope to make an impact on global strategies, policies, laws, programmes and activities.¹⁰ They specifically contain recommendations on expropriation, compensation and the decision-making processes involved in such state action.¹¹ The 2014 colloquium hopes to explore the extent to which compliance with the Voluntary Guidelines are prevalent within the various legal traditions of the world. At least three aspects would be worth examining: (1) The likelihood that the Guidelines will be put into practice, given their non-binding, soft-law character. (2) The role of the Food and Agriculture Organisation of the United Nations (FAO) in ensuring the successful implementation of the Guidelines.¹² (3) The tension between the need for specific norms and the generalised Guidelines in implementing best practice.

Our focus is not limited only to the Voluntary Guidelines. We are also interested in other similar recommendations, e.g. the GLTN's Working Paper I on evictions, acquisition, expropriation and compensation or the Land Governance Assessment Framework (LGAF) of the World Bank. Another interest is expropriation in the context of international investments. Bilateral investments treaties increasingly contain provisions regarding indirect expropriation; acts and decisions taken by governments that interfere with the right to the property or diminish the value of the property.

Apart from considerations such as the obligation to give reasons, or to balance interests at stake, in considering the possible the criteria that might underlie an inquiry into best practice in expropriation law, we find the following questions relevant:

(1) Should affected parties be equipped to participate effectively in an administrative procedure leading to expropriation?¹³

⁹ A summary of the outcome of these consultations can be retrieved from: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_outcome_document_English_corrected.pdf

¹⁰ Guidelines, p. V; see also Guideline 2.3.

¹¹ Guideline 16.1 stipulates that the States should only expropriate for a public purpose and should define the concept of public purpose in law to allow for judicial review. Guideline 16.2 stipulates that the expropriation procedure should be fair and transparent. Guideline 16.3 recommends that the States guarantee fair and prompt compensation. This is only an extract from the Guidelines, which contain more detailed recommendations on how those three aspects should be regulated.

¹² The FAO supported the consultations that preceded the drafting of the Guidelines and is striving to assist in the implementation of the Guidelines throughout the world. The FAO is planning to disseminate information about the Guidelines, to assist in the forming of partnerships between stakeholders and to contribute to capacity building.

¹³ Guideline 3B.3 of the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests, which were endorsed by the Committee on World Food Security (CFS) in 2012, recommend that States empower the



(2) Assuming that effective participation requires sufficient information about the procedure itself and the proposed expropriation, who might be eligible to receive information? Following from this, it may also be asked whether an expropriating authority can be expected to take initiative to provide information. These issues go to the transparency of the expropriation procedure.

(3) How may the consultation process be maximised without compromising the efficiency of the procedure, and without unduly burdening limited state resources.¹⁴

(4) Who may take the decision to expropriate?¹⁵ This issue goes to the quality and democratic legitimacy of the decision to expropriate.¹⁶

(5) What form may public participation take? Different jurisdictions may prescribe different forms of participation that vary as to the input from the people, the influence of the people on the decision and the degree of interaction between the people and the authority. These forms *inter alia* include the mere provision of information by the people, consultations, deliberations and co-decision procedures.¹⁷

In this context, it may be prudent to revisit the established types of expropriation, namely administrative expropriation, judicial expropriation, statutory expropriation. In most legal systems property can only be expropriated by the state in terms of law that provides for expropriation, which law must specifically authorise the state to expropriate private property for a public purpose or in the public interest against payment of compensation. Most expropriations take place by way of administrative action, where the state – through a competent administrator – exercises a statutorily authorised discretion to expropriate property to realise a certain public purpose. But expropriation may occasionally also be achieved through judicial authorisation, i.e. where a court of law orders expropriation in terms of authorising legislation. Statutory expropriation, though equally uncommon, entails the expropriation of property through promulgation of legislation without the involvement of

people to participate effectively. German law, by contrast, does not provide for such an obligation of the competent authority.

¹⁴ § 106 of the German Federal Building Code provides an exhaustive list of participants in the expropriation procedure under that Code. The UK Land Acquisition Act 1981 allows for the submission of objections by the entire public, but only obliges the competent authority to take account of objections submitted by certain people. Denyer-Green B *Compulsory Purchase and Compensation* (10 ed 2013) 23, and Section 13(1), (2) of the Acquisition of Land Act 1981, read in conjunction with section 13(6).

¹⁵ Section 2(1) of the SA Expropriation Act 63 of 1975 provides that the Minister of Public Works is competent to expropriate. Section 226(8) of the UK Town and Country Planning Act 1990. Section 226(1) of the UK Town and Country Planning Act 1990 provides that the directly elected council of a borough, county or district is the competent authority. The compulsory purchase, however, has to be confirmed by the Secretary of State.

¹⁶ If the authority is a directly elected body instead of an appointed authority, the decision will be more democratically legitimate. If the authority is a body at a higher administrative level instead of a body at a level closer to the people, it is likely to have better administrative and legal skills, but is also likely to be less responsive to the needs of the people.

¹⁷ Section 3(2)(b)(b) PAJA in South Africa provides for a consultation mechanism if the rights of individuals and not a group of the public would be materially and adversely affected by the proposed decision. Guidelines 16.2 and 3B.6 of the Voluntary Guidelines on the Responsible Governance of Tenure, by contrast, recommend that the expropriation procedure should have a deliberative character.



an administrative action or judicial decision.¹⁸ Though principles governing these types of expropriation are largely settled and uncontroversial, the introduction of soft-law mechanisms, and the rise of expropriation law issues in an international context may necessitate a closer look at the viability of the existing taxonomy.

Ultimately, we raise the question whether we have to reconceptualise the rules of expropriation in the light of these new guidelines and recommendations.

2.3 Consequences of Expropriation

The impact of an expropriation decision on a community may be devastating.¹⁹ Expropriation, however, may also revive or create communities, for instance by redeveloping blighted or slum areas owned by private entities or by giving communities access to major roads or public transport. It should be ascertained how the impact of the expropriation can be predicted and how this impact can be integrated into efficiency considerations.

While the characteristics and decisions of those involved in expropriation processes influence elements such as the design of expropriation procedures, expropriation criteria and decisions, these elements, in turn, also influence the economic and social actors involved. In engaging with the consequences of expropriation, we are interested in incentives, perverse or otherwise, induced by the actions of the legislator, expropriation authority and other economic/social actors.

Full compensation, for instance, can create an incentive to make unnecessary investments, especially where the expropriatee is in a good financial position. Less than full compensation, however, may create an incentive for the expropriating authority to disregard the impact of the expropriation on the landowner, which may be aggravated by the landowner's inability to participate effectively in the expropriation procedure.

In this regard, considerations of efficiency also attract normative scrutiny. For instance, if full compensation is not provided (and the expropriatee is not adequately compensated by the long-term benefits of the expropriation), the expropriation has a redistributive effect because the expropriatee bears more of the burden than their fellow citizens. Whether expropriation law should have redistributive purposes of this kind, is a matter of quite some disagreement, one that we would like to explore at the colloquium.

¹⁸ Germany is one of the few legal systems that recognises this unusual form of expropriation, as Article 14.3 of the German Basic Law 1949 (*Grundgesetz*, hereafter referred to as *GG*) specifically stipulates that expropriation may “only be ordered by *or* pursuant to” (own emphasis) a law which provides for expropriation, which opens the door to accommodating statutory expropriation in their legal regime.

¹⁹ Famously, in *Kelo v City of New London*, 545 U.S. 469 (2005), a community of home owners were up-rooted by the expropriation decision. As the goal of the expropriation, namely the promotion of economic development and employment opportunities, was not achieved, it is still unknown what will come in their place. See, for instance, this article of the Washington Post of 5 February 2014: <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/05/kelo-condemnation-site-taken-for-economic-development-still-lies-empty/>.



3 What to do next

The organising committee will solicit contributions to the colloquium. We are distributing this concept paper to those who have expressed an interest in participating in 2014 to get an idea of possible topics from those wishing to present. If you therefore have a particular idea that you would like to explore in a paper, please let us know soonest by simply emailing your idea to Hanri.Mostert@uct.ac.za / L.C.A.Verstappen@rug.nl / Sluysmans@feltz.nl, no later than 7 May 2014. We shall be in touch shortly thereafter to negotiate the parameters of the papers we think would fit with our objectives, asking you to formulate your abstracts around these negotiated themes. We have space for 18 papers.

This year, our budget for supporting travel and accommodation will be rather limited. We will make every effort to contribute to the costs of the speakers, but will only be able to give more information about possible sponsorships and the extent thereof around July 2014. Please give us advanced notice if you will not be able to attend without some form of sponsorship. Meanwhile, a colloquium website will be open by 1 May 2014 on www.rug.nl/gcl/expropriation2014, and we request you to register your attendance there as soon as possible, even if you're awaiting confirmation of your participation as a speaker.

We are looking forward to seeing you all in Rome in September!

Best wishes

Hanri Mostert (Hanri.Mostert@uct.ac.za)

Leon Verstappen (L.C.A.Verstappen@rug.nl)

Jacques Sluysmans (Sluysmans@feltz.nl)

Ernst Marais (EJ.Marais@uj.ac.za)

Björn Hoops (B.Hoops@rug.nl)

10 April 2014

