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Special Issue:

Regulatory Takings in Land-Use Law

A Comparative Perspective on Compensation Rights

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[1] **About the Guest Editor:**

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Acknowledgement and thanks

I owe great thanks to Prof. Dan Mandelker of the Washington University Law School for initiating the idea of devoting an issue of Global Studies Law Review to some aspect of land use law, and for introducing me to the Review. I take responsibility for choosing the topic of "regulatory takings" and for deciding to cover eleven countries. We thus faced the task of editing papers written by numerous authors whose mother tongues are not English. After many months of editorial work, we all realized that the editorial challenge was even more exacting than anticipated. My deep appreciation for the excellent work done by the two Chief Editors whose terms spanned this project – Ryan Cantrell and Edmund Chiang. Their perseverance in this complex project and the professionalism of their staff made this project possible.

The major part of this project was carried out while I was a visiting researcher at the University of Miami. I am grateful to Dean Dennis O. Lynch of the School of Law and to Dean Elizabeth Plater-Zyberk of the School of Architecture for providing the facilities for this research. My warm thanks to University of Miami President Dr. Donna Shalala who made it possible for me to devote my time to this project.

Introduction:

Regulatory Takings Viewed Through Cross-National Comparative Lenses

The concern over the negative impacts on property values caused by land-use planning decisions may be universal, but the approaches, laws and policies are highly varied around the world. The terms used differ not only from one language to another, but also among countries that speak the same language. This two-volume Symposium covers 11 advanced-economy, democratic countries and represents a wide variety of laws and practices.

The issue: The relationship between land use regulation and property values

The impact of land-use regulations on property values – especially in the downwards direction - is the inherent "raw nerve" of planning law and practice. The "regulatory takings" issue, as it is called in American English, has extensive social, ethical, economic, and environmental implications. It is also a key stumbling block in the implementation of land-use policies.

The vast majority of countries across the globe today have some form of land-use law and regulation (though not all countries apply and enforce these laws). Wherever market mechanism works, land use regulations may cause shifts in land values, at times reducing the current or potential economic value of real property and at other times increasing it. Real property usually holds high economic and social value and represent a households" major investments[2]. Individuals and firms base important decisions on the value of real property. Any significant decline in land values is likely to be seen as a threat.

The path-braking analysis of the relationship between land-use regulations and property values was made by the British in 1941. During the height of the Second World War, they embarked on a comprehensive discussion of the legal conceptions suited for post-war reconstruction. The famous *Uthwatt Report*[3] addressed the relationship between "compensation and betterment". The Report introduced two new concepts: The "shifting

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[2] This statement applies not only to "developed" economies but also, as De Soto has convincingly argued, to underdeveloped" countries as well. S*ee generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

[3] The British Expert Committee on Compensation and Betterment, Cmd 6386, 1942. This report is known by the name of its chair, as the *Uthwatt Report*. Its importance in shaping British recovery is recognized not only by planners and lawyers, but also by historians of British history. See for example, Michael Tichelar, The Conflict over Property Rights during the Second World War *Twentieth Century British History* 2003, Vol. 14 (2), 165. See also: *See also:* Malcolm Grant, *Compensation and Betterment*. Chapter 5 in: British Planning. (Barry Cullingworth, Ed. The Athlone Press 1999).

value" of land and its "floating value" of land. The shifting value refers to the idea that the demand for any given type of land uses in a particular region is finite; the effect of land use regulation is to shift the value from a place where the restrictions are tougher to another place whether they are lighter. Floating value refers to the monetary value of the expectations of landowners who hope that a particular land use would "land" on their plot of land[4].

A high-profile issue in the United States

In the United States the "takings issue" (more precisely, "regulatory takings" or "partial takings") is a contentious, hotly debated topic. This issue has led to several decades of case law, hundreds of scholarly papers and scores of books – probably the most-analyzed topic in land-use law anywhere in the world. Yet the line separating compensable (or avoidable) and non-compensable regulations remained elusive and highly contentious.

In the 1990s, the regulatory takings issue became a major target for the "property rights" movement[5]. Seeking to add more predictability to daily decisions, some property rights advocates initiated special state statues. These statutes varied widely, and did not contribute much towards a consensus or resolution[6]. Another surge in public attention to the takings issue came in 2004, with the enactment of Oregon's "Measure 37"[7]– a rather extreme initiative on compensation rights that drew highly polarized views[8].

Perhaps the strongest boost towards making the "takings issue" a broad-public topic came in the aftermath of the Supreme Court decision in *Kelo*[9]. This decision made eminent domain – an issue closely linked with regulatory takings – into a real "household" topic. Following *Kelo*, there is a new wave of initiatives for state statues, some focusing on eminent domain only, others encompassing regulatory takings as well. The "takings issue"

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[4] *See* Victor Moore, *A Practical Approach to Planning Law,* 9th Edition, 2005. Chapter 1, sections 1.10 - 1.12.

[5] See also: Kayden, Jerold S. 2004. "Charting the Constitutional Course of Private Property: Learning from the 20th Century," in Private Property in the 21st Century, H. M. Jacobs, Ed. Northampton, MA: Edward Elgar, pp. 31-49.

For a sampler on the property rights debate see, on the one side: Echeverria, John. D. and Eby, Raymond Booth, 1995. Let the People Judge: Wise Use and the Private Property Rights Movement. Washington, D.C.: Island Press. And compare with: Yandle, Bruce (ed.), 1995. Land Rights: The 1990s' Property Rights Rebellion. Rowman & Littlefield.

[6] *See* Harvey M. Jacobs. *State Property Rights Laws: The Impacts of Those Laws on My Land.* Cambridge, Mass: Lincoln Institute of Land Policy (1999); and Stacey S. White, State Property Rights Laws: Recent Impacts and Future Implications. *Land Use Law and Zoning Digest,* July 2000: 3-9. (2000).

[7] Ballot Measure 37 § (8) (Or. 2004).

[8] See and compare: Edward J. Sullivan. YEAR ZERO: THE AFTERMATH OF MEASURE 37. *ENVIRONMENTAL LAW* Vol. 36:1310. With: Sara C. Galvan. GONE TOO FAR: OREGON'S MEASURE 37 AND THE PERILS OF OVER-REGULATING LAND USE. *Yale Law and Policy Review,* Spring 2005 587. For a planning scholar's analysis see: Ozawa, Connie, ed. 2004. *The Portland Edge : Challenges and Successes in Growing Communities.* Washington, DC : Island Press. Yale Law and Policy Review Spring 2005

[9] *Kelo v. City of New London*, 125 S.Ct. 2655 (2005)

is likely to continue to engage American legislators, planners, lawyers, and civil society actors.

The current state of comparative knowledge

In stark contrast with the USA, in most (but not all) other countries the takings issue has not drawn much attention. One might have thought that this topic would be a prime one for cross-national research. In fact, there is very little international exchange and learning on this topic, even among neighboring countries (such as the USA and Canada, The Netherlands and Germany or Belgium and France). Despite the inherent intellectual challenge posed by the takings issue, there has been little comparative research on this topic. This Symposium set of two volumes is, to the best of our knowledge[10], the first systematic comparative research devoted to this topic.

However, this research project is by no means the only comparative research on the relationship between land use regulation and property values published in the English language. The seminal theoretical and comparative contribution on this topic is a book edited by Hagman and Misczynski, published in 1978[11]. The book covers five English-speaking countries with advanced economies (The UK, Canada, Australia, New Zealand and the USA).[12] Another important contribution is a book by Alexander published in 2006. Focusing on the constitutionality of regulatory property rights, this book analyses the jurisprudence in three countries[13]. Another book on comparative planning law[14] is a collection of previously-published papers or excerpts on a variety of planning-law issues, among them taking through regulation[15].

These contributions were published in the USA. Considering Europe's quest for a "single market" and greater legal uniformity, one would expect that European scholars would have addressed the compensation issue in a cross-national comparative framework. Yet, as surprising as this may seem, there has not been an equivalent research effort in Europe[16].

The purpose and scope of this Symposium

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[10] The survey of literature covers publications in the English language only.

[11] Hagman D.G. and Misczynski D.J. Eds. (1978), *Windfalls for Wipeouts: Land Value Recapture and Compensation*. Chicago: American Society of Planning Officials.

[12] *Id.* The introductory chapter of this book frames the issue, and the rest of the chapters analyze selected instruments designed either to tame the impact of planning regulation on land values or to redistribute its effects

[13] *See generally:* Alexander, Gregory S.: *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence.* Chicago University Press, 2006.

14 Kushner, James A. *Comparative Urban Planning Law.* Durham, N.C.: Carolina Academic Press. 2003. Most papers present a two-country comparison on a specific topic, and the countries covered differ widely from topic to topic, accordingly to the availability of papers.

[15] *Id.* Chapter 7 Pp 163-196 is devoted to regulatory takings, but is not systematic on this topic. The papers compare some aspect of American takings law with either Italian, Swiss, German, or international law.

[16] This assessment is supported by the 13 European authors who participated in this project, who cover a variety of languages. The two European books in the English language that do discuss planning laws comparatively, do not analyze the takings issue in depth (Schmidt-Eichstead, 1995; European Commisson1997-200o).

American legal and planning scholars continue to be divided on the regulatory takings issue. In the absence of a theoretically correct, or ultimately just and consensual solution, the wide range of positions adopted in other countries may offer a valuable external perspective. The range of approaches represented in these volumes – each widely different from the other – provides a real-life matrix of options and a set of policy alternatives.

The purpose of this Symposium is to offer American readers as well as readers from many other countries a systematic international comparative perspective to frame their own county's debate over the relationship between property rights and land-use regulation. Because nine of the eleven countries covered in these volumes is a member of the European Union, this research project may also contribute to cross-national comparisons within the EU.

Injuries to property values caused by land-use regulations fall along a continuum – from no injury at all (or enhancement in value), to a reduction of all or most of the property value. This entire range potentially falls within the scope of this project.

The core question posed for each of the contributing authors is this:

Under your country's laws, are there compensation rights for reduction in property values due to a planning, zoning, or development-control decisions (excluding physical expropriation)? If so, what are the legal and factual conditions for a compensation claim? And how extensive are such claims in practice?

It is important to distinguish the right to compensation for injurious land use regulations, from the right to compensation for land taken through eminent domain (known internationally as "*expropriation"* or *"compulsory purchase).* In the latter, the ownership rights are compulsorily transferred to an authorized body. Eminent domain does *not* fall within the direct scope of this Symposium. However, as in the USA, in most of the countries represented here, the distinction between compensation for regulation and compensation for expropriation is not always "a bright line". Situations of "near-expropriation" (also known as "inverse condemnation" or "planning blight") do occur, and these *are* included in the scope of this project. The legal debates in the various countries around the distinction between eminent domain and regulation are not as intensive as in the USA (and differ from country to country), yet they too shed some light over the perception of the compensation dilemma in that particular country.

The countries included

Eleven countries were chosen for analysis. In view of the extensive and easily available literature on American regulatory takings law, there was no need to include a chapter on the USA.

The countries selected represent a wide spectrum of legal-institutional contexts. They share a democratic system of government and an advanced (and in one case, an emerging) economy. The countries covered are: Canada, England, France, The Netherlands, Sweden, Finland, Germany, Austria, Greece, Poland, and Israel. Three countries - Canada, Germany and Austria – have a federal structure; the rest are unitary states. Nine of the 11 countries are members of the European Union, yet, their laws and practices differ greatly from each-other – so greatly that a "Euro-blind" reader may not have guessed their joint affiliation.

The method for enabling comparability

This publication project is rather ambitious. The challenge is to have the authors follow a shared set of guidelines so as to enable each reader to create comparative knowledge. The difficulties are many: The details of takings law and practice in each country are complex and nuanced, and require in-depth knowledge of each country's law, jurisprudence, institutions, and practice. There are also language barriers: In each country, court decisions on land use law are delivered in the local languages only. No country in our sample (except Canada, of course) offers translations into English of court decisions in the planning area, and in many countries even the statues have not been translated. To carry out this research project, we relied on leading experts in planning law from each country who were able to provide in-depth analyses in English of their country's laws and practices. I developed a common framework and a set of guideline to anchor the analysis.

Another aspect of the language problem became apparent in the differences in the terminology used in each county's legal and planning discourse (as translated into English by each country's authors, based on local-English usage). In order to create a common platform on which to build the comparative analysis, I drew up a set of definitions for terms and concept based on my past comparative research on other aspects of land-use law and policy.

To calibrate terms and concepts, I prepared a set of scenarios of potential types of regulation, injuries to property values, and contextual conditions. These scenarios were incorporated into a document of guidelines to serve as common benchmarks. In order to develop a set of guidelines that would encompass the wide variety of legal situations in each of the countries, I first read the literature available (in English) on land use law and practice in each of the countries. Next, I conducted a set of preliminary interviews with each of the prospective authors. Through a "revolving" strategy: I expanded or refined the scenarios and guidelines until I was satisfied that the guidelines would be able to encompass most of the laws and practices in the sample countries. The effort of editing the set of papers nevertheless proved to be a major challenge, and in many cases, further clarification with the authors was required.

The structure of the two volumes

The set of twelve articles – eleven country-specific and concluding remarks by Professor Mandelker – is too large for a single Law Review volume. The set of countries was purposely selected so as to offer a wide variety of approaches. Rather than attempting to divide the set of countries into two groups along some artificially selected dimension, we opted for an alternative approach: to include in each volume a variety of legal approaches to regulatory takings.[17] In addition to the Introduction, the first volume includes five countries: Canada, England, France, Greece, and Poland[18]. The second volume includes

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[18] In dividing the papers between the two volumes we took into account the time gap in publication and the possibility that some readers will not have access to both volumes at once. We also considered the sizes of the articles

The Netherlands, Sweden, Finland, Germany, Austria and Israel. Professor Daniel Mandelker's Concluding chapter will close the Symposium.

The comparative findings in a nutshell

Although no land-use law in the world can evade the need to address the relationship between land use regulations and property values, the readers of the papers in this Symposium will find that no two countries – even those with ostensibly similar legal and administrative traditions – have adopted the same position on this question. The differences are significant, often unpredictable. They exist even though nine of the eleven countries belong to the EU. If one imagines a hypothetical scale of degrees of compensation rights, only a few of the countries take one of the two extreme positions along that scale and say either a stark "**no**" or a broad "**yes**". Most countries included here hold some middle-ground position along the scale and have their own matrix of specific policies. And each country's set of laws and policies differs significantly from every other's equivalent set.

Perhaps the most interesting – and counterintuitive – finding is that any attempt to guess a given country's position on regulatory takings law based on some well-known attributes, is likely to fail. Careful reading of the full set of papers shows that presumptions based on geographic proximity or even shared language and cultural backgrounds do not hold: adjacent and related countries exhibit widely different laws on regulatory takings.

It is our hope that the wide variety of laws and practices will enable the readers of the two Symposium volumes to gain new perspectives on a range of possible legal approaches and instruments. The international differences can offer a rich set of experiences from which to select and learn.
