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## SYMPOSIUM REGULATORY TAKINGS IN LAND-USE LAW A COMPARATIVE PERSPECTIVE ON COMPENSATION RIGHTS

### INTRODUCTION: REGULATORY TAKINGS VIEWED THROUGH CROSS-NATIONAL COMPARATIVE LENSES

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The concern over the negative impacts on property values caused by land-use planning decisions may be universal, but the approaches, laws, and

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I owe great thanks to Professor Daniel Mandelker of the Washington University School of Law 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 *Global Studies Law 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 articles written by numerous authors whose native language was 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 Editor-in-Chiefs 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.

policies are highly varied around the world. The terms that are used differ not only from one language to another, but also among countries that speak the same language. This two-volume Symposium covers eleven advanced-economy, democratic countries and represents a wide variety of laws and practices.

## I. 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 “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 (although not all countries apply and enforce these laws). Wherever the 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 represents households’ major investments.<sup>1</sup> Individuals and firms base important decisions on the value of real property. Any significant decline in land value is likely to be seen as a threat.

The path-breaking 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*<sup>2</sup> addressed the relationship between “compensation and betterment.” The *Uthwatt Report* introduced two new concepts: the “shifting value” of land and the “floating value” of land. The term “shifting value” refers to the idea that the demand for any given type of land-use in a

1. This statement applies not only to “developed” economies but also, as De Soto has convincingly argued, to “underdeveloped” countries. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

2. EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, FINAL REPORT, 1942, Cmd. 6386. This report is known as the *Uthwatt Report*, named after the committee’s chair, Augustus Uthwatt. The importance of the *Uthwatt Report* in shaping British recovery is recognized not only by planners and lawyers, but also by historians of British history. See, e.g., Michael Tichelar, *The Conflict over Property Rights During the Second World War*, 14 TWENTIETH CENTURY BRITISH HIST. 165 (2003); Malcolm Grant, *Compensation and Betterment*, in *BRITISH PLANNING: 50 YEARS OF PLANNING AND REGIONAL POLICY* (Barry Cullingworth ed., 1999).

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.<sup>3</sup>

## II. A HIGH-PROFILE ISSUE IN THE UNITED STATES

In the United States, the “takings issue” (more precisely, “regulatory takings” or “partial takings”) has been 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.<sup>4</sup> Seeking to add more predictability to daily decisions, some property rights advocates initiated special state statutes. These statutes varied widely and did not contribute much towards a consensus or resolution.<sup>5</sup> Another surge in public attention to the takings issue came in 2004, with the enactment of Oregon’s “Measure 37,”<sup>6</sup> a rather extreme initiative on compensation rights that drew highly polarized views.<sup>7</sup>

Perhaps the strongest boost towards making the “takings issue” a broad public topic came in the aftermath of the Supreme Court decision in *Kelo*.<sup>8</sup> This decision made eminent domain—an issue closely linked with regulatory takings—a real household topic. Following *Kelo*, there is a new wave of initiatives for state statutes, some focused only on eminent domain while

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3. See VICTOR MOORE, A PRACTICAL APPROACH TO PLANNING LAW § 1.10-1.12 (9th ed. 2005).

4. See Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning from the 20th Century*, in PRIVATE PROPERTY IN THE 21ST CENTURY 31–49 (Harvey Martin Jacobs ed., 2004). For a sample of the property rights debate, see JOHN D. ECHEVERRIA & RAYMOND BOOTH EBY, LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT (1995). Compare BRUCE YANDLE, LAND RIGHTS: THE 1990S’ PROPERTY RIGHTS REBELLION (1995).

5. See HARVEY M. JACOBS, STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE LAWS ON MY LAND (Lincoln Inst. of Land Policy 1999); Stacey S. White, Commentary, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE LAW AND ZONING DIG., July 2000, at 3–9, available at <http://www.planning.org/PEL/commentary/pdf/Jul00.pdf>.

6. Ballot Measure 37 § 8 (Or. 2004).

7. See Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131 (2006); compare Sara C. Galvan, Comment, *Gone Too Far: Oregon’s Measure 37 and the Perils of Over-regulating Land Use*, 23 YALE L. & POL’Y REV. 587 (2005). For a planning scholar’s analysis, see CONNIE P. OZAWA, THE PORTLAND EDGE: CHALLENGES AND SUCCESSES IN GROWING COMMUNITIES (2004).

8. *Kelo v. City of New London*, 545 U.S. 469 (2005).

others encompass regulatory takings as well. The “takings issue” is likely to continue to engage American legislators, planners, lawyers, and civil society actors.

### III. THE CURRENT STATE OF COMPARATIVE KNOWLEDGE

In stark contrast with the United States, the takings issue in most (but not all) other countries 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 U.S. and Canada, the Netherlands and Germany, 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,<sup>9</sup> 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.<sup>10</sup> The book covers five English-speaking countries with advanced economies: the United Kingdom, Canada, Australia, New Zealand, and the United States.<sup>11</sup> Another important contribution is a book by Alexander published in 2006. Focusing on the constitutionality of regulatory property rights, this book analyses the jurisprudence of three countries.<sup>12</sup> Another book on comparative planning law<sup>13</sup> is a collection of previously published papers or excerpts on a variety of planning law issues, among them taking through regulation.<sup>14</sup>

These contributions were published in the U.S. Considering Europe’s quest for a “single market” and greater legal uniformity, one would expect

9. The survey of literature covers publications in the English language only.

10. DONALD G. HAGMAN & DEAN J MISCZYNSKI, *WINDFALLS FOR WIPEOUTS: LAND VALUE RECAPTURE AND COMPENSATION* (1978).

11. *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 redistribute its effects.

12. *See generally* GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006).

13. JAMES A. KUSHNER, *COMPARATIVE URBAN PLANNING LAW* (2003). Most papers present a two-country comparison on a specific topic, and the countries covered differ widely from topic to topic, according to the availability of papers.

14. *Id.* at 163–96. Chapter 7 is devoted to regulatory takings; however, the chapter is not systematic on this topic. The papers compare some aspect of American takings law with either Italian, Swiss, German, or international law.

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.<sup>15</sup>

#### IV. THE PURPOSE AND SCOPE OF THIS SYMPOSIUM

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. In these volumes, the range of approaches—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 country's debate over the relationship between property rights and land-use regulation. Because nine of the eleven countries covered in these volumes are members 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 questions posed for each of the contributing authors are these: *Under your country's laws, are there compensation rights for reduction in property values due to 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 case, 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 U.S., in most of the countries represented in this Symposium, the distinction between compensation for regulation and compensation for expropriation is not

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15. This assessment is supported by the thirteen European authors who participated in this project, who cover a variety of languages. The two European books in the English language that comparatively discuss planning laws, GERD SCHMIDT-EICHSTAEDT, *LAND USE PLANNING AND BUILDING PERMISSION IN THE EUROPEAN UNION* (1995) and a 1997 book by the European Commission, do not analyze the takings issue in-depth.

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 intense as they are in the U.S. (and differ from country to country), yet they too shed some light over the perception of the compensation dilemma in that particular country.

#### V. THE COUNTRIES INCLUDED IN THE SYMPOSIUM

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 United States.

The countries selected represent a wide spectrum of legal-institutional contexts. They have in common democratic systems of government and advanced (in one case, emerging) economies. The countries covered are Canada, the United Kingdom, 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 eleven 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.

#### VI. 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) offers translations into English of court decisions in the planning area, and in many countries, even the statutes 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 analysis in English of their country’s laws and practices. I developed a common framework and a set of guidelines 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). To create a common platform on which to build the comparative analysis, I drew up a set of definitions for terms and concepts 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. 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.

## VII. THE STRUCTURE OF THE TWO VOLUMES

The set of twelve articles, eleven that are country-specific and a concluding remark by Professor Daniel 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 a somewhat artificially selected dimension, we opted for an alternative approach by including in each volume a variety of legal approaches to regulatory takings. In addition to this Introduction, the first volume<sup>16</sup> includes five countries: Canada, England, France, Greece, and Poland.<sup>17</sup> The second volume<sup>18</sup> includes the Netherlands, Sweden, Finland, Germany, Austria, and Israel. Professor Daniel Mandelker’s concluding remarks will close the Symposium.

## VIII. 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 articles in this Symposium will find that no two countries—even those

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16. 5 WASH. U. GLOBAL STUD. L. REV. (2006).

17. 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.

18. 6 WASH. U. GLOBAL STUD. L. REV. (2007).

with ostensibly similar legal and administrative traditions—have adopted the same position on this question. The differences are significant and 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.