The Legitimate Justification of EXPROPRIATION

A Comparative Law and Governance Analysis

Björn Hoops
LLB LLM (Bremen/Oldenburg) LLM (Groningen)
Assistant Professor of Law, University of Groningen
Table of Contents

Table of figures ........................................................................................................ xxi
List of Tables ........................................................................................................... xxi
Preface ..................................................................................................................... xxi
List of abbreviations and glossary ........................................................................... xxv
Zusammenfassung ..................................................................................................... xxxv
Samenvatting ........................................................................................................... xliii

Chapter 1 Introduction
1.1 Third-party transfers for economic development—A societal problem... 1
1.2 The legitimate justification of expropriation ................................................ 4
1.3 The goals of this research and the research questions ................................ 5
1.4 Delineation of the object of the study ............................................................ 9
1.5 The selection of the examined jurisdictions ................................................ 12
1.6 Methodology and structure of the book ....................................................... 16
1.7 Terminology .................................................................................................... 20
  1.7.1 Basic comparative terminology for expropriation law .......................... 20
  1.7.2 Other frequently used terms ................................................................. 24
  1.7.3 Gender-neutral language ....................................................................... 26
1.8 Links to other research .................................................................................. 26
1.9 A guide to reading this book ........................................................................... 27

Chapter 2 A descriptive theory of the legitimate justification of expropriation
2.1 The need for a contextualising and descriptive theory of the legitimate
  justification ............................................................................................................. 29
  2.1.1 Diverging terminologies .......................................................................... 29
  2.1.2 The project-purpose paradigm and its flaws ........................................ 32
  2.1.3 The contextualising descriptive theory of the legitimate
    justification ......................................................................................................... 37
    2.1.3.1 German law ..................................................................................... 37
    2.1.3.2 Property theories ............................................................................ 39
    2.1.3.3 ‘Public good’ theories ..................................................................... 40
    2.1.3.4 Synthesis ......................................................................................... 42
  2.1.4 Going beyond the boundaries of expropriation law ............................... 43
2.2 The substantive definition of the legitimate justification ............................. 43
  2.2.1 The legitimate purpose ............................................................................ 44
  2.2.2 The relationship between the project and the legitimate
    purpose ................................................................................................................. 45
  2.2.3 The alternative project argument ............................................................ 47
  2.2.4 The suitability of the expropriation ......................................................... 50
  2.2.5 The least invasive means argument ........................................................ 50
  2.2.6 The balance between public benefits and adversely affected
    interests ................................................................................................................ 51
Table of Contents

2.3 The endurance of the legitimate justification ........................................ 52
2.4 The governance of the legitimate justification of expropriation .......... 53
  2.4.1 Governance .................................................................................. 54
  2.4.2 The need for a governance perspective on the legitimate justification ............................................................................................................. 54
  2.4.3 The governance analysis of the legitimate justification .................. 55
2.5 Table of partially equivalent requirements ......................................... 57

Chapter 3 German law
3.1 Applicable law ...................................................................................... 60
  3.1.1 Constitutional expropriation law: The German Basic Law of 23 May 1949 ........................................................................................................... 60
    3.1.1.1 The definition and protection of property under Art. 14(1) and (2) GG ......................................................... 61
    3.1.1.2 Art. 14(3) GG: The expropriation of property rights for the public good............................................................ 64
      3.1.1.2.1 The public good as a requirement for a valid expropriation ................................................................. 65
      3.1.1.2.2 The statutory basis ................................................................................................................................. 68
    3.1.1.3 Other applicable constitutional rules ........................................ 71
      3.1.1.4 Constitutional standards vary according to purpose and transferee ........................................................................ 71
    3.1.2 Art. 1 of the First Protocol to the European Convention .......... 73
  3.1.3 The Charter of Fundamental Rights of the European Union .......... 74
  3.1.4 Federal and State statute law ............................................................ 74
    3.1.4.1 Legislative power in the field of expropriation law ......... 75
    3.1.4.2 General expropriation statutes ........................................... 76
    3.1.4.3 Project-specific expropriation statutes ................................. 77
    3.1.4.4 The Hamburg Aerodrome Act ........................................... 78
      3.1.4.5 Stages of an expropriation under the Aerodrome Act and applicable provisions ........................................... 80
3.2 The legitimate purpose ............................................................................. 81
  3.2.1 The substantive definition: The Basic Law .................................... 82
    3.2.1.1 No comprehensive definition of legitimate purposes ....... 82
    3.2.1.2 The negative definition: Illegitimate purposes ................. 84
    3.2.1.3 Third-party transfers for economic development .......... 85
      3.2.1.3.1 Is economic development a legitimate purpose? .................................................................................. 86
      3.2.1.3.2 Economic development as a legitimate purpose: Additional requirements? ........................................... 88
      3.2.1.3.3 General economic development as an illegitimate purpose ............................................................. 89
    3.2.2 The substantive definition: The Hamburg Aerodrome Act ....... 89
  3.2.3 The governance of the legitimate purpose ....................................... 90
The Legitimate Justification of Expropriation

3.2.3.1 The role of the legislator: The specificity of purposes and projects in the expropriation statute

3.2.3.1.1 General rules under the principle of specificity

3.2.3.1.2 Specific rules for expropriations of the first and second category

3.2.3.1.3 Specific rules for third-party transfers for economic development

3.2.3.1.4 Specificity in practice: The Hamburg Aerodrome Act

3.2.3.2 The roles of the administrative authorities

3.2.3.2.1 The role of the planning authority

3.2.3.2.2 Excursus: The role of municipalities in expropriation law

3.2.3.2.3 Extending the role of the planning authority: The advance effect in expropriation law

3.2.3.2.4 The role of the expropriation authority

3.2.3.3 The role of the courts

3.2.3.3.1 Judicial deference to the legislator's choice

3.2.3.3.2 Legislative decision-making is subject to procedural safeguards

3.2.3.3.3 Judicial scrutiny of the definition of the purpose in the project plan

3.2.3.3.4 Judicial scrutiny of the application of the legitimate purpose

3.2.3.4 Illustration of the governance structure

3.2.4 Conclusion

3.3 The contextualisation

3.3.1 The relationship between the project and the legitimate purpose

3.3.1.1 The suitability of the project

3.1.2 The need for a project and its contribution to the legitimate purpose

3.3.1.3 Stricter requirements for third-party transfers for economic development?

3.3.1.4 The relationship between the project and the legitimate purpose under the Hamburg Aerodrome Act

3.3.2 The alternative project argument

3.3.2.1 The Basis of the Assessment

3.3.2.2 Requirements

3.3.2.3 Standard of judicial scrutiny

3.3.3 The suitability of the expropriation

3.3.4 The least invasive means argument

3.3.4.1 Categories of less invasive means

3.3.4.2 The test of legal and economic suitability
3.3.4.3 Overview of the steps for an assessment of the least invasive means argument ........................................... 124
3.3.4.4 Is a third-party transfer a more invasive means? .......... 124
3.3.4.5 The least invasive means argument under the Hamburg Aerodrome Act ..................................................... 125

3.3.5 The balance between the public benefits and adversely affected interests .......................................................... 125
3.3.5.1 General constitutional rules ........................................ 127
  3.3.5.1.1 Relevant interests ............................................ 128
  3.3.5.1.2 Weighing the relevant interests .............................. 129
  3.3.5.1.3 Sanction for failure to balance: Unconstitutionality ......................... 132
  3.3.5.1.4 The role of compensation .................................. 133
  3.3.5.1.5 An example of a disproportionate project ....... 133
3.3.5.2 Specific constitutional rules for third-party transfers?..... 134
3.3.5.3 Protection of adversely affected interests in statutes ....... 135
3.3.5.4 The Hamburg Aerodrome Act: The balance between the public benefits of the extension and adversely affected interests ...................................................... 137

3.3.6 The governance of the contextualisation .......................... 139
3.3.6.1 The role of the legislator ........................................ 139
  3.3.6.1.1 The Basic Law: The legislator’s definition of conditions .................................................. 140
  3.3.6.1.2 The legislator’s role in determining the balance between public benefits and adversely affected interests ............... 141
  3.3.6.1.3 Example: The state legislature of Hamburg and the Aerodrome Act ........................................ 145
3.3.6.2 The role of the administrative authorities ...................... 147
3.3.6.3 The role of the courts ............................................ 149
  3.3.6.3.1 Review of the expropriation statute ......................... 150
  3.3.6.3.2 Review of the project plan ................................ 150
  3.3.6.3.3 Review of the application of the proportionality tests .................................................. 151

3.3.7 Conclusion .................................................................. 152

3.4 The administrative and court procedures ............................ 154
3.4.1 Constitutional standards for administrative procedures .......... 154
  3.4.1.1 Public participation .............................................. 154
  3.4.1.2 Duty to give reasons ............................................. 155
3.4.2 The planning procedure under the Hamburg Aerodrome Act ................................................................. 155
  3.4.2.1 The position of the planning authority in the state system .................................................. 156
3.4.2.2 The hearings procedure ............................................ 156
  3.4.2.2.1 The provision of information ............................... 156
  3.4.2.2.2 The access to the procedure and the type of participation ............................................ 157
  Affected persons can submit objections ............... 157
  The hearing .......................................................... 158
3.4.2.3 The project plan and the role of objections .......... 159
3.4.2.4 The duty to furnish reasons .................................. 159

3.4.3 The expropriation procedure under the Hamburg Aerodrome Act .................................................. 160
  3.4.3.1 The position of the expropriation authority in the state system ............................................. 160
  3.4.3.2 Provision of information ..................................... 160
  3.4.3.3 The access to the procedure and the type of participation ..................................................... 161
  3.4.3.4 After the hearing ................................................ 162

3.4.4 The court procedures .................................................. 162
  3.4.4.1 Constitutional standards of judicial protection .......... 162
  3.4.4.2 Judicial protection against the project plan under the Hamburg Aerodrome Act ............................. 163
  3.4.4.3 Judicial protection against the expropriation decision ... 164

3.5 The endurance of the legitimate justification .......................................................... 165
  3.5.1 Preventive measures ................................................ 165
    3.5.1.1 Securing a permanent contribution to the public good.. 166
    3.5.1.2 Specific rules for third-party transfers for economic development ........................................ 166
    3.5.1.3 Possible legal means ......................................... 171
    3.5.1.4 The governance of preventive measures .................. 171
    3.5.1.5 Preventive measures under the Hamburg Aerodrome Act .............................................. 172
  3.5.2 Corrective measures ................................................ 174
    3.5.2.1 Constitutional principles .................................. 174
    3.5.2.2 Third-party transfers give rise to additional problems .... 176
    3.5.2.3 The governance of corrective measures .................. 177
    3.5.2.4 Corrective measures under the Hamburg Aerodrome Act ..................................................... 177

3.5.3 Conclusion ............................................................ 178

Chapter 4 Dutch law

4.1 Applicable law .................................................................. 180
  4.1.1 Art. 1 of the First Protocol to the European Convention on Human Rights .............................................. 181
    4.1.1.1 Effect in Dutch law ............................................ 181
    4.1.1.2 Protection of property from expropriation under Art. 1 of the First Protocol ................................. 182
4.1.2 The Constitution: Grondwet voor het Koninkrijk der Nederlanden

4.1.2.1 The definition of expropriation ........................................... 184
4.1.2.2 Art. 14(1) Gw: The public interest requirement and proportionality ................................................................. 186
4.1.2.3 Art. 14(1) Gw: Other constitutional requirements for a lawful expropriation ......................................................... 188
4.1.2.4 Art. 14(1) Gw: The Statutory Basis .......................................... 189
4.1.2.5 Administrative, judicial, and statutory expropriation........... 190
4.1.2.6 Protection of property from other state action than expropriation ................................................................. 190

4.1.3 Statute law applicable to third-party transfers for economic development

4.1.3.1 The planning procedure: The Spatial Planning Act .......... 192
4.1.3.2 The expropriation procedure: The Expropriation Act ...... 194
4.1.3.2.1 Purposes in the Expropriation Act............................... 194
4.1.3.2.2 Economic development as a purpose in the Expropriation Act................................................................. 195
4.1.3.2.3 Expropriation on the basis of a binding land-use plan ................................................................. 196
4.1.3.2.4 Combining administrative and judicial expropriation ................................................................. 196
4.1.3.2.5 Relationship to other legislation ........................................ 197
4.1.3.3 The General Administrative Law Act................................. 197
4.1.3.4 The endurance of the legitimate justification .................... 198
4.1.3.5 Overview of applicable statutes........................................... 198

4.1.4 Future developments ............................................................. 199

4.2 The legitimate purpose

4.2.1 The substantive definition....................................................... 200
4.2.1.1 Boundaries under the European Convention and the Constitution ................................................................. 200
4.2.1.2 A positive definition of legitimate purposes? ................. 201
4.2.1.3 The broadening legislative definition of legitimate purposes ................................................................. 202
4.2.1.4 Third-party transfers for economic development .......... 203
4.2.1.5 Economic development as a pretext .................................. 204
4.2.1.6 Economic development projects must serve spatial development ................................................................. 206

4.2.2 The governance perspective ...................................................... 208
4.2.2.1 The role of the legislator .................................................. 208
4.2.2.2 The role of the planning authority (Municipal Council and Executive)................................................................. 210
4.2.2.3 The role of the expropriation authority (Crown) .......... 212
4.2.2.4 The role of the courts ......................................................... 213
4.2.2.5 Illustration of the governance of the legitimate purpose. 215
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.4.4 The governance of the contextualisation of the expropriation</td>
<td>249</td>
</tr>
<tr>
<td>4.4.4.1 The role of the legislator</td>
<td>250</td>
</tr>
<tr>
<td>4.4.4.2 The role of the planning authority (Municipal Council</td>
<td>250</td>
</tr>
<tr>
<td>and Executive)</td>
<td></td>
</tr>
<tr>
<td>4.4.4.3 The role of the expropriation authority (the Crown)</td>
<td>251</td>
</tr>
<tr>
<td>4.4.4.4 The role of the courts</td>
<td>252</td>
</tr>
<tr>
<td>4.4.5 Conclusion</td>
<td>254</td>
</tr>
<tr>
<td>4.5 The administrative and court procedures</td>
<td>255</td>
</tr>
<tr>
<td>4.5.1 General standards for administrative procedures</td>
<td>255</td>
</tr>
<tr>
<td>4.5.2 The administrative planning procedure</td>
<td>256</td>
</tr>
<tr>
<td>4.5.2.1 Position of the planning authority in the state system</td>
<td>257</td>
</tr>
<tr>
<td>4.5.2.2 The uniform public preparation procedure</td>
<td>257</td>
</tr>
<tr>
<td>4.5.3 The administrative expropriation procedure</td>
<td>260</td>
</tr>
<tr>
<td>4.5.3.1 Position of the expropriation authority in the state system</td>
<td>260</td>
</tr>
<tr>
<td>4.5.3.2 The uniform public preparation procedure</td>
<td>260</td>
</tr>
<tr>
<td>4.5.4 The court procedures</td>
<td>263</td>
</tr>
<tr>
<td>4.5.4.1 General standards</td>
<td>263</td>
</tr>
<tr>
<td>4.5.4.2 The court procedure before the Judicial Division</td>
<td>263</td>
</tr>
<tr>
<td>4.5.4.3 The court procedure before the civil courts</td>
<td>264</td>
</tr>
<tr>
<td>4.6 The endurance of the legitimate justification</td>
<td>266</td>
</tr>
<tr>
<td>4.6.1 Preventive measures</td>
<td>266</td>
</tr>
<tr>
<td>4.6.1.1 Procurement law</td>
<td>267</td>
</tr>
<tr>
<td>4.6.1.2 An unwritten obligation to take preventive measures</td>
<td>269</td>
</tr>
<tr>
<td>under Dutch law?</td>
<td></td>
</tr>
<tr>
<td>4.6.1.3 Preventive measures in practice</td>
<td>271</td>
</tr>
<tr>
<td>4.6.1.4 Intensity of preventive measures</td>
<td>271</td>
</tr>
<tr>
<td>4.6.2 Corrective measures</td>
<td>272</td>
</tr>
<tr>
<td>4.6.2.1 Art. 1 of the First Protocol to the European Convention</td>
<td>272</td>
</tr>
<tr>
<td>4.6.2.2 Art. 61 Ow</td>
<td>273</td>
</tr>
<tr>
<td>4.6.2.2.1 Non-realisation</td>
<td>273</td>
</tr>
<tr>
<td>4.6.2.2.2 Change of purpose under Art. 61(4) Ow</td>
<td>274</td>
</tr>
<tr>
<td>4.6.2.2.3 Change of purpose and the general exception to Art. 61 Ow</td>
<td>275</td>
</tr>
<tr>
<td>4.6.2.3 Alternative options in cases of indirect third-party transfers</td>
<td>275</td>
</tr>
<tr>
<td>4.6.2.3.1 The desirability of a right to reacquire</td>
<td>276</td>
</tr>
<tr>
<td>4.6.2.3.2 Alternative options (I): Identification and</td>
<td>276</td>
</tr>
<tr>
<td>Fraus Legis</td>
<td></td>
</tr>
<tr>
<td>4.6.2.3.3 Alternative option (II): Contractual obligation to carry out</td>
<td>278</td>
</tr>
<tr>
<td>the project</td>
<td></td>
</tr>
<tr>
<td>4.6.2.3.4 Alternative option (III): Tort law</td>
<td>279</td>
</tr>
<tr>
<td>4.6.2.3.5 Alternative option (IV): Art. 14 Gw and</td>
<td>280</td>
</tr>
<tr>
<td>general principles as a legal basis</td>
<td></td>
</tr>
</tbody>
</table>
4.6.3 The governance of the endurance of the legitimate justification . 281
4.6.4 Conclusion ................................................................. 281

Chapter 5 New York State law
5.1 Applicable law ............................................................... 283
  5.1.1 The definition of expropriation (condemnation) .................. 283
  5.1.2 Federal Constitutional law ............................................. 284
  5.1.3 New York State law .................................................... 286
    5.1.3.1 The New York State Constitution ............................. 286
    5.1.3.2 The condemnation statutes ..................................... 287
      5.1.3.2.1 The Urban Development Corporation Act ............... 287
      5.1.3.2.2 Industrial development agencies ......................... 289
      5.1.3.2.3 Municipal redevelopment plans ........................... 289
      5.1.3.2.4 Urban renewal areas ...................................... 290
    5.1.3.3 The Eminent Domain Procedure Law ........................... 291
    5.1.3.4 The State Environmental Quality Review Act (SEQRA) .... 292
    5.1.3.5 Other relevant legislation ..................................... 294
  5.1.4 Overview of applicable legislation ................................ 295
5.2 The legitimate purpose .................................................. 296
  5.2.1 The substantive definition: The Fifth Amendment ............... 297
    5.2.1.1 The narrow view: Use by the public ........................... 298
    5.2.1.2 The broad view: Public purpose ................................ 299
    5.2.1.3 Condemnations for urban redevelopment and the removal of blight: Berman v Parker ............................ 299
    5.2.1.4 Combating land oligopolies: Midkiff .......................... 301
    5.2.1.5 Comprehensive economic development in distressed communities: Kelo v City of New London ......................... 302
    5.2.1.6 The only firm boundary: Private use .......................... 305
  5.2.2 The substantive definition: New York State law .................. 305
    5.2.2.1 Historical development: From a narrow definition of public use ......................................................... 306
    5.2.2.2 ... to a broader definition: Commercial centres ............ 307
    5.2.2.3 ... to a broader definition: Substandard and insanitary areas ......................................................... 308
      5.2.2.3.1 Slum clearance: Housing Authority v Muller and Murray v La Guardia ................................................. 308
      5.2.2.3.2 Beyond slum clearance: Cannata ................................ 309
      5.2.2.3.3 Throwing the door wide open: Yonkers and its consequences ......................................................... 310
      5.2.2.3.4 Recent outrage (I): Goldstein ............................... 312
      5.2.2.3.5 Recent outrage (II): Kaur .................................... 314
      5.2.2.3.6 Impact upon statutory bases ................................ 316
    5.2.2.4 Still to be decided: Economic development outside blighted areas? ....................................................... 317
    5.2.2.5 Remaining private uses ........................................... 318
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.2.3 The substantive definition: The pretext test as protection</td>
<td>319</td>
</tr>
<tr>
<td>against abuse</td>
<td></td>
</tr>
<tr>
<td>5.2.3.1 The requirements of the pretext test as applied in New York State</td>
<td>320</td>
</tr>
<tr>
<td>5.2.3.2 Stricter scrutiny only in economic development cases?</td>
<td>321</td>
</tr>
<tr>
<td>5.2.3.3 Successful pretext defences in practice</td>
<td>322</td>
</tr>
<tr>
<td>5.2.4 The substantive definition: Conclusion</td>
<td>323</td>
</tr>
<tr>
<td>5.2.5 The governance perspective</td>
<td>324</td>
</tr>
<tr>
<td>5.2.5.1 The role of the legislator</td>
<td>325</td>
</tr>
<tr>
<td>5.2.5.2 The role(s) of the administrative authorities</td>
<td>326</td>
</tr>
<tr>
<td>5.2.5.3 The role of the courts</td>
<td>328</td>
</tr>
<tr>
<td>5.2.5.3.1 Level I Deference: The interpretation of the constitutional public use requirement</td>
<td>329</td>
</tr>
<tr>
<td>5.2.5.3.2 Level II and III Deference: The interpretation of the statutory basis and the facts—The general approach</td>
<td>330</td>
</tr>
<tr>
<td>5.2.5.3.3 Level II and III Deference: The interpretation of the statutory basis and the facts—The approach to substandard and insanitary areas</td>
<td>331</td>
</tr>
<tr>
<td>5.2.5.3.4 Level II and III Deference: The interpretation of the statutory basis and the facts—Stricter scrutiny in economic development cases?</td>
<td>335</td>
</tr>
<tr>
<td>5.2.5.3.5 Strict scrutiny: Procedural norms</td>
<td>336</td>
</tr>
<tr>
<td>5.2.5.4 Conclusion</td>
<td>336</td>
</tr>
<tr>
<td>5.2.5.5 Illustration of the governance of the legitimate purpose.</td>
<td>337</td>
</tr>
<tr>
<td>5.3 The contextualisation</td>
<td>337</td>
</tr>
<tr>
<td>5.3.1 The relationship between the project and the legitimate purpose</td>
<td>339</td>
</tr>
<tr>
<td>5.3.1.1 The need for the project</td>
<td>339</td>
</tr>
<tr>
<td>5.3.1.2 The suitability of the project</td>
<td>340</td>
</tr>
<tr>
<td>5.3.1.3 The suitability of independent parts of the project</td>
<td>340</td>
</tr>
<tr>
<td>5.3.1.4 Enhanced contribution: Economic development must be the dominant purpose</td>
<td>342</td>
</tr>
<tr>
<td>5.3.2 The alternative project argument</td>
<td>343</td>
</tr>
<tr>
<td>5.3.2.1 The obligation to consider alternative projects</td>
<td>343</td>
</tr>
<tr>
<td>5.3.2.2 The judicial review of the authority’s choice</td>
<td>344</td>
</tr>
<tr>
<td>5.3.2.2.1 The judicial review under the EDPL</td>
<td>344</td>
</tr>
<tr>
<td>5.3.2.2.2 The judicial review under SEQRA</td>
<td>348</td>
</tr>
<tr>
<td>5.3.3 The suitability of the condemnation</td>
<td>348</td>
</tr>
<tr>
<td>5.3.4 The least invasive means argument</td>
<td>348</td>
</tr>
<tr>
<td>5.3.4.1 Purchase on the private market</td>
<td>349</td>
</tr>
<tr>
<td>5.3.4.2 More land than is necessary for the project</td>
<td>350</td>
</tr>
<tr>
<td>5.3.4.3 Less invasive legal means</td>
<td>351</td>
</tr>
</tbody>
</table>
5.3.4.4 Self-realisation .................................................. 352
5.3.4.5 Overview of findings ............................................. 352
5.3.5 The balance between the public benefits and adversely affected interests ............................................. 353
5.3.5.1 US Federal law: The Fifth Amendment ................. 353
5.3.5.2 New York State law: Urban renewal areas and municipal redevelopment plans ......................... 354
5.3.5.3 New York State law: EDPL and SEQRA ............... 354
5.3.5.4 Some fixed environmental protection standards ...... 357
5.3.5.5 The role of compensation .................................... 357
5.3.5.6 Suggestions in the literature ................................. 358
5.3.6 The governance of the contextualisation ..................... 359
5.3.6.1 The role of the legislator ..................................... 359
5.3.6.2 The role of the administrative authorities .......... 359
5.3.6.3 The role of the courts ....................................... 360
5.3.7 Conclusion .......................................................... 361
5.4 The administrative and court procedures ....................... 362
5.4.1 The planning procedure ............................................. 362
5.4.2 The condemnation procedure ..................................... 364
5.4.2.1 The position of the condemnation authority in the state system ........................................... 364
5.4.2.2 Provision of information ...................................... 365
5.4.2.3 Access to the procedure ....................................... 366
5.4.2.4 The type of participation .................................... 366
5.4.2.5 The determination ............................................. 367
5.4.3 The court procedure ................................................. 368
5.5 The endurance of the legitimate justification ................... 369
5.5.1 Preventive measures .................................................. 369
5.5.1.1 New York State condemnation statutes ................ 370
5.5.1.2 Examples from practice ....................................... 370
5.5.2 Corrective measures .................................................. 371
5.5.3 The governance of the endurance of the legitimate justification .................................................. 373

Chapter 6 South African Law
6.1 Applicable law .......................................................... 375
6.1.1 The definition of expropriation ................................. 375
6.1.2 The general constitutional and administrative law framework ............................................. 376
6.1.2.1 Section 25(1) and (2) of the Constitution .............. 379
6.1.2.2 The relationship between Sections 25 and 36 of the Constitution ........................................... 383
6.1.2.3 The relationship between Sections 25, 33 and 36 of the Constitution ........................................... 385
6.1.2.4 The relationship between Section 33 and PAJA ........ 388
6.1.2.5 Illustration: Interaction of applicable norms ............ 389
6.1.2.6 The future: The 2015 Expropriation Bill .................. 389
6.1.3 Statutory path(s) to third-party transfers for economic development

6.1.3.1 Scenario I: No statutory planning instrument

6.1.3.2 Scenario II: Municipal planning instrument

6.1.3.3 Scenario III: Statutory economic development scheme

6.1.3.4 Overview of analysed legislation

6.2 The legitimate purpose

6.2.1 The substantive definition of legitimate purposes

6.2.1.1 Pre-constitutional jurisprudence

6.2.1.1.1 Before the introduction of a national Expropriation Act

6.2.1.1.2 Under the Expropriation Act of 1965

6.2.1.1.3 Under the Expropriation Act of 1975

6.2.1.2 In the constitutional era

6.2.1.2.1 Sotirios Spetsiotis

6.2.1.2.2 Bartsch

6.2.1.2.3 Offit Enterprises

6.2.1.2.4 Harvey

6.2.1.2.5 Erf 16

6.2.1.2.6 Evaluation of the jurisprudence in the constitutional era

6.2.1.3 Economic development as a legitimate purpose in the literature

6.2.1.4 Conclusion

6.2.2 The governance of the legitimate purpose

6.2.2.1 The role of the legislator

6.2.2.2 The role of the planning and expropriation authorities

6.2.2.3 The role of the courts

6.2.2.4 Conclusion

6.2.2.5 Illustration of the governance of the legitimate purpose

6.3 The contextualisation

6.3.1 The relationship between the project and the legitimate purpose

6.3.1.1 Case law

6.3.1.2 Just administrative action

6.3.1.3 Sections 25(1) and 36(1) of the Constitution

6.3.1.4 Conclusion

6.3.2 The alternative project argument

6.3.2.1 Case law

6.3.2.2 Constitutional law and PAJA

6.3.2.2.1 Reasonable administrative action

6.3.2.2.2 Section 25(1) and Section 36(1) of the Constitution

6.3.2.3 Conclusion
6.3.3 The suitability of the expropriation ............................................. 437
6.3.4 The least invasive means argument ........................................... 438
   6.3.4.1 Case law ................................................................................. 438
   6.3.4.2 The Expropriation Act and the 2015 Expropriation Bill ....... 440
   6.3.4.3 Literature ............................................................................. 441
   6.3.4.4 Constitutional law and PAJA ................................................. 441
   6.3.4.5 Conclusion ............................................................................. 445
6.3.5 The balance between the public benefits and adversely affected interests .................................................. 445
   6.3.5.1 The interest of the expropriatee ............................................ 445
      6.3.5.1.1 The commitment to transformation as a constitutional value ................................................. 446
      6.3.5.1.2 The role of compensation ................................................. 447
      6.3.5.1.3 Reasonableness: The balancing of interests.............. 449
   6.3.5.2 Affected public interests other than environmental protection ......................................................... 455
   6.3.5.3 Environmental protection ...................................................... 458
   6.3.5.4 Conclusion ............................................................................. 459
6.3.6 Concluding remarks on heightened judicial scrutiny and land reform ......................................................... 459
6.3.7 The governance of the contextualisation ........................................ 460
   6.3.7.1 The role of the legislator ......................................................... 460
   6.3.7.2 The role of the planning and expropriation authorities ... 461
   6.3.7.3 The role of the courts .............................................................. 464
   6.3.7.4 Conclusion ............................................................................. 466
6.4 The administrative and court procedures ................................................. 467
   6.4.1 The expropriation procedure ...................................................... 467
      6.4.1.1 The expropriation authority ............................................... 468
      6.4.1.2 The expropriation procedure under the Expropriation Act: Participation ................................................. 468
      6.4.1.3 The expropriation procedure under Section 25(1) of the Constitution ......................................................... 469
      6.4.1.4 The expropriation procedure under the 2015 Expropriation Bill ............................................................. 469
   6.4.2 The planning procedures ........................................................... 470
      6.4.2.1 The planning authority ......................................................... 470
      6.4.2.2 Public participation .............................................................. 471
      6.4.2.3 Internal appeal ..................................................................... 471
   6.4.3 Common procedural rules on participation under PAJA ....... 472
      6.4.3.1 Provision of information ..................................................... 473
      6.4.3.2 Access to the procedure ..................................................... 474
      6.4.3.3 Type of participation ......................................................... 475
      6.4.3.4 Empowering measures ....................................................... 476
      6.4.3.5 The obligation to give reasons ........................................... 478
6.4.4 The court procedure ................................................. 479
6.4.5 Conclusion ......................................................... 480

6.5 The endurance of the legitimate justification ................................................................. 480
   6.5.1 Preventive measures .................................................. 481
   6.5.2 Corrective measures .................................................. 483
      6.5.2.1 Case law ..................................................... 483
      6.5.2.2 Literature .................................................... 484
         6.5.2.2.1 Lawfulness of administrative action ................. 485
         6.5.2.2.2 Section 25 of the Constitution .......................... 486
   6.5.3 The governance of the endurance of the legitimate justification ..................... 487
   6.5.4 Conclusion ......................................................... 487

Chapter 7 Exploration and evaluation of differences and similarities
   7.1 The comparative analysis ............................................................................. 489
      7.1.1 The legitimate purpose ........................................................................... 489
         7.1.1.1 The substantive definition: Legitimate purposes under the constitution .......... 489
         7.1.1.2 The substantive definition: Economic development as a legitimate purpose under the constitution .......... 491
         7.1.1.3 The substantive definition: Economic development as a legitimate purpose in legislation .......... 493
         7.1.1.4 The governance of legitimate purposes ............................................. 494
            7.1.1.4.1 The courts' broad interpretation of legitimate purposes under the Constitution ............... 495
            7.1.1.4.2 The diverging roles of the legislator ........................................ 495
               The responsibility to define legitimate purposes ........................................ 495
            7.1.1.4.3 The dominant model: Freedom for the planning authority and judicial deference ... 497
            7.1.1.4.4 The German model: Administrative and judicial control of the legitimate purpose.... 501
      7.1.1.5 Concluding remarks ............................................................................. 502
      7.1.2 The relationship between the project and the legitimate purpose ................. 503
      7.1.3 The alternative project argument .................................................................. 506
      7.1.4 The suitability of the expropriation ......................................................... 510
      7.1.5 The least invasive means argument ......................................................... 510
      7.1.6 The balance between the public benefits and adversely affected interests ........... 513
         7.1.6.1 The role of the legislator in taking into account adversely affected interests .............. 513
         7.1.6.2 The authority's obligation to balance interests ...................................... 513
         7.1.6.3 The distinction between planning discretion and the legitimate justification of expropriation ............................. 514
### The Legitimate Justification of Expropriation

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1.6.4</td>
<td>The judicial boundaries to the authority's scope for manoeuvring</td>
</tr>
<tr>
<td>7.1.6.5</td>
<td>The diverging relationships between the planning authority and the judiciary</td>
</tr>
<tr>
<td>7.1.6.6</td>
<td>The role of compensation and the protection of property rights</td>
</tr>
<tr>
<td>7.1.7</td>
<td>The administrative procedures</td>
</tr>
<tr>
<td>7.1.7.1</td>
<td>The competent authorities</td>
</tr>
<tr>
<td>7.1.7.2</td>
<td>The provision of information</td>
</tr>
<tr>
<td>7.1.7.3</td>
<td>The access to the procedure</td>
</tr>
<tr>
<td>7.1.7.4</td>
<td>The moment of participation</td>
</tr>
<tr>
<td>7.1.7.5</td>
<td>The type of participation</td>
</tr>
<tr>
<td>7.1.7.6</td>
<td>The obligation to give reasons</td>
</tr>
<tr>
<td>7.1.8</td>
<td>The court procedures</td>
</tr>
<tr>
<td>7.1.9</td>
<td>Preventive measures</td>
</tr>
<tr>
<td>7.1.10</td>
<td>Corrective measures</td>
</tr>
<tr>
<td>7.1.11</td>
<td>Conclusion</td>
</tr>
<tr>
<td>7.2</td>
<td>The roots of the main similarities and differences</td>
</tr>
<tr>
<td>7.2.1</td>
<td>Similarity: The recognition of economic development as a legitimate purpose</td>
</tr>
<tr>
<td>7.2.2</td>
<td>Difference 1: The 'lazy' legislator versus the 'proactive' legislator</td>
</tr>
<tr>
<td>7.2.3</td>
<td>Difference 2: The freedom of the planning authority versus judicial control</td>
</tr>
<tr>
<td>7.2.3.1</td>
<td>Complexity, discretionary powers, and limited judicial review</td>
</tr>
<tr>
<td>7.2.3.2</td>
<td>Historical predispositions as a cause of diverging standards</td>
</tr>
<tr>
<td>7.2.3.3</td>
<td>Confidence in the judiciary</td>
</tr>
<tr>
<td>7.2.3.4</td>
<td>The intrinsic value of a property right</td>
</tr>
<tr>
<td>7.2.3.5</td>
<td>Other explanations</td>
</tr>
<tr>
<td>7.3</td>
<td>Application of international good governance standards</td>
</tr>
<tr>
<td>7.3.1</td>
<td>International good governance standards on expropriation</td>
</tr>
<tr>
<td>7.3.2</td>
<td>The definition of legitimate purposes must ensure judicial review</td>
</tr>
<tr>
<td>7.3.2.1</td>
<td>Interpretation of the good governance standards</td>
</tr>
<tr>
<td>7.3.2.2</td>
<td>Application of the standards to the examined jurisdictions</td>
</tr>
<tr>
<td>7.3.3</td>
<td>The obligation to balance interests and consider less harmful alternative projects</td>
</tr>
<tr>
<td>7.3.3.1</td>
<td>Interpretation of the good governance standards</td>
</tr>
<tr>
<td>7.3.3.2</td>
<td>Application of the standards to the examined jurisdictions</td>
</tr>
<tr>
<td>7.3.4</td>
<td>Special protection of vulnerable groups</td>
</tr>
<tr>
<td>7.3.4.1</td>
<td>Interpretation of the good governance standards</td>
</tr>
</tbody>
</table>
7.3.4.2 Application of the standards to the examined jurisdictions ......................................................... 554
7.3.5 Recognition of the least invasive means argument ................................................................. 555
7.3.5.1 Interpretation of the good governance standards ........................................................... 555
7.3.5.2 Application of the standards to the examined jurisdictions ......................................................... 555
7.3.6 Good governance standards for administrative procedures .................................................. 556
7.3.6.1 Interpretation of the good governance standards ........................................................... 557
7.3.6.2 Application of the standards to the examined jurisdictions ......................................................... 558
7.3.7 Preventive measures ......................................................................................................................... 560
7.3.7.1 Interpretation of the good governance standards ........................................................... 560
7.3.7.2 Application of the standards to the examined jurisdictions ......................................................... 560
7.3.8 Corrective measures ......................................................................................................................... 561
7.3.8.1 Interpretation of the good governance standards ........................................................... 561
7.3.8.2 Application of the standards to the examined jurisdictions ......................................................... 562
7.4 Recommendations .......................................................................................................................... 562

Chapter 8 Summary and conclusion
8.1 The goals of the research .................................................................................................................. 570
8.2 A descriptive theory of the legitimate justification of expropriation ........................................ 571
8.3 German law ......................................................................................................................................... 574
8.4 Dutch law .......................................................................................................................................... 578
8.5 New York State law .......................................................................................................................... 581
8.6 South African law .............................................................................................................................. 584
8.7 Exploring and evaluating similarities and differences .................................................................. 587
8.7.1 The comparative analysis .......................................................................................................... 587
8.7.2 Possible roots of main differences and similarities .............................................................. 590
8.7.3 Compliance with international good governance standards .............................................. 591
8.7.4 Recommendations ...................................................................................................................... 592
8.8 Concluding remarks .......................................................................................................................... 593
Bibliography ........................................................................................................................................... 597
Cases ....................................................................................................................................................... 626
Legislation .................................................................................................................................................. 638
Index ......................................................................................................................................................... 661