

**INTERNATIONAL PRACTICE IN REAL ESTATE EXPROPRIATION AND
COMPENSATION ISSUES**

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ABSTRACT

This study examines the issues of compulsory seizure of private property in developed countries, the order and methodology of evaluation of material and moral damage. A comparative analysis of the regulatory and legal framework is made. The focus then shifts to the issue of compensation, and it is argued that the usual standard of fair market value falls far short of what is ethically required to ensure the "integrity" of owners. This point is further explored when considering recent research on the relationship between a person's sense of self-identity and the places they frequent. In order to provide an alternative to expropriation, the international experience of land sanitation is briefly described.

KEYWORDS: *Property Valuation, Compensation Standards, Just Compensation, Public Use, Eminent Domain, Seize.*

INTRODUCTION

Most, if not all, national legal systems allow public expropriation of private land and property for public purposes. Debates around expropriation usually center around the definition of public purposes, property valuation, and compensation standards (Lamoreaux, 2011; Scheiber, 1973). This chapter examines expropriation practices in the United States (US). The U.S. experience shows that much remains to be learned about the equitable application of the power to require landowners to relinquish possession of their property. In particular, the constitutionally required standard of "just compensation" for alienated property seems unattainable in practice. In this case, it is important to find alternatives to expropriation.

One possibility, widely used in other countries, is discussed here. To explore these issues, the following section provides a brief history of expropriation in the United States. The literature and case law are extensive and can only be examined superficially here. However, major trends and issues are presented. The focus then shifts to the issue of compensation, and it is argued that the usual standard of fair market value falls far short of what is ethically required to ensure the "integrity" of owners. This point is further explored when considering recent research on the relationship between a person's sense of self-identity and the places they frequent. In order to provide an alternative to expropriation, the international experience of land sanitation is briefly described.

The U.S. Constitution provides that private property may not be "taken" for public use without "just compensation" (U.S. Constitution, Amendment V). Despite this clear and concise statement, the history of expropriation in the United States has been described as "a massive body of case law, irreconcilable in its inconsistency, confused in its details, and contrary to all attempts at classification" (Note, 1949, pp. 605-606). However, several patterns of policy and practice can be distinguished.

MATERIALS AND METHODS

By the early 1820s, state courts in the United States had developed three concepts that were considered part of constitutional law, even when state constitutions were not clearly articulated:

- Eminent domain or expropriation of possessions was inherent in the attribute of sovereignty, so private property was subject to seizure by the state.
- This right could only be lawfully exercised by the state for a "public use" or "public purpose".
- When property was expropriated, "just" compensation had to be paid to property owners (Scheiber 1973).

Scheiber (1973) also describes what he calls the "acceleration doctrines" adopted by the early state courts and justified by the fact that the expropriated property had an extraordinary public purpose. One such doctrine was that compensation was limited to property that had been physically taken. For example, an 1823 Massachusetts court decision held that a homeowner was not entitled to compensation when the city changed the street grade by exposing the foundation of the house and depriving it of access. According to the court, those who buy land on hills or slopes are presumed to expect such changes. In 1857, the U.S. Supreme Court upheld a similar interpretation of the compensation claim, arguing that "private interests must give way to the public interest" (Scheiber, 1973, p. 236).

Another doctrine of acceleration limited access to a jury trial as long as certain procedures provided for appropriate assessment, appeal of assessments, and timely payment of compensation. The final doctrine, as defined by Scheiber, allowed state legislatures to partially offset the cost of compensation through a benefit on the remaining property for owners who were forced to give up only a portion of their property. As Scheiber notes, this "compensation" doctrine is mentioned often enough in court records and other sources to suggest that the subsidy thus required of private landowners was significant (Scheiber 1973). Indeed, Nichols in 1917 makes the following observation as to whether the benefits of the remaining land should at least partially compensate for the value of the land taken: On this question there is greater diversity of opinion and more different and inconsistent rules have been established than on any other point in the Eminent Domain Act.

Scheiber goes on to suggest that the most important development in the early U.S. expropriation law was "the complete transfer of these doctrines to the private sector in aid of registered companies to whom the legislature had transferred the power of eminent domain" (Scheiber, 1973,

p. 237). The power of eminent domain was granted to the road, bridge, canal, and railroad companies in each state. As a result, the railroad companies were able to acquire land at virtually no cost, arguing that the benefit to the landowners left over the land fully compensated for the value of the property taken. Moreover, once in possession of eminent domain, these companies could again use the power to expand their adjoining land holdings based almost exclusively on their own judgment of the company's needs.

Courts also relied on precedents set by the legislature for grain mills. Mills were important to many farming communities, and the legislature granted them special privileges, including the right to erect dams and flood adjacent land to provide the necessary water strength. To compensate owners of flooded land, mill dam statutes provided for either an annual assessment of lost income or a one-time award of damages. From the mid-1830s through the Civil War period, many states extended the mill dam principle to manufacturing plants needing water power for purposes other than grain milling (Scheiber 1973).

Some stakeholders resisted this expansion of expropriation power, although they found little support in the courts. By the 1850s, opponents began pushing through reforms to the state constitutional conventions. Ohio was one of the first states to amend its constitution to require corporations to compensate property owners, with compensation to be determined "regardless of the benefit of any improvements proposed by such corporation ... by a jury of twelve" (Scheiber, 1973, p. 241). Other states have begun to follow suit.

Despite attempts to limit the use of expropriation, especially in private interests, Scheiber summarizes the post-Civil War period as follows: The flowering of expropriation as an instrument of public policy to subsidize private enterprise can probably be dated to the following year: beginning in the 1870s and continuing until about 1910. During that era of supposed non-intervention (which was in fact a period of widespread government subsidies to business) all constitutional restrictions were lifted. (Scheiber, 1973, p. 243).

By about 1910 the form of expropriation laws in the United States began to change. As noted, state constitutions were being amended to require trial by jury, narrowing the range of permissible "compensation" procedures, and requiring prior compensation payments. In addition, expropriation was used in the area of urban planning and public goods. The topic of "excessive condemnation" became a central theme discussed both in the legislature and in courtrooms. With major regional development projects, federal urban renewal and highway programs, the focus shifted to government projects and their social implications.

In fact, expropriation is almost always justified by cost-benefit calculations. According to this argument, society as a whole would be better off if a particular private property interest were redirected toward some particular public use. The benefits to society are greater than the private costs of the present landowners. From this perspective, compensation becomes simply an application of the Kaldor-Hicks criterion, which allows winners (society) to compensate losers (landowners) and still be better off (Miceli, 1997). Society as a whole is better off. Specifically, no one feels worse off because compensation has occurred and aggregate social welfare has improved.

Obviously, several strong assumptions are made when applying this logic to expropriation. Perhaps the most obvious is that the compensation to be paid should equal the value of the landowners' losses. In theory, Kaldor-Hicks does not actually require compensation, but in the context of expropriation, compensation is required. Therefore, the calculation of the compensation owed to landowners is often a moot point.

Compensation almost always involves the valuation of the property interest in question. Appraisal theory states that the appraised value of property will depend on the purpose of the appraisal.

Properties have different "values" when viewed from different perspectives (Appraisal Institute, 1992). In the context of expropriation, " the choice of an appropriate measure of compensation for expropriation necessarily involves a choice among imperfect alternatives" (Wyman, 2007, p. 245). In the United States, the generally accepted standard of valuation is "fair market value," or the price at which the property would have been sold had the transaction been between a willing buyer and a willing seller, neither of whom is obligated to enter into the transaction (Wyman, 2007). When only a portion of the value of the property is taken, such as for a government easement, the compensation should reflect the total impact on the total value.

Fair compensation is one in which the injured party is in as good a condition as it would have been if the damage had not occurred. It includes the value of the land or the amount to which the value of the property from which it was taken has depreciated.

Generally, a property owner is not entitled to compensation before the government takes possession of the land. The Constitution does not require that compensation actually be paid before the land is taken. Nevertheless, the owner is entitled to reasonable, certain, and adequate compensation before his/her home is trespassed.

In Delaware, *L. & WR Co. v. Morristown*, 276 US 182 (US 1928), the court held that taking private property for public use is considered a violation of the common law, and the power to do so must be clearly expressed.

Property to be acquired includes not only real property but also personal property. Generally, intangibles, such as the right to indemnify a business, are not property in the constitutional sense. Exceptions are property interests subject to equitable compensation .

Also, patent rights are property protected by constitutional guarantees. When patent rights are appropriated for public use, appropriate compensation must be paid. Loss of visibility is compensable if the impairment of visibility is the result of changes in property taken from the landowner. However, the loss of visibility is not compensable if it is the result of a change in the property of another.

Similarly, property occupied by a railroad or other public corporation is private property and cannot be taken or put to use and used for another public use except after compensation has been paid.

Riparian right, may not be arbitrarily or arbitrarily destroyed or damaged except in accordance with law. If necessary, the riparian right may be used for public benefit after receiving the compensation due.

Acquisition by the public of a land easement for the construction of a public road does not confer a right and easement. If the use is authorized by proper authority and is not an additional burden, the owner cannot claim compensation.

To award the owner less compensation than the value of the property taken would be unfair to him/her. It would also be unfair to the public to award him/her an amount in excess of the value of the property.

In the United States, those exercising the power to seize real property can dispose of property in two ways:

- The government can take physical possession of property without a court order;
- the government can initiate a condemnation proceeding.

In a physical seizure proceeding, the property owner is afforded a remedy under the Tucker Act to recover just compensation. In a condemnation proceeding, compensation is available through the

court.

When the government chooses the physical seizure method, acquisition occurs at the time of seizure, even though title does not pass until compensation is actually paid. From the beginning of the acquisition procedure, the government's possession is legal, and the owner's title represents only his/her claim for compensation.

CONCLUSION

It should be clear from this brief review of the extensive literature and case law on expropriation that this instrument has a long but rather unpleasant history in the United States. Compensation in the constitutional sense is not full compensation, for market value is not the value that each property owner attaches to his property, but simply the value that the marginal owner attaches to his property. Many owners are "intra-marginal," meaning that because of the costs of moving, sentimental attachments, or the particular suitability of the property for their particular needs, they value their property more than its market value.

Expropriation has often been used to promote special commercial interests at the expense of the poor and minorities. Levels of remuneration remain controversial, even if market value is the agreed upon standard. Notions of public use and public purpose went far beyond the usual language. Federal edicts have been issued directing the national government to avoid any action of expropriation (Bush, 2006; Scheiber, 1973). And influential members of the judiciary recognize that they are simply unable to fairly and consistently satisfy people subject to expropriation.

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