Taking Land Around the World: International Trends in the Expropriation for Urban and Infrastructure Projects

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with the collaboration of
Carlos Herrera

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Lincoln Institute of Land Policy
Working Paper

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Lincoln Institute Product Code: WP07AA1

Abstract

Compulsory purchase, expropriation, eminent domain, or simply “taking”, are different names for one and the same legal institution: That which allows states to acquire property against the will of its owner in order to fulfill some purpose of general interest. Traditionally, expropriation has been considered one of the main instruments of land policy. However, nowadays it is subject to a number of criticisms and mounting social resistance. Campaigns for housing rights, movements for the defense of property rights, legislative and judiciary activism, and land tenure reforms, among other factors, are changing the conditions under which governments exercise their power of eminent domain.

This paper is the result of a first exploration to recent worldwide trends regarding the law and policy of the compulsory acquisition of land for urban and development projects. This task faces two main obstacles. On the one hand, governments do not produce systematic information about the use they make of their power of eminent domain, even when they recognize it as an instrument of their land policies. This makes policy analysis particularly challenging. On the other hand, academic research on the subject has focused on legal issues, leaving aside other dimensions of this government practice. Thus, the accumulated knowledge on the subject has a strong disciplinary bias.

Given the great diversity of situations that arise in different countries, it is necessary to define some general questions that guide our research. For that purpose, we are following three main avenues: First, we place the discussion on expropriation within the wider theme of the institution of property. Second, we take up the question that several authors have posed regarding whether there is a global convergence in property regimes around the world (Jacobs, 2006, Woodman, et. al. 2004). Thirdly, we suggest that for an orderly and fruitful comparative analysis of trends of eminent domain, we should look at the different contexts in which this is being discussed around the world. Our main conclusion is that, even if there are many symptoms that expropriation has fallen in deep disregard in many countries, there are not sufficient elements to proclaim its demise as an instrument of land policy.

The main policy recommendation that emerges from this first approximation is that while expropriation must be reconsidered as an instrument of land policy, “reconsidering” should not be interpreted as “dispensing with.” Rather, it should mean that governments need to find a new place and function to the use eminent domain power as a policy instrument.

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We wish to express our thanks to Greg Ingram, Martim Smolka, Alain Durand-Lasserve and Mila Freire, for their comments on a first draft of this paper.

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Céline Jacquin (Université Marne-La Vallée) provided research assistance in the assembling of materials from documentation centers and official sources in France.

Table of Contents

Introduction **1**

Major Trends in Policy and Law **1**

The Discontent About Expropriations **1**

Policy Changes: Obscure Facts, Clear Directions? **5**

Figure 1: Mexico: Urban Expropriations 1968-2004: Area And Expropriation Decrees By Year 6

Figure 2: Area Expropriated According to Type of Expropriation 1968-2004 6

Legal Changes; One Direction, Many Contexts **9**

Forces Behind Major Trends **12**

Social Resistance 12

Changing Patterns of Land Holding 13

Independent Judiciaries 13

Greater Role of Public Opinion 13

Changing International Context 14

Understanding Legal Issues in Context **14**

Context of Initiatives on Eminent Domain **15**

The Concept of Public Interest **16**

Compensation **17**

Housing Rights and Population Resettlement **18**

Expropriation of Different Components of the Bundle of Rights **19**

Policy Implications **20**

Proposals for Future Research **22**

Bibliography **23**

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Introduction

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This paper is the result of a first exploration to recent worldwide trends regarding the law and policy of the compulsory acquisition of land for urban and development projects. This task faces two main obstacles. On the one hand, governments do not produce systematic information about the use they make of their power of eminent domain, even when they recognize it as an instrument of their land policies. This makes policy analysis particularly challenging. On the other hand, academic research on the subject has focused on legal issues, leaving aside other dimensions of this government practice. Thus, the accumulated knowledge on the subject has a strong disciplinary bias.

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Major trends in policy and law

The discontent about expropriations

Let us begin by looking at some of the reasons for the growing discontent regarding the use of eminent domain in different parts of the world. Before we show the variety of those reasons, it is interesting to note that it was only in the last decade that such dissatisfaction became generalized. Three decades ago, the dominant approaches in urban law, planning and social sciences in general, saw the expropriation of land as a crucial component of any development strategy. It was part of an equation in which private interests were on one side,

whereas in the other side the public interest was a coherent combination of infrastructure works and land use regulation. Expropriation was the ultimate tool for advancing public over private interests and planning was the art of getting the right balance. For one author, there could not be urban policies "worth the name", if public authorities did not have the power to acquire and control land (Fromont, 1978).[1]

The first signs that expropriation was imposing high social costs (and not only the sacrifice of selfish individual interests) became evident with dams in developing economies. The construction of those symbols of development, whether for energy or for irrigation, meant the displacement of large numbers of people. According to Michael Cernea, in the last decade of the 20th Century, the number of displaced persons due to infrastructure projects reached between 90 and 100 million (Cernea, 2000). I some cases, those projects have displaced almost 1% percent of the population of an entire country.[2]

People in Africa have been particularly affected by the construction of dams, as there was an important surge of them in the seventies, largely due to the coincidence of de-colonization processes throughout the continent. Certainly, colonial powers had deployed their own territorial policies, displacing people for a number of causes (access to natural resources, creation of urban centres in strategic locations), but development projects became a new, and more pervasive, source of displacement in post-colonial times.[3] And their social impact got even more acute as land became scarce.[4]

Even when infrastructure projects tried to reduce the social impact of population displacement, as in the case of dams funded by the World Bank or USAID in the eighties, that goal was far from being accomplished.

The construction of dams became emblematic as a form of 'displacement by development.' But there are other forms of land dispossession that affected millions in post-colonial societies. "Villagization," as it occurred in Tanzania (Benjaminsen and Lund, 2003)[5] and land grabbing in Zimbabwe (Maposa, 1995), are only two examples of politically induced (and sometimes violent) changes in the relation between people and land that have had enormous consequences on societies. Regardless the intentions or the political context that explain such processes, there is no doubt that they constitute extreme forms of uncompensated taking of land from a great number of people who depended on it for their subsistence.

Expropriations related to infrastructure that imply peoples' relocation, have an impact that goes beyond an economic loss.[6] This is aggravated by the fact that legal systems usually do not recognize the difference between taking land away from people who live on (and from) it, than expropriating land from individuals or organizations for whom land is only an

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[1] Fromont, 1978, p. 7. See also Graëffly, 2006.
[2] Cernea, 1997, p. 7. According the same source, 505,000 people have been displaced in Africa just for dam projects.
[3] Mortimore explains that Independent governments in Africa played a more important role in land acquisition that their colonial predecessors (Mortimore, 1997, p. 26).
[4] The implications of the scarcity of land have been also important in defining new political processes (Lentz, 2006, p. 2).
[5] Benjaminsen and Lund, 2003, p. 61
[6] According to the risk model proponed by Cernea these are the eight risks associated with forceful displacement: landlessness, joblessness, homelessness, marginalization, food insecurity, increased morbidity and mortality, loss of access to common property and services and social disarticulation. (Cernea, 2000, p. 22).

"asset." Obviously, expropriation should not be confused with resettlement. The latter can take place without the former, and vice versa. But it is important to have those two situations in mind, in order to recognize two extreme forms of social cost. On the one hand, there is a high social cost in expropriations where land is expropriated with low (or no) compensation and people are forced to leave the place they inhabit. At the other extreme, expropriation procedures may result in high costs to society as a whole when, due to judicial decisions, governments are forced to pay exorbitant sums to land owners, as it has happened recently in Mexico and Brazil.

Expropriation of land as part of infrastructure projects has not only been part of development policies in post-colonial settings. The so-called emerging economies, particularly those with high and sustained growth rates like China, have resorted to huge projects in order to face their transport and energy needs. The Three Gorges dam is certainly the most publicized initiative in that context, and it is not difficult to see why it engrosses the list of projects with dubious environmental and social record (Padovani, 2003).

In many of these cases, the question becomes aggravated by two causes: the lack or insufficient recognition of land rights of the dispossessed population, and the weakness of the rule of law. Clearly, being deprived of land rights or not having access to a legal remedy to defend them is the ultimate state of vulnerability in relation to tenure. However, these elements should not to be seen as external to (or separate from) expropriation as a legal institution. The single action by which a government takes someone's property is only a moment in the history of a property right. It is after an expropriation has had its full effects (including the way courts deal with it) that we can establish the content and the extension of a property right. This is important if we are to understand the relation between expropriation and a wider issue: land tenure. If, in many countries, the removal of people from their land takes place without (or with minimal) compensation, that is precisely a sign of the weakness of their property rights.

This is far from being a mere legal technicality; it is a crucial element to understand the impact of taking land for public uses. In countries that have undergone major land tenure reforms, as a result of which certain groups have been awarded titles, while other users of the land (like herders) have been left without rights, the potential inequality in the new tenure arrangement will materialize as soon as land is taken for an urban or infrastructure project.[7] That inequality is not the result of the expropriation itself, but of the operation of an ill-conceived tenure system. Thus, both tenure systems and the operation of the legal system must be taken seriously if we want to understand the meaning and the impact of expropriations in different contexts. For the moment, it suffices to say that the literature on this subject shows that, in the last decades, part of the vulnerability of people affected by expropriations is closely related with those two crucial elements.

Thus far we have referred mainly to institutional questions. But there are also demographic and cultural aspects. In the last decades, conflicts over the expropriation of rural land seem to be less frequent than conflicts in the context of urbanization processes.[8]

[7] Examples of this can be found in Ho, 2000, p. 106.

[8] In Africa, in 1985 the main cause of displacement was the construction of dams and they represented 67% of the projects that the World Bank had in Africa that involved forced displacement while urban development projects represented 33%. In 1995 the numbers had change dramatically. While dams represented only 27% of the projects, urban development had grown to 57%. In China Urban resettlement now accounts for the majority of force displacements (Meikle and Youxuan, 2000, p. 129).

Cultural changes have also played their part, especially regarding big infrastructure projects. Dams, highways and ports have lost the appeal they once had as symbols of progress. As environmental and wider social arguments gain importance in public opinion, resistance against them become relevant; thus opposition to expropriations comes not only from owners but also from wider segments of society. One of the many examples of this is the ill - fated project of a new airport for Mexico City. After intense opposition from one of the villages whose land was being expropriated, and the mobilization of dozens of social organizations from many parts of the country, the Federal Government decided to abandon the project in 2002. This was seen by some commentators as the first great failure of Vicente Fox's administration, which had begun as the main outcome of Mexico's transition to democracy;[9] but the truth is that wide sectors of public opinion expressed their sympathy for 'peasants against airplanes.'

In sum, in recent times, the use of eminent domain power in developing countries has been associated with the displacement of millions of people from the lands that was considered to be 'theirs,' with the lack of recognition of property rights, the limited access to judicial remedies, and with a growing opposition to the infrastructure and urban projects for which that power is wielded.

Now dissatisfaction with expropriation has not been exclusive of the developing world. In the U.S.A., by means of both political and judicial activism, there have been serious attempts to put limits to eminent domain powers. The "property rights movement" enjoys growing support in several states of the Union and has launched initiatives in that direction. On the other hand, the Supreme Court has resuscitated two issues that had been dormant in takings jurisprudence for a long time: the question of "regulatory takings," that means the need to compensate for certain land use restrictions (as in the 1992 Lucas case) and, more recently, the question of whether it is correct to take land from one person to give it to another person, even if the latter would promote development projects from which the community would obtain benefits (Kelo).

At the same time, European countries like France and Italy, where land use policies and urban law had never been seen as being in conflict with the rule of law, have had to adapt their legislation in order to restrict the discretionary power exerted in expropriations, as a result of rulings from the European Court of Human Rights. In the following section we will review some of those legal developments. Here it suffices to say that they also reflect a growing discontent with expropriation practices.

Such discontent is also apparent in academic research. If, three decades ago it would have been improbable to see sociologists taking seriously the impact of expropriations on the lives of property owners, the works of Imrie and Thomas (1997) and Fabienne Cavaillé witness a change in this respect. In *L'experience de l'expropriation*, the latter shows not only what people have to go through when expropriated for a highway. Her work is part of a new way of looking at the institution of property in which the possession of land and houses is "…for the individual the confirmation that he is part of a community" (Cavaillé, 1999).[10] It is now a

[9] It is interesting to point out that, in a recent conference at the National University, the leader of a social organization from the southern state of Oaxaca, Carlos Manzo, declared that one of the great successes in his political career was that of having played a role in halting that project (Instituto de Investigaciones Filosóficas, October, 2006).
[10] Cavaillé, 1999, p. 203.

common place to say that the boundaries between public and private interests have become blurred. Probably it is an exaggeration to say that all this means a “crisis” for expropriation as an institution, but there are enough symptoms, in many different contexts, that it is being seriously reconsidered. In any case, it is important to assume the task of clarifying what is actually happening. In order to explore this question in different parts of the world, we will now deal with changes in policy and law, as well as with the driving forces behind them.

Policy Changes: Obscure Facts, Clear Directions?

Policy analysis requires quantitative information about the way a government task is carried out. In so far as expropriation is considered as an instrument of land policy, an evaluation of its use cannot be accomplished without quantitative data. We need to know how extensively it is used, for what purposes, and how all this changes through time. Also, it is important to know the level of compensations that are paid to owners, whether payment takes place before or after the occupation of land, and so on. Our first finding in this respect is the lack of official sources with that kind of information. It seems that one thing is to recognize expropriation as an instrument of land policy, and something different is to keep systematic records of its use. There is a number of ways for researchers to overcome this situation, but for the moment it makes very difficult the task of determining clear trends of expropriation as a government practice.

In fact, we did not find one single country that reports the use of expropriation in a systematic way. The main source is the judiciary and it does have a high qualitative value, as it helps us to understand the way conflicts over expropriations are dealt with, but it does not say anything about the number of cases that do *not* become legal conflicts. Even when there are professional groups interested in the subject, aggregate information is not available.[11] On the side of the Executive branch, information about procurement practices may be abundant but it is generally poor when it comes to crucial policy issues.[12] Besides, eminent domain powers for urban purposes are frequently exerted by local governments, which make it improbable that national statistics include this kind of information, even in highly centralized countries like France.[13] Researchers who have tried to find general trends have had to build their own data from *ad hoc* sources.

Indeed, one of the antecedents of this paper was a project sponsored by the Lincoln Institute of Land Policy in 2005 to explore the use of expropriation for urban development in Mexico (Herrera, 2005, Saavedra, 2005). It took several months to build a data base with all the expropriation decrees issued by the federal government between 1968 and 2005, and it does not include information about the amount of compensations paid. Figures 1 and 2 show the evolution of the use of expropriation in that context.

[11] See, for example, www.expropriationlaw.ca.
[12] In a recent survey, we have found that information on procurement in Mexico is so poor, that it is impossible to build indicators on good procurement practices (Azuela, 2006a).
[13] As our research assistant approached the Ministére de l’Equippement, she was told that information on expropriations was not available to the public. A report by the Conseil d’État in 1991 alerted on the fact that, after decentralization, it was difficult to track judicial decisions on the subject, let alone a systematic registry of them (Conseil d’Etat, 1991).

Figure 1: Mexico: Urban Expropriations 1968-2004: area and expropriation decrees by year

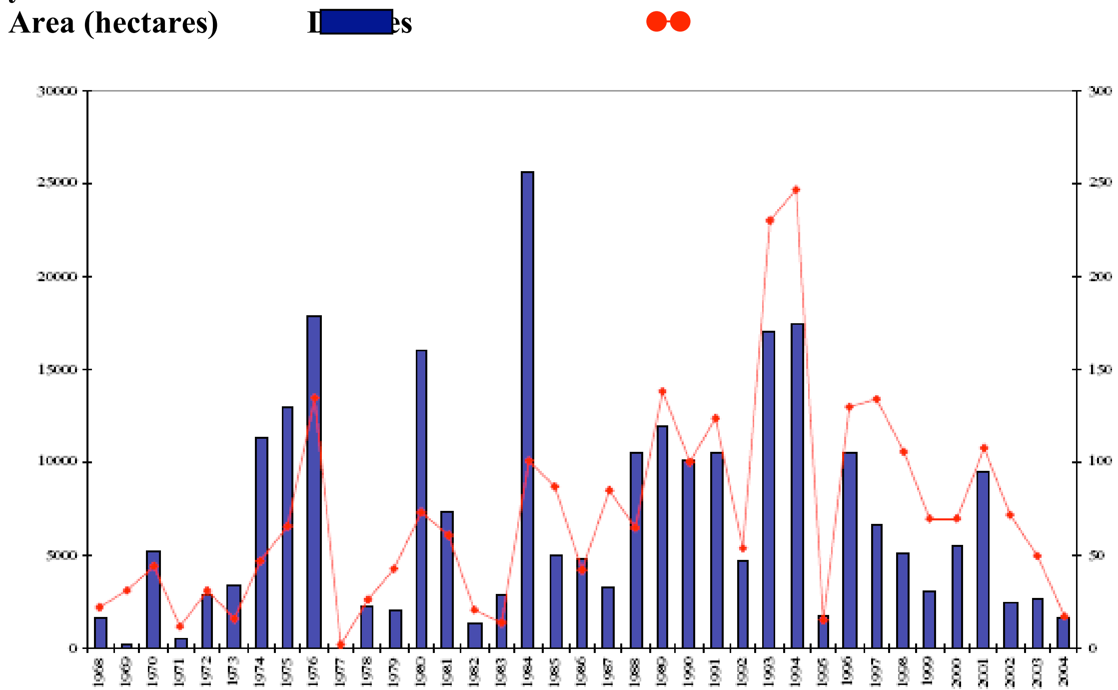
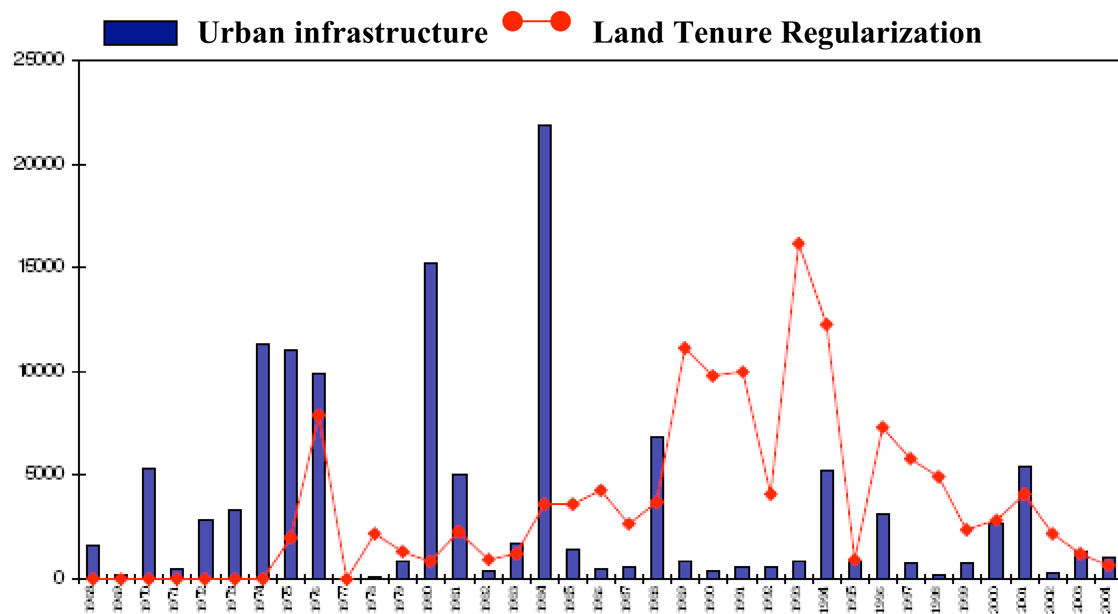


Figure 2: Area expropriated according to type of expropriation 1968-2004 (Hectares)



The interest of these data refers to the questions that it allows us to pose. For example: one may speculate whether the general decrease of expropriations for infrastructure projects has to do with structural adjustment policies that reduced funding for them, or to other factors such as social resistance or changing priorities within government. Also, the increase of

expropriations for land tenure regularization projects has to be explained in terms of the prevailing land tenure systems.[14]

Academic literature provides useful qualitative analysis and sometimes vivid accounts of the impact of expropriations in social life, but on the whole it does not offer an idea of the dimensions of expropriation within the universe of urban policies. The material we have revised so far leaves us with scattered, anecdotic[15] and mostly undocumented assertions as to the use of eminent domain. Thus, the notion that, for a number of factors, the use of expropriation would be declining appears as a sound hypothesis but cannot be easily documented. Moreover, trends seem to be rather heterogeneous. In the spirit of encouraging a debate, rather than presenting research results, we suggest that, for this purpose, countries can be divided up into three groups: those with high economic growth rates in which strong states, with a correspondingly weak rule of law, make extensive use of the power of eminent domain; countries with weakened states (and economies) where the use of expropriation has decreased; and highly industrialized countries where despite public opinion movements around expropriation, it is still used on a regular basis as part of urban policies.

In the first group, the most obvious case is China, with other Asian countries such as Korea, Singapore and Taiwan. According with a recent account of expropriation in the Pacific Basin, "the Asia Pacific Region and its rapid urbanization has generated a need for both land use control and use of compulsory purchase powers" (Kokata and Callies, 2002, I). Even if there is no data available, everything seems to confirm that the massive taking of rural land is keeping the pace of economic and urban growth. Recent legislation on property rights,[16] combined with growing social resistance,[17] might change this trend in China, but that still remains to be seen.

The second, and extremely heterogeneous, group is formed by countries in which a number of factors contribute to a reduction in the use of expropriation. Apart from structural adjustment programs, that reduce public investment, and social resistance, that constitutes a political constraint to projects, it is important to note the growing role that the judiciary is playing in many parts of the world to restrict governments' abuses. For example, we are informed that in Ghana courts decisions against the state in expropriation cases have "…slowed the pace of compulsory acquisition considerably" (Ashie Kotey, 2002).[18] In the case of Mexico all three factors are present and explain the trends shown in Figure 1.

Within this group, the case of Brazil deserves a special mention. Many expropriations for urban development projects are successfully challenged in courts and judges award huge compensations with high interest rates, as a result of which local governments have

[14] Regularization of tenure in land belonging to agrarian communities is carried out through an expropriation procedure, because the law does not recognize land sales made by their members. Even after the 1992 reforms that make this possible, informal sales are still frequent.
[15] A report by the French Conseil d'État inform us that, in Germany, expropriation is "much less frequently" used than in France (Conseil d'État, 1991, p. 185); sometimes it also reports the number of expropriation cases that were brought to its consideration in one year (Conseil d'État, 2006); in a colloquium a city major claimed that only in one out of 8 land acquisitions he used eminent domain powers (VV. AA. 1990, p. 233).
[16] The Chinese Congress approved the new legislation by a 99.1% vote on March the 16th, 2007. See http://www.chinalawblog.com/chinalawblog/2007/03/chinas_new_prop_1.html
[17] According to a recent report broadcast by the BBC, there were 65,000 acts of civil protest against expropriation only in 2006 (November the 24th, 2006, BBC International TV). See also Zweig, 2004.
[18] Ashie Kotey, 2002, p. 214. For the case of Benin, see Woodman et al, 2004, p. 349.

accumulated judicial debts (called *precatórios*) that are driving them to critical conditions. As a recent survey shows, "non-compliance with official demands can result in the sequestration of federal, state or municipal assets as well as intervention in the respective management regimes" (Maricato, 2000). From the financial point of view, "an explosive combination of interest-on-interest, monetary correction and legal fees effectively makes the debts virtually unredeemable" (id.). To give an idea of the size of the problem, only in the State of Sao Paulo "104 intervention orders have been issued against 60 municipalities;" in one single expropriation the amount of the *precatório* "is equal to five years or more of the entire municipal budget" (id.).

The third group includes highly developed countries in which there are intense debates around eminent domain in the realms of law and politics, which does not necessarily lead to radical changes in the way this instrument is actually used. In the U.S.A., the *Lucas* case reopened in 1992 the issue of regulatory takings and produced the fear that the planning system could be seriously weakened. More recently, the *Kelo* decision prompted initiatives to restrict the use of eminent domain for projects that would involve the transfer of land to private developers.

As we said before, there is no doubt that the property rights movement has been a growing force in the last two decades and that, as we will see, it seems highly probable that the law of eminent domain will change. However, when eminent domain is seen from the perspective of policy analysis the picture is somewhat different. According to a 2003 survey that covered the 239 largest cities in the U.S.A., expropriation seems to be alive and well, as it passed the proof of equity, effectiveness, and efficiency. Noteworthy, "…in 49% of the cases, the property was conveyed to real estate developers" (Cypher and Forgey, 2003),[19] which represents one of the main issues raised by the property rights movement. At the same time, the level of success of the use of eminent domain can be seen in the fact that "…only in 3% of the cases did litigation create an extensive delay in the development of various projects."[20]

By pointing at these research findings we are not trying to deny the impact that legal changes may have in the practice of expropriation or to suggest that changes in public opinion are irrelevant. Our intention is to illustrate the importance of policy research if we want to see what happens in practice. In this case, it prevents us from avoiding a premature conclusion about the "demise" of expropriation as an instrument of land policy. The survey by Cypher and Forgey proves that debates within the realms of law and public opinion cannot give us a precise image of what happens in practice.

In sum, there are sufficient indications that there is not a universal, let alone a uniform, decline in the use of expropriation. And even if there is a general trend in that direction, exploring the varying conditions under which it takes place is relevant for future research.

If there is not enough quantitative data about the actual use of expropriation, the tendencies in policy orientation is also a grey area. As we said before, despite the fact that eminent domain is recognized as a policy instrument, governments do not set explicit goals nor generate evaluation exercises about its use.[21] Even if one can find a 'rationale' behind decisions as to the use of eminent domain powers or other forms to acquire or to develop

[19] Cypher and Forgey, 2003, p. 261.
[20] Id. p. 264.
[21] Almost thirty years ago, the same point about information was made by Pierre Moor (1978) when he tried to evaluate the use of expropriation in a number of countries.

land, those decisions seem to be more a pragmatic response by governments to specific conditions than a conscious, let alone an explicit, effort in that direction. Obviously, changes in eminent domain law can be said to express the adoption of land policies. However, those changes are more significant as *limits* to the use of eminent domain power than as clear indications of the place that its use will have in the context of land policy as a whole.

Now the lack of explicit policy statements on expropriation seem to be more evident in the case of governments: as far as we can see, they do not communicate in a programmatic fashion the way they will use eminent domain or the reasons for a particular course of action. In contrast, multilateral organizations have been adopting clearer positions in this respect. In particular, the World Bank and the USAID have contributed to the diagnosis of the social impact that expropriations have had for populations displaced by infrastructure and urban development projects – especially when such projects have been financed by those organizations. After the recognition of such social costs, some of them have adopted clear and assertive policy orientations in this respect (Huggins, et al., 2003, Deininger, 2003).[22] Indeed, there have been attempts to reduce the social impacts of development projects, although there are not signs that things have improved in a significant way.[23]

An interesting aspect about policies adopted at international level refers to the different discourses that prevail in financial organizations, as opposed to that of the UN system and NGOs. In the latter two settings, the concept of *housing rights* organizes the discourse around evictions that are associated to expropriations. In contrast, financial organizations use the language of *property rights* to pose the problem in terms of public policy. More than a mere lexicological difference, this reflects different ways of defining the underlying issues: the concept of property rights (especially as used in the context of the World Bank) is part of an economic theory of development,[24] whereas the concept of housing rights refers to a moral imperative that comes associated to doctrines of social, economic and cultural rights.[25] Although security of tenure is seen as a common goal of all land policies, there are different philosophical foundations for the institutions that are to be created in order to attain that goal.[26] We will come back to the fact that, in the debate on expropriations, different institutional settings privilege different sets of issues.

Legal changes: one direction, many contexts

In section (2) of this paper we deal with the way different legal systems cope with the more salient issues in the field of eminent domain. Here we will only point at the general direction in which legal systems are moving regarding expropriation. If there is not clarity about tendencies in the way eminent domain powers are being used in practice, when we look at

[22] "Involuntary resettlement" policy statements (whether they involve expropriations or not), have been issued by the World Bank since 1980. The latest was issued in 2001.

[23] For a recent analysis see Cernea and McDowell, 2000.
[24] Institutional economics and evolutionism are the leading theories in this respect, North and Boserup being the most influential authors.
[25] In what is considered as *the* policy paper of the World Bank on land issues (Deininger, 2003), as well as in the Bank-backed analysis of the social consequences of relocation (Cernea), it is difficult to find the phrase "human rights", but it is impossible to find a mention to housing rights or, in general, to economic, social an cultural rights.
[26] Also, in the UN system, there has been an emphasis on communal systems of tenure (Platteau, 1992, p. 3). Recently, the World Bank has been more ready to accept that they can play a positive role.

legal developments we get a much more precise image of general trends – which, again, does not guarantee that judges around the world are going to follow the same pattern at the moment of adjudicating concrete cases.

Almost without exception, legislative changes in the last two decades tend to reduce government's power of eminent domain. Correspondingly, the rights of both individual and collective landowners *vis á vis* the state have been strengthened. In particular, criteria for compensations tend to stabilize at market values,[27] and authorities are subject to more stringent procedures. Interestingly, this trend does not include the definition of "public use" or "public purpose." In this respect, debates within the U.S.A. over this issue seem rather exceptional, as we will see.

The general trend towards a reduction of the power of eminent domain is so widespread, that it is worth mentioning the only example we have found in which legal developments seem to take a different path. That is the case of the South African Constitution of 1996 which, according to Southwood, recognizes a wide concept of "public interest", gives considerable discretionary power to the government to pay 'just and equitable compensation' (i.e. market value being just one of the elements to be taken into account), and departs from a previous regime of immediate payment of compensation, to a system in which "the Court is given a discretion to decide on the timing and manner of the payment" (Southwood, 2000).[28] Regardless the legal battles that, not surprisingly, are taking place around the interpretation of the constitutional text, it is an interesting case for its rarity. Probably, the explanation lies in the fact that South Africa is only beginning a cycle that other countries concluded years ago: the redistribution of land as part of an agrarian reform.[29]

Eminent domain law is changing in two ways: Directly, through legislation, judicial rulings or international treaties, and indirectly, through the wider path of land tenure reform. *Direct* changes are responses to the way governments are using their eminent domain power. By means of either legislative or judicial activity, rules are enacted in order to re-define that power. Sometimes, legislative changes are simply 'followed' by courts, but there are cases in which the courts make decisions that run against legislative or administrative rules, e.g. when they consider those rules to be unconstitutional.

Another way of changing in a direct way the rules on expropriation is through international law, which in turn may take different forms. Free trade agreements usually imply the commitment of the concerned states to respect property rights of investors from the other countries. Guarantees against unfair expropriations are an essential element here. Noteworthy, the first conflict under the North America Free Trade Agreement was between a U.S.A. corporation (Metalclad) and Mexico; an environmental conflict that transformed itself into an eminent domain international legal case.[30] The main problem with these developments is that, even if foreign investors have the same substantive protection as nationals regarding the protection of property rights, they are given additional procedures to defend those rights. As the Metalclad case has made clear, arbitration panels, available only to foreign investors, tend to show a particular bias towards economic interests, a bias that

[27] See Kotaka and Callies, 2002, and Kushner, 2003.
[28] Southwood, 2000, p. 4.
[29] In countries like Mexico, that cycle is in a more critical phase: the question is now to justify the expropriation of lands for public purposes to peasant communities that decades ago were the beneficiaries of expropriations that were the core of agrarian reform.
[30] Mexico ended up paying a compensation of almost 17 million dollars. See Azuela, 2006.

national courts will not necessarily share when they consider conflicts over expropriations carried out by government at the expense of nationals. Under unequal conditions of access to justice this difference is aggravated. So, in countries with free trade agreements foreign corporations can end with a privileged protection against expropriations, compared to nationals (especially the poor) of those countries.

Other changes in eminent domain law come from human rights law. Several European countries have been forced to change expropriation procedures as a result of resolutions of the European Court of Human Rights. It is important to stress that such restrictions are far from being a "re-foundation" of expropriation as a legal institution. Rather, they mean there is a supra national instance that has contributed to reduce the abusive use of eminent domain powers.[31]

There is also an *indirect* way of transforming the legal status of eminent domain: tenure reform, a process that is taking place in many parts of the world.[32] To the extent it creates new property rights over land, tenure reform re-defines the conditions in which state authorities may take that land. This increases people's security and at the same time means higher costs for government projects. If under conditions of weak land rights the relocation of populations for urban or infrastructure projects may be seen as a violation of (frequently ill defined) human rights, the same relocation, after tenure reform, has to face much more clearly defined *property* rights. This does not mean to assert that any land reform will produce equal benefits for all parties.[33] What we try to stress here is only that tenure reforms constitute an indirect way in which the legal status of expropriation is transformed.

Clearly, such reforms are taking place in a wide variety of contexts, and it is not easy to establish a clear classification: former communist countries have "re-founded" the institution of property; many developing countries are not only changing economic regimes where state land ownership used to prevail, but they are also dealing with land questions closely related to cultural identities; in turn, the issue of aboriginal rights appears with particular intensity in developed countries (Australia, New Zealand, Canada and the U.S.A.).

Land tenure reform is more than just a technical process; it has a foundational character.[34] This is particularly relevant when it is associated with the recognition of aboriginal rights. In many countries this is a relatively recent process, and therefore it is unusual that expropriation appears as an issue. That is, debates are so focused in how to 'give' rights to certain groups, that few people think about how to 'take' those rights away from them if and when that becomes necessary. The strong symbolic value that is attached to certain landscapes adds extra difficulties for the use of eminent domain powers.

In the following section we present a scheme to cope with the diversity of situations in which changes are being introduced to the legal status of expropriation, but there can be no doubt that there is a general trend to restrict (rather than to expand) the power of eminent domain.

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[31] For the case of France, see Hostiou, 2002, 2005, Shwing, 2004, and Conseil d'État, 2006. For Italy, see Ramacci, 2001.

[32] On this subject see Kuba and Lenz, 2006, Deininger, 2003, Benjaminsen and Lund, 2003, Durand-Lasserve and Royston, 2002, Toulmin et. al. eds, 2002., Mortimor, 1997, Maposa, 1995, Platteau, 1992.

[33] Often traditional systems of land use entail the existence of different sets of rights for different people over the same land. When property rights are given to one group only (leaving herders out, for example), tenure reform may imply new forms of social exclusion. See Mortimor, 1997, p. 3 and Lund, 2000, p. 17.

[34] There is a growing body of historical research that explores the importance of changes in land relations in the formation of states (see for example Joseph and Nujent, 1995, Scott, 1998, Mallon, 1995).

Before we consider the mayor forces behind this trend, it is important to point at still another source of complexity: the fact that there is not a linear relation between law and policy. Whereas in many cases the law is a vehicle for the institutionalization of urban and development policies, legal developments can also express interests and concerns that are not necessarily those of land policy makers. The legal system imposes limits to policies because it is an institutional space in which conflicts between policies and other concerns (such as human rights, environmental issues, and national security) must be processed.

Forces behind major trends

Changes in policies and legal rules regarding eminent domain for urban and infrastructure projects respond to five driving forces: mounting social resistance, changing land tenure patterns, growing independence of judiciaries, changes in public opinion, and changes in the international context. As in almost any other social phenomena, those forces can operate independently of one another or in a combined way. Again, the combination varies across countries.

Social resistance.

Social discontent with the use of eminent domain power is probably the mayor driving force behind the trends we have referred to. Obviously its impact will depend on the level of mobilization and on the prevailing political conditions, the analysis of which is beyond the scope of this paper. Despite the fact that the issue that prompts social mobilization is always the same, i. e. the "taking" of someone's property by a government agency, motivations can be varied. In the developing world populations displaced by government projects may mobilize for a better compensation, but sometimes they resist for cultural reasons. No compensation will be enough when it comes to places that are considered irreplaceable – graveyards are the most obvious example.

Likewise, in industrialized countries people may oppose the compensation offered, but in other cases they can also contest the purpose for which property is being taken – as in the famous Kelo case. Certainly, the ideological foundations of the property rights movement in the U.S.A.[35] are very different from those of the international campaign against forced evictions and for housing rights,[36] even if they may converge in the same point.

There is one element that gives an additional strength to social resistance against expropriations, even if it has nothing to do with the interests of property owners. Many people mobilize against projects not because of the expropriation, but against the project itself. It is no news that there is a growing dissatisfaction with very idea of "development" that is represented by structures such as dams, highways, airports, and shopping malls. Even when development initiatives meet strict environmental requirements, the cultural connotations of certain projects will remain a source of social protest and this will add to the complexities of the use of eminent domain power.

[35] See Jacobs, 2006.
[36] See http://www.cohre.org and Azuela et al., 1998.

Changing patterns of land holding

Property rights are important not only as cultural representations. Their relevance depends on more basic (i.e. structural) facts, such as land scarcity. This may sound strange for societies in which the land question has been settled for centuries, as in Western Europe, but it is important in societies where social practices like pastoralism are still part of the agenda. In some African countries, land became a more pressing issue only in postcolonial times as a result of wider demographic changes and new land use patterns (Lenz, 2006, Platteau, 1992). We do not intend to examine this question in any depth; this is only to point out that in the study of the social impact of expropriations one has to consider a wider view of the relation between society and territory. Thus it should be no surprise that government interventions upon landownership face more serious resistance in a context of growing land scarcity.

Interestingly, some researchers on land law issues are beginning to be attracted by more complex accounts of the society-territory relation, through the study of time-space compression as a central feature of contemporary societies (Woodman, et. al., 2004). But we can put it in simple terms: Land holding patterns should be recognized as a driving force (or at least as a backdrop) behind all developments in the realm of land policies and laws – eminent domain included.

Independent judiciaries.

Legislation protecting property holders from arbitrary expropriation is useless without an independent judiciary that checks government's actions. In the last two decades, many countries have undergone political and institutional changes that include a growing autonomy of the judiciary. Although this can be overrated by discourses of "transition to democracy" that tend to depict all previous regimes as outright authoritarian,[37] there is no doubt that judicial activism is a growing phenomenon, and this has opened new spaces for the defense of those affected by expropriations. Often this means a long learning curve for civil servants who had grew accustomed to arbitrary practices.[38]

Now a strong judiciary does not necessarily mean greater restrictions to the power of eminent domain, as the Kelo case in the U.S.A. clearly illustrates: there the Supreme Court made an act of deference to the legislative branch, by ruling that expropriations of land that is then transferred to private persons for development purposes are not unconstitutional, as long as state legislations provide for it. The property rights movement has been fighting a battle against the doctrine in Kelo, precisely because it allows restrictions on property rights, not on the government's power of eminent domain.

Greater role of public opinion.

The role of public opinion has not been explicitly recognized by the literature on eminent domain. However, at least in the two cases we have at hand, i.e. Mexico and the U.S.A., it is obvious that trends in the use of eminent domain are highly influenced by public opinion.

[37] Mexico is a case in point. Whereas most participants in public debate tend to believe that it is only now that the Supreme Court begins to show autonomy towards the executive, specialized research has long demonstrated that things were not so simple. See the classic study of González Casanova, 1964.

[38] In the case of Mexico, expropriations took place and had full legal effects, without due process. It was only this year that the Supreme Court ruled that authorities must respect this right in the process of expropriation that this has started to change.

Obviously, from a technocratic point of view long public debates imply unnecessary delays and the risk of distorting the "real" meaning of projects. And it is true that in many cases manipulation and oversimplification in these debates can be the same as in political campaigns. In fact, they may even take place at the same time and with the same rules: During the last general election in the U.S.A. on November 2006 citizens of eleven states voted on "anti-Kelo property-rights initiatives."[39]

Far from attempting a normative evaluation of this subject here, the point is that the strengthening of public opinion in many countries has been an additional force behind the decrease in the use of eminent domain powers in those countries. At any event it is a force that follows its own logic. Surely, the public sphere can be seen as the space of enlightened communication, although a more skeptical view will see in it social and political actors fighting from different positions over eminent domain and using prevailing cultural codes in order to advance their own views and interests. In particular, different opinions on the idea of economic development as embodied in infrastructure and urban projects will concur in the public space. Because there is not a pre-given recipe of the outcome of these processes, this issue should be part of the research agenda if one is to understand the whole spectrum of social conditions that shape expropriation practices.

<u>Changing international context</u>.

Last but not least, the international context plays a mayor role in the adaptation of policies and laws regarding expropriation. Free trade agreements create special rules for investors, international campaigns may force governments to adopt certain policies, and of course the web increases the diffusion of legal and political ideas about eminent domain. The question of whether there is a global convergence or not in property regimes has to do with this issue (Jacobs, 2006, Woodman et. al. 2004). We think that in order to tackle that question it is important to recognize that globalization is not a homogeneous set of forces that imposes itself upon all countries in the same way. Rather, national states are subject to different international contexts, and they respond differently to them. In the following section we propose a classification of such contexts.

Understanding legal issues in context

Not surprisingly, when seen from a "world perspective," the field of eminent domain appears as an extremely heterogeneous universe. In order to explore its diversity we suggest considering the different contexts in which issues are debated. Our idea of "context" includes two aspects. First, it refers to the institutional setting on which eminent domain is being discussed – i.e. the various law-making agencies of national or sub-national governments, NGOs, the WB, the UN system, and so on. The second aspect refers to the substantive issues, that is, the questions around which eminent domain is being discussed (human rights, economic development, social justice, and so on). By looking at the context in which eminent domain is debated, we can explore the positions that are being advanced by different actors. In this way, we can reconstruct the process behind developments in policy and law. More importantly, we can tackle the question of whether there are signs of convergence at international level in this subject. Thus we suggest that eminent domain law and policy are being debated in four main contexts:

[39] *The Wall Street Journal*, November 4-5, 2006.

- As a constitutional issue, in the context of the national state, where the balance between public and private interests is being discussed.[40]
- In relation to economic development, within organizations and agencies as the World Bank, the IMF and USAID, where the debate is centered around the role of tenure systems in economic development and around the social impact of expropriations for infrastructure projects.
- As a human right issue, within a great variety of contexts, such as the UN system, NGOs and the European Court of Human Rights.
- In relation to the protection of foreign investors, within free trade agreements.

Contexts of Initiatives on Eminent Domain

Issues → Institutional cont ↓	**Constitutional issues**	**Economic development**	**Housing as a human right**	**Protection of forei investors**
The nation state	**China, the U.S.A.**		India[41]	
Development agencies (WB. IMF)		**Africa, Asia**		
The UN System. NGOs…			**India, South Africa**	
Free trade agreements.				**North America**

It must be stressed that these are no more than ideal types. All changes in eminent domain law are processed through national or sub-national (legislative, administrative or judiciary) mechanisms. And at the same time many of them are part of an international debate (maybe in more than one institutional context). On the one hand, there are only a small handful of countries in which there is not an influence from an international context, or that influence is less strong (the U.S.A, China, Brazil…). On the other hand, the international contexts in which most countries are inserted are extremely varied. The intention of our typology is to capture that diversity.

Pointing at these contexts does not mean to affirm a causal nexus. Changes in policy, like most social phenomena, are multi-causal.[42] Paying attention to those contexts is only a road map to explore the way ideas and initiatives are processed in different contexts and, in particular, whether there is convergence or not at global level. In what follows we examine the main issues that constitute the law of eminent domains.

[40] A classic constitutional problem that only in authoritarian regimes appears to be settled.
[41] We use the case of India to illustrate that initiatives often are processed in more than one context.
[42] Also, the analysis of these issues can benefit from the vast literature on "diffusion" that has been produced in the context of political science.

The Concept of Public Interest

One of the key issues in discussing expropriation is its justification. The most pervasive idea is that the individual interest of property owners must give way to the more general interests of society. Virtually every constitution that recognizes private property at the same time determines that the state can take property from individuals, under two conditions: Paying just compensation and with the purpose of satisfying some general interest, expressed through terms like "public use", "public purpose" "utilité publique" "utilidad pública," and so on. In order to avoid any bias towards a particular legal tradition, we will use the phrase *public interest* to refer to this kind of justification. The public interest clause is then an important limit to the exercise of the eminent domain power.

Today most countries acknowledge that the legislative and the executive branches have a wide discretionary power to decide when there is a public interest that validates an expropriation. It is hard to find an example of the Judiciary declaring legislation unconstitutional because it does not respect the public interest clause.[43] The same can be said about judicial decisions regarding the way the executive power exerts its eminent domain power. There is a strong assumption, especially in democratic countries, that the executive power will act reasonably when deciding what constitutes public interest.

As an exception to this general trend, an intense debate has emerged in the U.S.A. regarding the definition of what the Constitution means by "public use," after the Supreme Court decided the now famous Kelo case in May 2005. The city of New London prepared a plan for economic revitalization of the city. In order to fulfill this plan the local authority expropriated land in an urban area (that was not completely blighted), for an ambitious project that included the participation of private investors. The question was whether it was legitimate to take land from private individuals in order to transfer it to private entities –assuming that new investments would bring an economic revival of the area. Relying on its long-standing precedents, the Court upheld the decision by the city, based on the principle of legislative deference. It was not the first time that the Supreme Court had decided that the economic development was a valid use of the power of eminent domain.[44]

In the rest of the world, the concept of public interest can be defined in a number of ways and it is interesting to illustrate this variety. For example, most constitutions in the Commonwealth tradition require that property subject to compulsory purchase be used for "a public purpose or a public use."[45] Some Constitutions establish an elaborate catalogue of provisions about what constitutes public interest. Others leave this task to the legislative branch.

On the other hand, in Japan we find a very limited scope of what constitutes a public interest. The Law of Expropriation contains a precise list of the kind of projects that justify the use of expropriation. The interpretation of this statute is limitative in nature, although this does not seem to be a problem for the academic literature.[46] Malaysia is one of the few countries

[43] Allen, 2000, p. 211.
[44] As part of the debate, the major of New York City has strongly argued in favor of the use of eminent domain for economic development: "Times Square really was the poster child for a seedy, dangerous, unattractive, porno-laced place. Because of eminent domain and some forward-looking people in this city, they turned it into a place where 24 hours a day you're safe on the street." See http://www.nysun.com/article/32017.
[45] Allen, 2000, p. 201.
[46] Kotaka and Callies, 2002, p. 147.

where the literature documents a strong debate and even social unrest due to an extremely wide definition of public interest. The cause of this dissatisfaction apparently is the abuse in discretionary power that the government enjoys in the use of expropriation for economic development. In the case of New Zealand there is a complete revision by the judiciary of the need to acquire the property subject to expropriation.[47] Finally, in Africa we have not found discussions around this issue. As in many countries, who gets compensation for expropriation is a much greater source of concern.

In any case the purpose of a definition of public interest is to reduce the margin for an arbitrary use of this instrument, but most jurists around the world do not see the variations in the definition of public interest as a fundamental problem. What the literature seems to suggest is that the substantive justification of expropriation, through the concept of public use, public purpose or another equivalent, is not an issue that may be driving eminent domain to a crisis, the U.S.A. being an exception with the anti-Kelo movement. In terms of the context in which this issue is being discussed, our hypothesis is that this is dealt with in the context of the institutions of national states, with very little external influence. If there is any 'convergence' in this respect it has nothing to do with developments in specific international contexts.[48]

Compensation

The second key issue in expropriation law refers to the compensation that is to be awarded to the affected owners. It can be considered as the most pressing issue in takings law around the world and it involves two fundamental questions: how to determine the amount of compensation to be paid, and who is entitled to obtain one.

In turn, the problem of determining the amount of compensations can be analyzed at two levels. On one hand we have the debate around the general criteria for fixing it: commercial value, fair price value, fiscal value, and so on. On the other hand there is a more technical discussion around methods of valuation. The latter does not have an effect on the principles of eminent domain, but the lack of technical competence of civil servants in charge should not be underestimated, as it may exacerbate conflicts around expropriations.[49]

As to the general criteria for fixing the compensation, there is a clear convergence in most countries towards market value.[50] While this does not pose a mayor problem when property rights are clear, it represents enormous challenges in situations where it is unclear who owns what or when the social cost of relocation outweighs the market value of the land. Most studies on population resettlement do not recognize the relevance of this issue[51] and there are

[47] Godlovitch, in Kotaka and Callies, 2002, p. 240.
[48] See note 40, *supra*.
[49] The case of Mexico is emblematic in this regard. Some of the most serious political conflicts of the nation in the last years originated in incredibly misplaced assessments of compensation in hard expropriation cases (Herrera, 2005).
[50] Countries that are lagging behind in this regard include Singapore, Taiwan and Thailand (Kotaka and Callies, 2002). As Allen says, "most of the older statutory schemes required subjective valuation of loss, but modern statutes generally require only objective valuation. In general, constitutional cases do not distinguish between methods of valuation, although it appears that most courts regard objective valuation, based on market values, as the constitutional minimum" (Allen, 2000, p. 230).
[51] See the various works by Michael Cernea included in the bibliography.

even suggestions that the concept of compensation is not useful to solve the problems that huge projects generate.[52]

No doubt, the social cost of the displacement of people in many countries due to the use of eminent domain has been enormous, but part of the problem is that compensations have been too low. This does not mean to deny other (more qualitative[53] or procedural) questions, such as the need to establish mechanisms of social consultation and the obligation of respecting due process rules. But there are projects that will have to go on, even without the consent of those who own the land. And in order to offset the burden that expropriation imposes on them, it is difficult to think of a different solution than economic compensation – even if it is accompanied by the most "inclusive" social policies.

The second issue that affects compensation is the recognition of tenure rights to groups that had not been considered as property holders before. Herders, tenants, laborers and other social categories become (rightly, we must insist) entitled to be compensated for the loss of their possessions.

The point is that for those two reasons compensations tend to be (or will have to be) much higher than it has been in the past. When this makes projects unviable form a financial point of view, it is in itself a good reason to abandon them. But apart from financial considerations, there are also legal limits to the option of increasing compensations. Procurement legislation usually forbids the acquisition of assets by government agencies at prices above market levels. Clearly, there is a public interest in keeping those acquisitions at reasonable levels. This does not mean that it is impossible to reach a fair intermediate solution to this question; it means that there is a limit beyond which the use of expropriation becomes seriously questionable.

Not surprisingly, issues about compensation are treated differently in different international contexts. Through free trade agreement, states guarantee fair compensation to foreign investors, although valuation techniques are seldom agreed upon. At the other extreme, international campaigns for housing rights tend to ignore the issue of compensation. Now beyond the impact that such international developments may have on the practice expropriation, there are many cases in which the national dynamic is much more important than any international context. Exorbitant compensations awarded by judges in Mexico and Brazil can hardly be related to international processes, as they result from specific political and legal developments at national (and sometimes at local) level. It is here that the convergence hypothesis seems less plausible.

Housing Rights and Population Resettlement

The idea of housing rights has the potential of changing legal doctrines on expropriation in a fundamental way, to the extent it a distinction between two types of expropriations: those which affect people in their ability to meet a basic need (housing), on the one hand, and those that affect individuals or legal entities for whom property is only an asset. In spite of that potential, the idea of housing rights has not yet had an impact on the law of expropriation.

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[52] "The displaced surely deserve more than just compensation, as it is a concept and a procedure that is inflexible, imprecise and unjust" Nayak, 2000, p. 103

[53] In Japan the loss of cultural values as a result of expropriation has incited legal debates. See Kotaka and Callies, 2002, pp. 156-157

With a few exceptions[54], the idea of housing rights has had its greater influence through international campaigns in cases of egregious evictions. It is worth to highlight one aspect of the dominant discourse in this specific international context (a space created by UN organizations and NGOs), in contrast with the discourse that prevails in economic development agencies. We have already noted the difference between these two settings: in one context, the dominant idea is housing as a human right – an idea of human dignity. In the other context what dominates is a pragmatic theory of economic development based on the importance of property rights.

Despite the fact that both discourses have huge potential consequences for a redefinition of the law of eminent domain, they have so far avoided an explicit recognition of such consequences. On the one hand, housing rights discourse entails a systematic condemnation of evictions, but it rarely recognizes situations in which evictions have some form of legal validity. This is a serious limit to housing right as a doctrine, as it will be hard to accommodate within the ensemble of values that a legal system is meant to protect – including other human rights that may collide with housing rights in certain situations, such as environmental rights.

On the other hand, discourses on resettlement risk have been extremely useful in documenting the social costs of urban and infrastructure projects, but they have not recognized the consequences of that critique for eminent domain law and property law in general – as we have seen in the issue of compensation. Surely, these two discourses correspond to two different and in many ways opposed legal cultures – maybe two different worldviews. By ignoring each other, these approaches follow the opposite route to convergence: Rather, they are the most notorious *divergence* in the field of eminent domain nowadays.

Expropriation of different components of the bundle of rights

Here we will try to point at a potential convergence between two apparently unrelated issues: Regulatory takings as a traditional problem in eminent domain law, on the one hand, and the relevance of the doctrine of bundle of rights for the recognition of compensation rights for certain categories of users of the land that have been defined as non-property owners, such as herders and agricultural laborers, on the other.

The issue of regulatory takings is probably the most popular topic of discussion in the law of eminent domain. In almost every developed country there is an ongoing discussion about regulation of the use of land that imposes so severe restrictions that should be considered as an expropriation and therefore should be compensated. Following the notion that property is a bundle of rights, the question is how many of the sticks in that bundle (or which of them) can be taken by the state in the name of a public interest without generating a right to be compensated for the loss.

Noteworthy, nobody talks about "regulatory givings,"[55] i.e. the increase in property values that generous land regulations generate; a point that should not be discarded as eccentric. In some European legal systems, most notably in Spain, the dominant legal doctrine holds that the extent of property rights is defined by urban plans. In particular, development rights are

[54] India and South Africa seem to be the most relevant.
[55] We owe this point to Greg Ingram.

not inherent to the ownership of land; they are the result of a public decision expressed in a development plan[56].

In the United States the problem of regulatory takings has been discussed since 1887 in the Mugler v. Kansas case (Gordon, 2000). After all this years, we still cannot find a generally accepted theory on what constitutes a regulatory taking. And if we analyze the decisions of the U.S. Supreme Court we will find enormous variations over time.

In Europe variations are also great. Even in legal systems that recognize the doctrine that social obligations are inherent to private property, like Germany and Switzerland, legislation recognizes the idea of regulatory takings through the concept of "material expropriation" (Kushner, 2003). Thus there are planning restrictions that create the obligation for the government to compensate the loss. At the other extreme, French jurisprudence has for many decades admitted that land use restrictions do not give a right to compensation. It is remarkable that this issue has not entered in the agenda of the European Court of Human Rights, which has been the main source for the restriction of eminent domain powers in Europe.

In any case, there is an obvious contrast between Europe and the U.S.A. regarding regulatory takings: In Europe, legal developments are strongly conditioned by *supranational* instances, whereas in the U.S.A. the future of regulatory takings will depend on *sub-national* developments, as State legislatures are the loci of legal change. In both sides of the Atlantic, the planning system has not been paralyzed by those restrictions, as many authors fear.

Now there is an interesting link that can be established between the doctrine behind regulatory takings and expropriations in many parts of the developing world. In many African countries, for example, the use of eminent domain is depriving people who are not recognized as owners of the land, of their means of subsistence. Tenants, herders and agricultural laborers are amongst those who are paying the highest social cost of expropriation because they are not recognized as holding any property right at all. An extension of the doctrine of the "bundle of rights" might open the way for the recognition of a variety of interests over the same piece of land, exactly the same way as in most developed countries tenants are entitled to compensation in case of an expropriation. This is a potential convergence of legal ideas to one and the same goal: to give protection from the use of eminent domain powers to those who are more vulnerable to it.

Policy implications

There are clear indications of growing difficulties in using the power of eminent domain the way it has been used it traditionally. Legal restrictions, social resistance and rising costs are the main obstacles. The most important policy implication of this trend can be stated as the need to reconsider the use of eminent domain as an instrument of land policy. However, *reconsidering expropriation does not mean discarding it altogether*. Rather, governments need to *re-define* the conditions under which they can expect that expropriations can be successful – i.e. efficient, equitable and socially accepted. In many cases, they will be more expensive, they will imply longer consultation proceedings and their success will depend on issues that have nothing to do with property rights – such as environmental concerns about certain projects. This may result

[56] For an in-depth analysis of the concept of land property in the Spanish legal system see García de Enterría and Parejo-Alfonso, 1994.

in a reduction in the number of expropriations, but it is difficult to envisage a scenario in which governments are completely deprived of the power of eminent domain, particularly as urban and infrastructure needs become more acute.

We have shown a wide variety of issues that should be taken into account as eminent domain laws and policies are reconsidered. Beyond such diversity, it is important to bear in mind the two extreme kinds of social costs that they can produce: on the one hand, expropriations that involve the resettlement of a population can bring about high costs for those affected. On the other, distortions in the operation of judicial institutions (whether it is due to corruption, incompetence or an ill conceived legal framework) can impose high costs for society as a whole to the extent they impose prohibitive costs to the use of eminent domain powers.

Thus far, debates on eminent domain have taken place in contexts that do not recognize the whole array of issues at stake: Housing rights campaigns, with all their moral force, have failed to acknowledge the economic implications of policy options; development theories that inspire land tenure reforms in many countries ignore the dimension of human rights; free trade agreements focus only in the interests of investors. If land policies are to be based on solid foundations, all those dimensions must be considered. Expropriations should be seen not only as opportunistic actions to which governments can resort, they must be part and parcel of both property regimes and land policies. This is particularly important in countries that are experiencing a transition from state – ownership of land to private property. As Vincent Renard wrote almost fifteen years ago for an Eastern European audience:

> "It may seem a paradox, for countries where state landownership is generalized, to mention the power of eminent domain. However, the lack of legislation in this respect can create great difficulties as privatization becomes generalized. It will not take long before new property owners… see the benefits of holding land, while the community does not have the right to promote the necessary changes for its proper use…" [57]

Now apart from a reconstruction of expropriation as a policy instrument and as a legal institution based on profound analyses, it is urgent to start on a more simple aspect: The development of information systems that allow us to observe the way eminent domain powers are actually used and the social impact they produce. As it happens in other fields of public policies, access to public information has improved in many countries. But transparency is useless if there is no information to look at.

[57] Renard, in Renard and Acosta, 1993, p. 19.

Proposals for future research

For future research on land expropriation for urban and infrastructure we propose three avenues:

First, there is a great need for more empirical analyses, as the field is dominated by legal studies. This does not mean to underestimate the relevance of the law. Rather, if we are to understand what the law really means for society in this realm, it is important to develop more studies about the way in which eminent domain it is used by governments, about the way it is combined with other instruments and, above all, about its social consequences. This must include a wide array of research methods, from the construction of data bases to case studies and ethnographic approximations.

Second, expropriation should be studied as one aspect of the institution of property. Otherwise its moral, economic and philosophic implications cannot be discussed. As Michael Mortimore has said, changes in property regimes around the world during the last decades have been so profound, that we can take this time as a "breathing space" to reflect about their many implications (Mortimore, 1997).[58]

Third, there are many specific questions one can envision about the expropriation of land for urban and infrastructure projects. But their relevance will always depend on local or national priorities. If there is one common question for all researches in this field, that is the question of convergence. Our own suggestion is that convergence cannot be studied as some sort of "global" (homogeneous) phenomenon. Instead we think that there are different contexts in which policies and laws are processed. Different issues are discussed in different institutional settings. Following developments in all those contexts is important if we want to understand where our laws and policies come from.

[58] Mortimore, 1997, p. 261

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[59] Because this is a first approach to the subject on our part, this is a probably too long bibliography. Comments on missing authors and sources are welcome.

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