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# Rethinking Public Interest in Expropriation Law

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## **SPEAKERS and ABSTRACTS**

## An Institutional Analysis of Land Expropriation in China

China has a bifurcated land system, with clear distinctions between urban and rural land use rights. While state-owned land in urban areas has become commercially transferable, rural land cannot be transferred. This discrepancy has been exploited by property developers, investors, village heads and local governments, which has caused wide-spread, large-scale malpractice in relation to expropriation of land. Thus, conflict over expropriation of land has been, and continues to be, a simmering hotpot of social unrest in China. It has been claimed that land disputes over expropriation is one of the most common ways of provoking grassroots resistance and undermining public confidence in the government. This paper addresses the root causes of land disputes both from an institutional perspective, evaluating the most recent statutory changes, and from the policy perspective, analyzing the national strategy of integrating urban and rural areas, including the recent local experiments on transforming the inalienability of rural land use rights.

*Dr Lei Chen is an assistant professor at the School of Law, City University of Hong Kong. His research focuses on Chinese property and contract law from historical, comparative and empirical perspectives. His writings on these subjects appear in legal journals, edited volumes of multidisciplinary scholarship, and monographs in various jurisdictions: US, UK, China, Germany, Netherlands, Italy, South Africa, Mexico, Singapore, Korea and Hong Kong. He was awarded a GRF grant from the Hong Kong research Grant Committee on assessing property relations in Chinese condominium associations. He has obtained both a Common Law LLB and a Chinese Law LLB at the University of London and East China University of Political Science and Law respectively, which was followed by an LLM degree from the University of Aberdeen (Scotland) and a PhD from the University of Stellenbosch (South Africa). He was elected a member of the International Academy of Comparative Law and members of various academic societies both in China and internationally. He has served frequently as an expert witness, consultant and advisor on issues of expropriation, rural land reform and case management in for PRC Supreme People's Court, Legislature and NGOs.*

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## Expropriatory Compensation, Distributive Justice, and the Rule of Law

This Essay examines the possible justification for providing less than full (fair market value) compensation for expropriation. One obvious justification applies in cases of public measures, where the burden is deliberately distributed progressively, namely, where redistribution is the desired goal of the public action or at least one of its primary objectives. Beside this relatively uncontroversial category, two other justifications are often raised: that partial compensation is justified by reference to the significance of the public interest, even if it is not redistributive, and that it can serve as a means for adjusting the amount of the compensation to the specific circumstances of the case. This Essay criticizes both justifications, arguing that the former is normatively impoverished while the latter is an

affront to the rule of law. Yet, it argues that the notion of partial and differential compensation can serve as a powerful tool for developing a nuanced expropriation doctrine that serves important property values and also targets the potentially regressive effects of a uniform rule of full market value. The proposed doctrine draws careful and rule-based distinctions between types of injured property (fungible vs. constitutive) and types of benefited groups (local communities vs. the broader society).

*Prof Dagan's interests lie in property law and legal theory. Although he has a broad interest in property law in general, he has written extensively on American takings (or expropriation) law, specifically focusing on just compensation, distributive justice in expropriation law as well as the social responsibility inherent in property.*

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Dr Elmién du Plessis (University of Johannesburg)

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## **The Public Purpose Requirement in the Calculation of Just and Equitable Compensation**

The South Africa Constitution requires that the amount of compensation must reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances, including, but not restricted to, the list of factors in section 25(3). A decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation.

Section 25(3)(e) requires the court to have regard to the purpose of the expropriation. It is not clear whether this means that if land is expropriated for land reform purposes the owner can be expected to accept a lower price than where property is expropriated for non-land reform public purposes, or whether it merely confirms the reformist agenda of section 25. The purpose of the expropriation in section 25(3)(e) is complimented by section 25(4), which states that public interest includes the nation's commitment to land reform.

This paper will consider the possible impact of the public purpose factor in determining compensation for expropriation.

*Dr du Plessis completed her dissertation entitled "Compensation for expropriation under the Constitution" in 2009 at Stellenbosch University. Her research interests are constitutional property law, land reform (in general), indigenous land rights, environmental law and legal theory. Of particular interest to her is how to calculate compensation for expropriation, should the state expropriate property for an important public purpose, such as realising key land reform initiatives.*

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## State Action and Expropriation: Some Recent Australian Developments

This paper will examine the ambit of the Australian federal constitutional ‘just terms’ requirement in cases of compulsory acquisition by the state. It will do so by focussing on the boundary between those state actions that do trigger the payment of ‘just terms’ compensation, and those that do not, specifically by reference to two important recent High Court decisions. The first of these is *ICM Agriculture Pty Ltd v Commonwealth* which concerned the Federal government’s ‘buy-back’ of water licences to advance environmental values in relation to the Murray-Darling River Basin. The second is the *British-American Tobacco Australasia Co v Commonwealth* where a consortium of tobacco companies challenged the government’s recently enacted ‘plain-packaging’ legislation. In both cases, the plaintiffs argued that the relevant legislation triggered an obligation to pay compensation on ‘just terms’ because the government had acquired property rights, namely rights to water in the former case, and intellectual property rights in the form of trade marks in the latter case. In finding in favour of the Federal government in both cases the High Court appears to have adopted a less restrictive approach to government actions to regulate the environment, and to advance public health by finding that compensation is not payable in these instances. There will be some analysis of the strong dissenting judgements in the cases which advocated that compensation be required in these circumstances to limit governmental power over citizens. It will be argued that these cases provide a clearer indication of what will constitute expropriation – or ‘acquisition’ as the Australian Federal Constitution terms it – in cases where the state enacts regulatory statutes.

*Prof Edgeworth has published extensively in a number of legal fields, namely law and social theory, legal history, housing law and property law. He is actively involved in the reform of housing law and property law. He also researches in the field of constitutional property law, with a particular focus on state interference with property that amounts to expropriation.*

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## Expropriation and New Property: Trends in Australian Jurisprudence

The paper explores how expropriation laws work in relation to impacts upon third parties by reference to emerging or new forms of property. In recent years, changes in the nature of resources and energy and the advent of statutory property in many jurisdictions have reconfigured conventional ideas around property rights and the acquisition of interests by governments. The paper uses as its focus recent jurisprudence from the Australian High Court with respect to water entitlements and carbon emissions trading. It develops an analysis of how these developments influence broader questions about public interest and third party rights.

*Prof Godden's research interests include environmental law, natural resources law (especially water law) property law and indigenous peoples' land rights. Her work focuses on public interest issues such as the impact of climate change on environmental law and water law and economic development for indigenous communities. Due to her expertise in property law and the land rights of indigenous peoples, she is an expert as to the benefits of allowing expropriation in favour of third parties to promote land reform.*

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Prof Magdalena Haldas (University of Silesia)

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## Expropriation as an Infringement of Land Ownership

This paper examines the nature of ownership and the admissibility of land expropriation in a democratic country. The starting point of the analysis is viewing ownership as right which in Poland is protected by constitutional provisions as well as by private and public law provisions. Member States of the European Union must also consider EU law, which contains explicit provisions on the protection of ownership.

In this light it is necessary to examine art. 31(3) of the Polish Constitution of 2<sup>nd</sup> April 1997 where it is stipulated that the Republic of Poland protects ownership and the right to inherit; expropriation is allowed only for public purposes and with just compensation. Expropriation is an instrument which, when employed, leads to the deprivation or limitation of land ownership. Therefore it is only permissible in extraordinary circumstances and may benefit strictly defined entities. Despite many differences, most European legal systems allow expropriation only if a public purpose is to be achieved and no other legal institutions may be utilized to achieve that purpose. The notion of a public purpose/interest is fundamental and must be examined in the context of relevant legal provisions and Polish Constitutional Tribunal and Supreme Court judgements in which **the essence of ownership** has been analyzed and in which the **principle of proportionality** has been stipulated in an attempt to define the acceptable and the unacceptable limitations of the right of ownership.

Land is a scarce resource and private ownership does not always allow public needs to be protected or realized. Consequently, it is necessary to find a legally and socially accepted way of acquiring land from individuals in order to attain public goals. Expropriation is an institution which must not be abused or employed at the expense of an individual.

*Prof Haldas specializes in private law, particularly property law, succession law and family law. She has a keen interest in all matters relating to real estate, whether covered by private or public law. In the field of property law she has published on the notion of ownership, its protection, entitlements and obligations of private and public owners. Her research also takes into account matters relating to expropriation and management of public real estate in the context of property value.*

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## The Land Assembly Solution to Third Party Transfers

Abstract: My paper will be adapted from *Michael Heller and Rick Hills, Land Assembly Districts, 121 Harvard Law Review 1467 (2008)*. I will argue that it is pointless to continue debating whether expropriations for “third party transfers” meet a public purpose or public interest test. Such expropriations are always both attractive and appalling. States need the power to condemn because so much land globally is inefficiently fragmented. But public land assembly provokes hostility because vulnerable communities may get bulldozed. Courts offer no help. The academic literature is a muddle. Is it possible to assemble land without harming the poor and powerless? Yes. The solution is what Hills and I call Land Assembly Districts, or “LADs.” This new property form solves the age-old tensions in eminent domain and shows, more generally, how careful redesign of property rights can enhance both welfare and fairness. The economic and moral intuition underlying LADs is simple: when the only justification for assembly is over-fragmentation of land, neighbors should be able to decide collectively whether their land will be assembled. Our legal theory solution is equally simple: use property law to retrofit communities with a condominium-like structure tailored to land assembly. Let’s try giving those burdened by condemnation a way to share in its benefits and to veto projects they decide are not worth their while.

*Professor Heller's scholarship focuses on property theory and law. His recent books include The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives (Basic Books, 2008) and Commons and Anticommons (Elgar Publishing, 2 volumes, 2010). Heller has published dozens of articles in the leading American law reviews, including “Land Assembly Districts” (with Rick Hills) and “The Tragedy of the Anticommons” in the Harvard Law Review and “The Liberal Commons” (with Hanoch Dagan) in the Yale Law Journal.*

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## Democratic Legitimacy and the Public Purpose Requirement for the Expropriation of Land

In democratic political systems state action is only regarded as legitimate if it complies with democratic standards. This, of course, also applies to the expropriation of land and, in particular, to the determination that the expropriation of land serves a public purpose. In this paper it is analysed how it is ensured under English, German and South African law that the determination of the public purpose is democratically legitimate. Having discussed the relevant concepts of democratic legitimacy and its sources, I consider all Acts of Parliament, administrative decisions and other legal acts that are relevant to the determination of the public purpose. For instance, if land is expropriated under German law in order to implement a development plan, these legal acts include an Act of Parliament, the administrative decision to adopt a development plan, the administrative decision to approve the development plan and the administrative decision to expropriate. The following aspects of the legal acts are scrutinised as to their impact on the act’s democratic legitimacy: the position in the state system of the entity that adopted the legal acts; the procedure that led to the legal act; the



extent to which the legal act defines the public purpose; how that entity is accountable to the electorate.

*Mr Hoops is PhD candidate and lecturer with the Department of Private Law and Notarial Law of the University of Groningen, The Netherlands. He obtained his master's degree in law from the University of Groningen in 2013. In 2012 he obtained his bachelor's degree in Comparative and European Law from the universities of Bremen and Oldenburg, Germany. His research interests include property law, land governance and the legitimation of norms. In the framework of his PhD project he undertakes a comparative analysis of the public purpose requirement for the expropriation of land in several jurisdictions. He is also an editor of the law journal "Hanse Law Review".*

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**Prof Heinz Klug (University of Wisconsin)**

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## **Public Interest, Land Reform and the Transfer of Property to Third Parties: A Comparative Perspective**

The expropriation of land and its subsequent transfer to third parties has been repeatedly challenged as an illegitimate use of the power of eminent domain. While land reform has traditionally involved the transfer of land from one private owner to another, the legitimacy of land reform outside of the post-war reforms of feudal land holdings in Korea, Japan and Taiwan has always been controversial. Such transfers have however not been limited to classic examples of land reform. In the United States such transfers have become a common method underlying processes of urban redevelopment. However, the legality and legitimacy of these transfers has been central to constitutional challenges before the Supreme Court from *Midkiff* to *Kelo* and to legislative responses in the States across the United States. In Southern Africa the idea of limiting the power of eminent domain through the application of the principle of willing seller/willing buyer has been central to debates over land reform in Zimbabwe and South Africa. This paper will trace these debates in a number of different jurisdictions focusing on the legitimacy, scope and nature of specific forms of land redistribution as manifestations of the public interest.

*Prof Klug is Evjue-Bascom Professor of Law, Associate Dean for Research and Faculty Development and Director of the Global Legal Studies Center at the University of Wisconsin Law School. He is also an Honorary Senior Research Associate in the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. His interests include comparative constitutional law, constitutional law, human rights and humanitarian law, property law and natural resources law. He has a special interest in expropriating property in favour of third parties for purposes of promoting land reform.*

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## Expropriation: Policies, Paths and Pathologies

This paper will outline in conceptual terms the forms of direct and indirect expropriation in Western property systems. It will attempt to elucidate categories for expropriation. In all cases, the nature of the categories will be examined in light of what one might call the different “architectural” features of expropriation (nature of policy goal, nature of expropriating entity, method of expropriation) as well as to the varying justificatory burdens placed on the State or State-sponsored actor in expropriating. Some conclusions about the underlying nature of property will be extracted.

*David Lametti is Associate Professor of Law, Faculty of Law, McGill University. A former Associate Dean (Academic), he is a founding Member of the Centre for Intellectual Property Policy (CIPP), and was its Director from 2009 to 2011. Professor Lametti is also a Member and former Director of the Institute of Comparative Law at McGill. He teaches and writes in the areas of civil and common law property, intellectual property and property theory. His work to date has attempted to understand the parameters of traditional and intellectual resources in analytic terms, linking them to their underlying justifications and ethical goals. His current writing is grounded in the tradition of Virtue Ethics, and touches upon property, intellectual property and social norms.*

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## Public Use, Compensatory Justice and Third Party Transfer Limits In States Responding to Economic Crisis and Natural Disasters

This paper will analyze how two states, Michigan and Louisiana, have adapted the scope of permissible public use for expropriation and imposed constitutional, statutory and judicial limits on state and local governmental power to expropriate private property and transfer it to other private parties and other public actors. Both states have played prominent roles in debates over the propriety of economic development takings in the last several decades.

In Michigan, the highest court famously indulged such takings in *Poletown* before reversing itself in *County of Wayne v Hathcock*. After *Kelo v. City of New London*, Michigan moved to impose strict constitutional prohibitions on economic development takings and strengthened compensation rights for residential property owners, residential tenants and other parties affected by expropriation. At approximately the same time, the Michigan Supreme Court upheld an expropriation that produced significant benefits for one designated private party, even though ownership of the property remained in public hands.

Louisiana similarly enacted strict constitutional prohibitions on economic development takings and third party transfers in reaction to *Kelo*. After Hurricane Katrina, however, Louisiana struggled to modify strict limits as it became clear that the demands of post-disaster community revitalization would require a more flexible approach to blight expropriation and subsequent third party transfers. Moreover, in the past two years several



recent state court decisions have been receptive to expropriations that appear to create quite targeted, largely private benefits at the expense of a single property owner, while other decisions threaten to create major loopholes in Louisiana's strict constitutional limits on third party transfers by approving expropriating entities' creative, but formalistic disguise of such transfers in quasi-feudal property forms.

The paper will thus show that in states in which expropriation can play a crucial role responding to economic crises or natural disasters, a legal system's handling of expropriation can demonstrate significant internal contradiction. Public use restrictions, third party transfer prohibitions and compensation rules can prove to be highly malleable legal concepts.

*Prof Lovett's research focus is on property law in common, civil and mixed jurisdictions, with particular focus on property use and how this is affected by radically changed circumstances, for instance the effects of a hurricane on a property law regime. He is especially interested in the effects of the public interest on the amount of compensation should the state expropriate property in order to realise important social goals in the aftermath of a period of crisis.*

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## Distinguishing between Regulation and Expropriation of Property: Lessons from South African, Australian and German Law

Most jurisdictions recognise the distinction between regulation (or deprivation) and expropriation in constitutional property law. A proper distinction between these forms of state interference is essential, as compensation only accompanies expropriation. Unfortunately, the distinction between these forms of state interference is not clear-cut, as there exists a grey area between the two where instances of excessive regulation sometimes seem to "blur into" expropriation.

In *Agri SA v Minister for Minerals and Energy*, the South African Constitutional Court recently caused uncertainty concerning the distinction between these two types of interference. The Court held that for an infringement of property to amount to expropriation, the state must acquire the substance or core content of that which the claimant lost. In other words, the Court identified state acquisition as an essential requirement for every expropriation. This approach is unattractive, as it could potentially relieve the state from the obligation to pay compensation for losses in instances which clearly are expropriatory in nature, such as where the state extinguishes certain rights in property (ie leases or servitudes) as well as cases concerning third party transfers for purposes of promoting land reform.

The paper argues that a better approach would be to focus on the source of the interference – instead of concentrating on its effect – to ascertain whether it results in regulation or expropriation. For this reason Australian and German law are analysed, as both these legal systems have developed interesting methods for establishing when property infringements amount to expropriation.

*Dr Marais finished his doctoral thesis at the South African Research Chair in Property Law, Stellenbosch University, in 2011 and is currently a post-doctoral research fellow at the University of Cape Town. His research interests are in property law generally, specifically the areas of acquisitive prescription and constitutional property law. He is particularly interested in the limits of ownership as well as the distinction between regulation (deprivation) and expropriation of property rights.*

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**Prof Hanri Mostert** (University of Cape Town)

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## **The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre- and Post-Constitutional Jurisprudence in South Africa**

The terms *public interest* and *public purposes* are both prevalent in South African law pertaining to the requirements for expropriation. This contribution undertakes an analysis of judicial treatment of the two terms before the onset of constitutional supremacy and thereafter.

It demonstrates that in the pre-constitutional era, the terminology as such had not been regarded as exceptionally contentious despite varying interpretations attached to it in cases such as *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271; *Fourie v Minister van Lande en 'n Ander* 1970 4 SA 165 (O) and *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 3 SA 774 (WLD). As a consequence, the terms were not subjected to rigorous legal analysis. The paper exposes the inadequacies of pre-constitutional case law in this regard, focusing specifically on expropriation for social restructuring purposes. Expropriations to serve the goals of Apartheid were upheld – or simply not questioned – as constituting a *public purpose* or being in the *public interest*.

These interpretations may not have been relevant since the introduction of a new Constitution, were it not for the discrepant formulations of the public purpose requirement in the 1996 Constitution and in the Expropriation Act of 1975, which is still applicable law, even though it predates the Constitution. The extent of this problem is only becoming clear as post-constitutional case law emerges, despite that the public purpose/interest requirement has received very little actual attention in jurisprudence since 1996. The root of the problem is in trying to distinguish between broad and narrow interpretations of these terms. It is in trying to gain insight from previous judicial treatment of the terms *public purpose* and *public interest*, that the poverty of pre-constitutional precedent becomes apparent. This is demonstrated by drawing from analyses of the problems around *inter alia* third party transfers (*Harvey v Umhlatuze Municipality & Others* 2011 (1) SA 601 (KZP)) and change of purpose (*Bartsch Consult (Pty) Limited v Mayoral Committee of the Maluti-A-Phofung Municipality*).

*Hanri Mostert pursued the question of how land as a scarce resource of great public importance could be appropriately regulated, whilst simultaneously private claims to it could be acknowledged in her doctorate, as a DAAD research fellow at the Max Planck Institute for Public and International Law in Heidelberg, Germany. Her research interests matured into specialisations in Land Law and Mineral Law, in which fields she contributes to authoritative*

*sources on South African Law, addressing issues of constitutional property protection, landlessness, tenure security, restitution, nationalisation, land governance and mineral resource regulation. She holds a professorial appointment at the University of Cape Town and is a visiting professor in the Department of Private and Notary Law at the University of Groningen's Centre for Law and Governance.*

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## **Bargaining with the State after *Koontz v. St. Johns River Water Management District***

In *Koontz v. St. Johns River Water Management District* (2013), the U.S. Supreme Court revisited its exactions jurisprudence for the first time in many years. Under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Court has created a zone of heightened scrutiny of burdens imposed as part of bargains between landowners seeking development approval and the state. Scholars have disagreed about both the normative basis and the reach of the Court's exactions test. Like the public use requirement in eminent domain, exactions scrutiny seems designed to root out situations of government favoritism towards particular private actors. Nevertheless, the degree to which the test the Court has created serves that goal seems questionable. Moreover, it has proven difficult to keep the exactions doctrine from jumping over the boundaries separating it from takings law more generally and, in the process, becoming a vector for heightened judicial review of all land use restrictions. These tendencies were on full display in *Koontz*. The best solution may be for the Court to get out of the exactions game altogether and leave the policing of land use favoritism to state courts.

*Prof Peñalver focuses on property and land use, as well as law and religion. His work explores the way in which the law mediates the interests of individuals and communities. From a constitutional property perspective, he is particularly interested in regulatory takings (constructive expropriation) and whether it is legitimate for the state to expropriate property for so-called third party transfers.*

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**Prof Hendrik Ploeger (Delft University of Technology) & Prof Jaap Zevenbergen (University of Twente, ITC)**

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## **Between Expropriation and Restriction: What If the Public Interest Does Not Require the Whole Property?**

Regulations of expropriation assume that a property can be taken in the public interest against compensation. However, what if the whole property is not needed for a specific purpose? E.g. when only part of a piece of land is needed for the construction of a road. Normally, in such a case only that part is taken, whereas the remainder stays with the owner, unless these

remnants cannot be used any longer. Less evident is the case when e.g. a high voltage power line has to run over someone's land and takes up minimal surface for the supporting poles, while limiting certain usage in the vicinity of the line. The latter case at face value might appear to be more a matter of 'control of the use of property', than of 'deprivation of his possessions', to use the wording of Article 1 Protocol 1 ECHR.

With more intensive and multilevel land use (esp. in urban areas), the intricacy of both public interests and private property is ever increasing. A rail tunnel might run under a commercial building or a housing block. Different theoretical solutions are possible, starting either from restricted private use, to reestablishment of a limited property right for the original owner after expropriation of the land or the expropriation of a (3 dimensional) property volume as such. The choice of the solution will depend on legal factors, but also on the (private and public) interests involved.

The paper will discuss the theoretical possibilities, as well as practical solutions implemented, with a focus on Western Europe and the Netherlands more specifically.

*Prof Ploeger received his PhD, entitled "Horizontal splitting of property", in 1997. He worked as an assistant professor at Leiden University and as a notary lawyer until 2001, when he joined Delft University of Technology in 2001; first as assistant professor at the section geo-information and land development, and from 2010 as associate professor. In 2009 he was appointed by the Free University Amsterdam to the Endowed Professorship in Land Law and Land Administration. Prof Ploeger conducts research and teaches in the field of land law and land administration (land registry and public registries). His work focuses on the significance of human rights for the application of national land-policy instruments, the interaction between technology and law in the development and management of projects with multiple and multifunctional land use, and the influence of European Union policy on national real-estate law and systems of land bookkeeping. He is a member of the editorial boards of *Ars Aequi* publishers (Private Law section) as well as the editorial advisory board of the *International Journal of Law in the Built Environment*.*

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*Prof Zevenbergen holds two Master degrees, one in land surveying and one in law. His doctoral degree focused on Systems of Land Registration (Delft University of Technology, 2002). He is currently professor of land administration and management in the Department of Urban and Regional Planning and Geo-Information Management at the University of Twente-ITC, the Netherlands. He sits on the advisory boards of the Global Land Tool Network (with the secretariat at UN Habitat) and of the (Dutch) IS Academy on Land Governance. His focus on land registration, cadastre and land management makes him a specialist on the definition of the object to be expropriated and who to expropriate it from.*

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## Public Interest in Takings Cases in Italy and France: The Constitutional and Human Rights Dimension

Article 42 of the Italian Constitution declares that private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to ensure its social function and to make it accessible to all. Under the same article, property can be expropriated only in cases determined by the law, for reasons of public interest, with compensation.

On the other side of the Alps, the French Constitution affirms that ‘the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid’ (Art. 17 of the Declaration of the Rights of Man and the Citizen of 1789).

The first part of my paper discusses whether, despite the different language of these texts, the approach adopted by Italian and French Constitutional Courts in the interpretation of the concepts of *general interest* and *public necessity* leads to a shared approach to the definition of the requirements that must be observed to proceed to the compulsory transfer of private property.

The second part of my paper addresses the understanding of the public interest requirement developed by the Court of Strasbourg and critically considers whether, and to which extent, the ECtHR’s jurisprudence can be used to guarantee that States use their powers to authorize takings only when some public benefit arises from it.

*Dr Praduroux is research fellow at the University of Turin (Italy). Her main fields of interest concern European human rights law, constitutional property law and private comparative law. In April 2012 she defended her PhD thesis on property protection in Europe, with particular attention to the interaction between European human rights law and Italian and French property law.*

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## The Less Invasive Means Argument in South African Expropriation Law

Section 25(2) of the 1996 Constitution of the Republic of South Africa states that property may only be expropriated for a public purpose or in the public interest and that compensation should be paid. It is accepted that the justification for the expropriation lies in the public purpose or public interest that is served. The question whether the availability of a less invasive means other than expropriation is a valid defence against an expropriation that is otherwise for a valid public purpose or in the public interest has recently been addressed by the South African courts. Due to the rationality test that the courts customarily apply to expropriation decisions, the courts regard the availability of an alternative less invasive means to realise a public purpose as irrelevant. However, since the decision to expropriate property is an administrative action it should be considered whether the application of a

proportionality-type inquiry would involve the question of whether the state took less invasive means into account when it decided to expropriate property. It is also worth considering whether the amendment of legislation would be able to address this issue adequately.

*Dr Slade finished his doctoral thesis, entitled “The justification of expropriation for economic development” at the South African Research Chair in Property Law, Stellenbosch University, in 2012. His interests are constitutional property law, international law and property law generally. He is particularly interested in the scope of expropriation if less invasive means are available to realise the goal behind the expropriation.*

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**Prof Jacques Sluysmans** (Radbout University of Nijmegen)

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## **Change of Purpose or Non-Realisation of the Public Purpose after Expropriation**

In the Dutch Expropriation Law there is a clear provision – article 61 - on how to deal with a change of purpose or non-realisation of the public purpose after expropriation: in those cases the former owner may reclaim his property or claim additional compensation.

What I propose to do is to analyse the theory underlying this provision and the case law it caused. Having firmly established the foundations and scope of article 61 of the Dutch Expropriation Law, I would then like to compare this Dutch system with the way in which some other jurisdictions deal with the same problems. This comparative outlook will include Belgium, France, Germany and South-Africa. Do these countries have comparable regulations either in black letter law or emerging from case law? If so, what do those regulations entail? If not, why not?

I would even like to argue why certain systems are better than others and come to suggest the minimum standard that – in my opinion – rules of good governance require.

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## Public Purpose / Interest in Expropriation viewed against the Standards of Good Governance

A sustainable society requires that laws and legal procedures meet good governance standards. This is necessary for economic growth, democratic development, and the prevention of social conflict in general. The best of these models combine a maximum of efficiency combines with a maximum of democracy, transparency, accountability, sustainability, and respect for fundamental/human rights and the rule of law.

This paper serves as the opening piece for the conference. It aims specifically to locate the discussion about rethinking the public purpose / public interest requirement in expropriation within academic debate about good governance. Expropriation encroaches on the individual desire for individual self-fulfilment and prosperity – expressed so well in the social construct of private property – for a good reason: a public purpose that is considered to be more important than the private interest of a property owner. The State, subject to the principle of legality, appropriately exercises the power of eminent domain. The action of any State authority must thus be based upon a statutory duty or provision. The legality principle is a fundamental part of the protection of rights, because it limits the capacity of the State to act. Expropriation is a fine example of an instrument of the State in which public interests meet and compete with private interests. This is why expropriation can be regarded as a litmus test for fair balancing of private and public interests in regulatory systems. A governance perspective could provide useful criteria for this test.

The paper explores these ideas specifically with reference to the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of the Committee on World Food Security – the latest global effort to establish good governance guidelines on land tenure.

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## Reviewing Expropriations – The Determinative Impact of the Public Purpose/Public Interest Distinction

The distinction between a public purpose for an expropriation and a public interest in expropriation is decidedly blurred in Irish constitutional property law. This paper argues that as a result of the history of the drafting of the Irish Constitution, and the text that that process produced, these concepts are elided in Irish law. This is reflected in modern expropriation law, where the key test is not public use, nor even a narrowly construed public purpose, but rather a deferential assessment of whether an expropriation is in pursuance of the common good and in the interests of social justice. A general public interest, as opposed to a particular public purpose, is all that is required, and it can be satisfied by inference on the basis of the presumption of constitutionality, which applies to both legislation and to administrative actions taken in implementing legislation.

Juxtaposed against this backdrop is an increased reliance in Irish law on proportionality analysis as a means of assessing the constitutionality of expropriations (and all other interferences with property rights). This paper argues that such analysis has little or no impact on the outcomes of cases – given the breadth of permissible purposes for expropriation in Irish law, and the deference afforded to the legislature in its selection of means, expropriations are never struck down as disproportionate interferences with property rights. Rather, the courts have reinforced the delegation of authority for balancing the competing interests of owners and the community at large to administrative decision-makers. Consequently, it is largely through the exercise by owners of their rights within administrative processes, and through debate within those processes about the aims of expropriations, that the meaning of ‘public purpose’ is determined in Irish law. While the courts have adopted a ‘strict scrutiny’ approach to reviewing expropriations, the deferential nature of their analysis of purpose and means suggests that such scrutiny can only have a potentially meaningful effect in the review of administrative *procedures*, not substantive *outcomes*. The paper argues that strict scrutiny and means/ends analysis do not prevent abuse of expropriation powers where broad, often vague, purposes are accepted as a legitimate basis for expropriation.

However, in a recent side-wind, a number of High Court decisions have amplified the right to inviolability of the dwelling that is protected in the Irish Constitution. Heretofore, this right was primarily invoked and vindicated in the context of the criminal law, and in particular, the enforcement of powers of search and seizure by the police. In its recent decisions, the High Court has given effect to this principle in a number of civil contexts, including most significantly, planning law. If adopted at Supreme Court level, this approach could potentially form a basis for stricter scrutiny of public purpose in the expropriation context. Nonetheless, it is argued that in the Irish context, the spectre of the Constitution’s text looms large, and is likely in most cases to provide administrative bodies and/or the legislature with a basis for justifying expropriations and expropriation powers.

*Prof Walsh completed her doctoral thesis on “Private Property Rights in the Irish Constitution” in 2011. Her research interests are in property law and theory, constitutional law, land-use law, and jurisprudence. In particular, she is interested in the theory of private ownership. Her work considers how theoretical justifications for private ownership shape the*

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## Delimiting the “Public Use” and “Public Interest”: The Elephant in the Room

Constitutions usually contain prohibitions against expropriating property except where this is justified by a ‘public use’ or is in the ‘public interest’. This type of constitutional fetter reflects an inherent and systemic preference for voluntary transfers of property rights, whilst acknowledging that individual rights exceptionally may have to yield for the sake of others. Courts and commentators have made valiant efforts to distinguish between expropriations which serve a justificatory public use, public benefit or public interest, and those which are wholly private and generally viewed as anathema.

Drawing such distinctions is an almost impossible task and one which has sometimes been dismissed as a relatively unimportant semantic debate. However, this dismissive approach is mistaken. The judicial blurring of the somewhat narrower public use test and its elision with public interest is of concern. In a world where almost any expropriation will satisfy even the nominally stricter public use requirement, it becomes more important than ever that courts use their discretion to prevent constitutional property protections from being totally denuded of meaningful content. This situation is complicated by the fact that the Anglo-American and European courts are often highly deferential to legislative decisions in the first place. Additionally, where private bodies or individuals benefit from takings it is often impossible to bring claims for judicial review against such parties.

It is argued in this paper that the public use and public interest limitations remain significant, despite their seeming breadth. It is contended that their constitutional purpose can be better understood by considering what it is that these limitations seek to protect property rights holders against. Or, to put it another way, this paper draws attention to the obvious but overlooked question (the so-called ‘elephant in the room’) by asking ‘why are we bothered about *non-public* or *private* expropriations in the first place?’ Why do constitutional framers include clauses which prohibit *private* expropriation? Clearly, on a literal interpretation, most constitutions explicitly refer to the ‘public’ so ‘private’ expropriations are not sanctioned. However, this paper argues that there are other values (such as personhood, stability and freedom from tyranny) that explain why it is more destabilizing for property regimes if property rights are taken for private purposes rather than broadly conceived public purposes. Whilst judicial deference is appropriate and good, it is important that this does not shade into judicial passivity. It is argued that refocusing on the underlying reasons for requiring the ‘public’ to be served by an expropriation may encourage a heightened and welcome level of judicial scrutiny.

*Prof Waring’s research interests lie in land law and property theory. She has a particular interest in the constitutional protection of property rights and the compulsory acquisition of land in England and America. Her doctoral thesis focused specifically on Anglo-American*

*private-to-private takings and partial takings. Her current research projects include work on the abandonment of land and a project looking at land registration in England and Wales.*

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## **“Public Interest” of Land Expropriations in Mainland China: 1982-2012**

This article examines the evolution of the “public interest” concept of Mainland China’s expropriation law over the past three decades. The Chinese Constitution of 1982 states that land may be appropriated or requisitioned ‘in the public interest’ by the state for its lawful use. The content of “public interest” was not defined. Congressional attempts at formulating a definition failed, but the need for a definition became urgent after the *Tang Fuzhen* incident in 2009. In the 2011 New Expropriation Regulation some aspects of the public interest are delineated, namely protection of national security and promotion of national economy and social development. Though Chinese scholars criticised the regulation for being too broad, the government believes the broad version of “public interest” is necessary for Mainland China, which still is attempting to allocate land resources more efficiently. However, as the Regulation only applies to expropriations of premises on State-owned land, different levels of government are not obliged to follow its definition of “public interest” when they decide to expropriate collectively owned land

To define “public interest”, I argue that we should focus on its certification process rather than its content. In other words, the best way to define “public interest” is to open the discussion to the public to discuss the relative issues through democratic processes to give content to what “public interest” means in Chinese law.

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