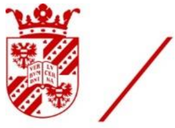


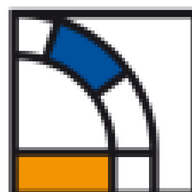
university of groningen

faculty of law

The Context, Criteria and Consequences of Expropriation Law

25–27 SEPTEMBER 2014

ABSTRACTS & BIOGRAPHIES



KNIR

KONINKLIJK NEDERLANDS INSTITUUT ROME

UNIVERSITY OF JOHANNESBURG

Prof Gregory Alexander (Cornell Law School)
gsa9@cornell.edu

Expropriation, Human Flourishing, and Capabilities

How does expropriation fit into a human flourishing theory of property? If we take it that property owners owe members of their communities obligations to provide resources necessary to develop those capabilities that are essential to human flourishing, then what does this require of them in terms of the state's power to expropriate?

Gregory S. Alexander, a well-known scholar in property law and theory, has taught at Cornell Law School since 1985. Following his graduation from Northwestern University School of Law in 1973, he clerked on the U.S. Court of Appeals for the Sixth Circuit. After a year as a Bigelow Fellow at the University of Chicago Law School, Alexander became a professor at the University of Georgia School of Law, where he remained until coming to Cornell in 1984. Professor Alexander has been a Fellow at the Center for Advanced Study in the Behavioral Science, in Palo Alto, California, and at the Max-Planck-Institutes for Comparative Law, in Hamburg and Heidelberg, Germany. He has taught at UCLA, Virginia, and Harvard Law Schools, and was the Herbert Smith Distinguished Visiting Fellow at Cambridge University. Mr. Alexander is a prolific and recognized writer, the winner of the American Publishers Association's 1997 Best Book of the Year in Law award for his work, Commodity and Propriety. His other books include The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence (Chicago), Community & Property (with Eduardo Peñalver) (Oxford), and Properties of Property (with Hanoch Dagan) (Aspen). His most recent book is An Introduction to Property Theory (with Eduardo Peñalver) (Cambridge).

Prof Sam Amoo (University of Namibia)
skamoo@unam.na

Expropriation: A Comparative Study of the Jurisprudence of Ghana, Namibia, South Africa and Zimbabwe

In a speech marking the formal opening of the Accra conference on legal education and of the Ghana law school, the late Dr. Kwame Nkrumah emphasised the need for the identification of the legal system with the ethos of the society:

There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had to be proved in court by experts, but no law can be foreign to its own land and country, and African lawyers, particularly in the independent African states must quickly find a way to reverse this judicial travesty.

The law must fight its way forward in the general reconstructions of African action and thought and help to remould the generally distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully

built up. Law does not operate in a vacuum. Its importance must be related to the overall importance of the people, that is to say, the state.

Samuel Kwesi Amoo holds a BA degree from the University of Ghana, Legon, an LLB from the University of Zambia and an LLM from the University of Toronto. He is an Advocate of the Supreme Court of Zambia and an Attorney of the High Court of Namibia. He was the Dean of the Faculty of Law, University of Namibia and is an Associate Professor in the same faculty. He serves as a member of the Board for Legal Education and is the Acting-Director of the Justice Training Center (JTC). He has written extensively on the Namibian legal system and has specialized in the property law of Namibia. His publications include An Introduction to Namibian Law: Materials and Cases and Property Law in Namibia. He also drafted, among others, the Regulations for the National Council for Higher Education and the Consolidated Land Bill of Namibia.

Dr Imre Andorkó (University of Debrecen)
andorko@agr.unideb.hu

The History of Hungarian Expropriation Law

The boundaries of periods of history of the Hungarian expropriation law are in connection with the turning points of the history of the more than 1000 years old Hungarian state. From the foundation of the state in 1000 until as late as 1848, feudal proprietary rights were characteristic of the Hungarian state. In this period no civil proprietary rights existed, which meant no expropriation in its current sense, either. Under the Austro-Hungarian Empire (1867-1918), several major and ambitious infrastructural developments were initiated and the use of private estates was often required, hence it was necessary to introduce a consistent and reliable regulation of expropriation. After the Second World War Hungary developed a single-party system by 1948 as part of the influence sphere of the Soviet Union, degrading the operation of democratic institutions to little more than formality. The basis of the socialist proprietary system was communal property achieved through forced, and often violent socialisation. The intention of collectivisation effacement of private property was perceptible on the area of expropriation law too.

Hungary became a democratic state after the party system change of 1989/1990. The comprehensive amendment of the Constitution in the course of 1989 and 1990 was the basis of the new property system. About fifty cardinal rulings were passed by the Constitutional Court established in 1990 regarding the expropriation laws made in the socialist era. I present the most important stations of the development of Hungarian expropriation law and I present in detail the decision of Constitutional Court to fully meet the requirements of the rule of law.

Imre Andorkó was born in Debrecen, Hungary, in 1984. He attended the Faculty of Law at the University of Debrecen from 2002 to 2007 and completed his PhD studies between 2007 and 2010, also at the University of Debrecen. He received his PhD degree in 2013. The title of his PhD thesis was "The civil and constitutional law aspects of expropriation". He currently educates subjects in connection with agricultural law at the University of Debrecen. In addition to these he continues his research in the theme of expropriation law and property law, and constantly publishes his research results.

Ms Karen Bezuidenhout (Stellenbosch University)
karenb@sun.ac.za

Compensating rather than Invalidating Regulatory Excess Measures in South African Law

Section 25 of the South African Constitution recognises two forms of legitimate state interference with private property, namely deprivation and expropriation. The demarcation line between these two interferences is not clear-cut. However, expropriation is generally understood to be a subset of deprivation. Section 25(1) authorises deprivation of property rights and simultaneously sets the boundaries for legitimate deprivation. Property may only be limited in terms of law of general application, for a public purpose and no law may authorise arbitrary deprivation of property. In *FNB* the Constitutional Court set out a test to determine whether a deprivation of property is arbitrary. In terms of this arbitrariness test, a complexity of relationships are considered, namely the relationship between the purpose for the deprivation and the nature of the property, the person affected and the extent of the deprivation, to determine whether the deprivation is justified. A regulatory deprivation that results in an excessive or disproportionate burden on one or a select group of property owners is held to be arbitrary and therefore unconstitutional. The default remedy in this case is generally an order of invalidity. However, there may be circumstances where it cannot be expected of the property owner to tolerate the burden that results from an otherwise legitimate regulatory deprivation, but the excessive or harsh effects of the regulatory action do not justify a declaration of invalidity either (hereafter regulatory excess measure).

This paper will identify and discuss various alternative approaches in foreign and South African law to invalidating these regulatory excess measures, including constructive expropriation, statutory compensation, compensation in terms of the égalité principle and constitutional damages.

Ms Karen Bezuidenhout obtained an LLB degree (2011) and is currently an LLD candidate and research intern at the South African Research Chair in Property Law at the University of Stellenbosch. The topic of her LLD thesis is "Compensation for excessive but otherwise lawful regulatory state action" under the supervision of Prof AJ van der Walt and co-supervision of Dr ZT Boggenpoel. Her research interests include property law generally and constitutional property law.

Dr Sjur K. Dyrkolbotn (Durham Law School)
s.k.dyrkolbotn@durham.ac.uk

The *Pointe Gourde* Principle and its Effect on Expropriation for Economic Development

In expropriation cases, the compensation question often occupies centre stage, and the way it is resolved largely influences the perceived legitimacy of the interference. In case the expropriation order itself, or the development project it forms part of, affects the value of the taken property, the question of compensation becomes particularly tricky. Many jurisdictions employ so-called ``elimination rules'' in such cases, to ensure that changes in value due to the expropriation scheme are disregarded. In this paper, I consider elimination rules in UK and Norwegian law, and I focus particularly on situations when expropriation takes place to

further economic development. The policy reasons for elimination rules become less clear in such situations, and it has been argued that mechanisms for benefit sharing should be used instead. For a concrete example of such a mechanism, I look to recent case law on expropriation for commercial hydropower in Norway, developed by the district ``appraisal courts'', special judicial bodies that rely largely on the discretion of lay people. I discuss how the Norwegian Supreme Court has partly confirmed and partly rejected the new approach. In particular, I note how they have applied an elimination rule similar to what is known as the ``Pointe Gourde'' principle in common law, to reject benefit sharing for some case types that the appraisal courts have judged differently. I analyse these developments against the debate on the Pointe Gourde principle in the UK, arguing that the rule is often inappropriate when expropriation benefits a commercial scheme.

Sjur K. Dyrkolbotn is a Norwegian lawyer who holds a law degree (cand.jur) and a PhD in logic, both from the University of Bergen. He is currently a PhD candidate at Durham Law School. Dyrkolbotn studies expropriation in light of property as a human right, focusing on cases when property is taken for commercial projects, so-called economic development takings. He also maintains an interest in logic and philosophy, particularly truth, (formal) argumentation theory and modal logic. A desire to bring logic and law together is an overreaching motivation behind much of his work.

Prof Douglas Harris (University of British Columbia)
harris@law.ubc.ca

Private-to-Private Takings and the Dissolution of Condominium

Condominium enables the subdivision of multi-unit developments into multiple titles. Title-holders within condominium hold a private interest in their units combined with an undivided share of the common property, a right to participate in the collective governance of the private and common property, and an obligation to contribute to the maintenance of the common property. As condominium buildings age, title-holders must decide whether to renovate or to dissolve the condominium, usually to sell the land to a developer. Jurisdictions around the world are grappling with the question of whether the decision to dissolve condominium should require unanimity among title-holders or something less. Unanimity is a difficult threshold, particularly where many, perhaps hundreds of title-holders are involved. However, a threshold less than unanimity (commonly 75-80% of title-holders in jurisdictions that do not require unanimity) enables a majority of title-holders to force unwilling members to sell their interests. This paper uses the expropriation or takings literature to understand the power of a majority of title-holders to force a minority to sell their interests in land and it asks whether that literature sheds light on the policy choice between a unanimity requirement or something less when dissolving condominium.

Associate Professor Harris writes and teaches in the fields of property law, legal history, fisheries law, and Aboriginal rights. He is the author of Fish, Law, and Colonialism (2001) and Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia (2008), winner of the Saywell Prize for Canadian Constitutional Legal History. In the field of property law, he has written on Aboriginal rights, title registration systems, condominium,

and the doctrine of regulatory takings. In 2013, Harris received the UBC Law Faculty's Award for teaching excellence.

Mr Björn Hoops (University of Groningen)
b.hoops@rug.nl

The *Kelo* Judgment of the US Supreme Court from a German Perspective

The public response to the *Kelo* judgment of the US Supreme Court in the United States was mostly withering. A significant number of scholars and politicians criticised that the judgment was eroding the constitutional protection of property from the use of eminent domain. Their call for a ban of takings for the purpose of economic development was crowned with some success. In a few States, the scope for takings for the purpose of economic development has been narrowed by either the State legislatures or State Supreme Courts. This shift serves to protect home owners, in particular the poor. In this contribution, I argue that this shift in the substantive definition of public use in State law is not inevitable.

Rather, the US Supreme Court should have further explored the procedural definition of public use. The jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*) shows that expropriation for the purpose of economic development is permissible. Yet, the public good requirement, enshrined in Art. 14(3) of the Basic Law (*Grundgesetz*), the constitutional principle of the reservation of statutory powers and the constitutional principle of proportionality impose various procedural safeguards. More specifically, the statutory basis of expropriatory action must be sufficiently specific, the expropriation is subject to two fully reviewed proportionality tests and the expropriation authority has to take measures that ensure that the private transferee actually contributes to the public good. I argue that these safeguards are sufficient to meet the target of the recent bans in the United States while expropriation for the purpose of economic development remains an option.

Björn Hoops is PhD candidate and lecturer with the Department of Private Law and Notarial Law of the University of Groningen, The Netherlands. In 2013 he obtained two master's degrees in law from the University of Groningen as well as another master's degree in Comparative and European Law from the universities of Bremen and Oldenburg. In 2012 he obtained his bachelor's degree in Comparative and European Law from the universities of Bremen and Oldenburg, Germany. He won the German-Dutch Law Prize in 2014 for his master's thesis on the transfer of property rights under the condition precedent of the bankruptcy of the transferor. 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 good requirement for the expropriation of land in several jurisdictions. Furthermore, he is an editor of the law journal "Hanse Law Review".

Prof Eran Kaplinsky & **Prof David Percy** (University of Alberta)
eran.kaplinsky@ualberta.ca / dpercy@ualberta.ca

The Impairment of Subsurface Resource Rights by Government as a “Taking” of Property: The Canadian Perspective

Most studies of expropriation focus on its effects on the surface of the land. However, in mineral rich jurisdictions, expropriation claims often arise from actual takings by government of subsurface resources, or from regulatory measures impairing private rights to subsurface resources. This paper traces the history of the legal treatment of such claims in Canada against the background of the general law of takings. Specifically, as private property is not constitutionally protected, but subject to Parliamentary Sovereignty, a claimant must prove de jure or de facto expropriation, or point to some statutory right to compensation. The paper then deals with a number of recent legislative initiatives, which have had direct impact on interests in subsurface resources, or have had the potential of adversely affecting resource rights through the enactment of planning legislation. The object of the paper is to assess any takings claims in connection with these programmes and to examine possible measures of compensation.

Eran S. Kaplinsky is an Associate Professor of Law at the University of Alberta. He holds an LL.B. from Tel Aviv University, and an LL.M. and an SJD from the University of Toronto. Professor Kaplinsky’s teaching and research focus on land use regulation, municipal law, and property law. Most recently, he co-authored “A Guide to Property Rights in Alberta” (with Prof David Percy) commissioned by the Alberta Land Institute. He is currently on sabbatical writing a monograph on land subdivision control.

David R. Percy, Q.C. is Professor of Law at the University of Alberta. He holds a M.A. degree in Jurisprudence from Oxford University and a LL.M. degree from the University of Virginia. He teaches in the fields of Water Law and Energy Law and has published three books on Water Law. He has worked as a consultant to the United Nations Food and Agriculture Oraganization on Water Law and Sustainable Aquaculture in 5 African countries and played a major role in drafting the Namibia Aquaculture Act.

David Percy has won teaching awards at the national, University and Faculty Levels. In 2013, he was awarded the University Cup, the University of Alberta’s highest recognition of faculty members who have excelled in both teaching and research.

Mr Tony Lamb (Private Consultant)
tlamb24@hotmail.com

How Culture affects Expropriation in Albania, Countries of the Former Soviet Union, Samoa and Laos

While the models for expropriation in much of the world follow the same basic approach of taking land and giving compensation, the manner in which expropriation is implemented shows significant variety across the globe. Cultural factors are a key element in how expropriation is implemented, with local customs and approaches overlaid on the basic procedures. Cultural factors also have an impact on the underlying tension in the taking of

private property, albeit that the property will be used for a public good. Despite constitutional and legislative foundations, the tension that arises from taking private property is widely evident, and is most obvious in more traditional and small-scale agricultural societies. A case study from Samoa, relating to the airport road, which passes through traditional lands, illustrates these views and shows how local customs of negotiations are overlaid on the legislative framework. Further examples from a diverse range of countries confirm the difficulties in applying the basic model in different cultural settings, and concludes that those implementing expropriation should exploit traditions and norms of their society to minimize difficulties and risks for all concerned. In this regard, elements of environmental dispute resolution, appropriately adjusted for the local conditions, can also be used to enhance implementation and go some way to resolving the inherent tension in expropriation of private property.

Tony Lamb is an Australian land law consultant with a background in government, but who currently works as a consultant for international organisations, particularly the World Bank and United Nations. Tony has worked in some 25 countries on most continents, with a focus on land registration systems in Eastern Europe and the countries of the former Soviet Union. In addition to land registration and expropriation, he has a particular interest in alternate dispute resolution mechanisms and improving the secure of women's property rights.

Prof Salvatore Mancuso (University of Cape Town)
salvatore.mancuso@uct.ac.za

Land and Expropriation in Africa: The Case of Eritrea

Expropriation in Africa has been historically linked to colonization and the appropriation of land made to the detriment of the local people. This situation has strongly contributed to the present connotation of expropriation in most of the African countries. Considered the way how expropriation works in Africa, it seems necessary to reconsider the same concept of expropriation, at least in the African context. The paper will present the situation of expropriation in Eritrea as a case-study to show how expropriation is characterized in most sub-Saharan African countries and the reason why the traditional approach to expropriation seems not fully satisfactory in Africa.

Salvatore Mancuso was born in Palermo (Italy) on 26 October 1963. He got his Bachelor of Law at the University of Palermo (Italy) and has obtained its Ph.D. in Comparative Law at the University of Trieste (Italy) with specialization on African law. He is the Chair, Centre for Comparative Law in Africa and Honorary Professor of African Law at the Centre for African Laws and Society of Xiangtan University (P.R. of China).

He has been Professor of Comparative Law and Legal Anthropology at the University of Macau, Adjunct Professor at the University of Trieste, Visiting Professor at the Universities of Limoges (where he is a Member of the CREOP - Centre de Recherches sur l'Entreprise, les Organisations et le Patrimoine), Réunion and Lisbon, and has given lectures at the Universities of Trento, Salerno and Palermo (Italy), Asmara (Eritrea), Bissau, Ghana – Legon in Accra (Ghana), Mauritius, Eduardo Mondlane in Maputo (Mozambique), Instituto Superior de Ciências Jurídicas e Sociais (Cape Verde), National Taipei University in Taiwan and East China University of Political Sciences and law in Shanghai (P.R. of China).

He has published and edited some books and several articles on Comparative and African Law. He is a member of the International Academy of Comparative Law, and Secretary General of the Juris Diversitas group. He is the editor in chief of the Journal of Comparative Law in Africa and member of the editorial board of several law journals focused on African law, among which Revue congolaise de droit et des affaires, Revue Juridique de l'ERSUMA, and Revue de droit uniforme africain.

Dr Ernst Marais (University of Johannesburg)
ejmarais@uj.ac.za

The End of the Road? Exploratory Observations on the (Im)possibility of Recognising Constructive Expropriation in South Africa in View of Recent Case Law

The South African Constitution provides two ways through which the state may legitimately interfere with property rights, namely deprivation (section 25(1), also described as regulation) and expropriation (section 25(2)). Deprivation typically entails instances where the state limits the use, enjoyment and exploitation of property generally for valid public purposes in the absence of compensation. Expropriation, on the other hand, usually involves scenarios where the state acquires property from one person or a small group of persons for a public purpose or in the public interest against payment of compensation.

The distinction between these two forms of state interference is still contentious in the new South African constitutional order, given the relative "youth" of our Constitution as well as the general paucity of case law on the meaning of expropriation. Some authors think that our property clause accommodates the doctrine of regulatory takings, which is also known as constructive expropriation. In terms of this doctrine courts are able to transform individually excessive deprivations into *de facto* expropriations which require compensation. Given the pre-constitutional meaning of expropriation, as well as the potential dangers this doctrine could hold for the South African state's legitimate land reform initiatives (which often entail valid but burdensome limitations on property), it is questionable whether it is suited for the South African constitutional property regime. For these reasons my paper analyses two recent judgments, one by the Constitutional Court and another by the Supreme Court of Appeal, both of which seem to exclude the possibility of recognising constructive expropriation in South African law. In this sense South African law should rather develop the notion of equalisation payments to cater for individually excessive deprivations instead of courts having a discretion to "transform" such interferences into expropriations which require compensation.

Dr Marais is an alumnus of the South African Research Chair in Property Law, Stellenbosch University, from which he acquired his doctoral degree in 2011. He completed two post-doctoral research fellowships, one with Prof AJ van der Walt at the Research Chair in 2012 and a second with Prof H Mostert at the University of Cape Town in 2013. He is currently a senior lecturer in the Faculty of Law at the University of Johannesburg, where he teaches property law. His research interests include property law in general as well as constitutional property law. His current work focuses on the distinction between the police power and the power of eminent domain under the South African property clause as well as the law of possession.

Dr Frankie McCarthy (University of Glasgow)
Frankie.McCarthy@glasgow.ac.uk

Expropriation and the "Three Rules" in Article 1 of the First Protocol to the ECHR

Article 1 of the First Protocol to the European Convention on Human Rights contains the right to peaceful enjoyment of possessions. The European Court of Human Rights has identified "three rules" within A1P1, by which state action may be categorised as a deprivation, a control of use or a more general interference with the peaceful enjoyment of possessions. The case law reveals apparent inconsistencies, whereby actions which result in permanent deprivation of ownership are nevertheless categorised in some cases as a control of use. It can be argued that the court is motivated here by values not articulated within the text of A1P1: if an applicant "deserves" compensation, the state action is more likely to be termed a deprivation; if the applicant is not "deserving", it will be a control of use. This question of who "deserves" what in this context raises a more fundamental issue - why protect property as a human right at all?

This paper is drawn from a larger research project which makes use of constitutional property theory, particularly the work of Carol Rose, to explore the jurisprudence on A1P1. The central thesis of the research is that an unarticulated conflict between differing conceptions of property law animates the Strasbourg jurisprudence, resulting in confusion as to the ambit of the protection.

Dr McCarthy's research interests lie in property law, family law and the human rights implications of both. She completed her doctoral thesis, on the evolution of Article 1 of the First Protocol to the ECHR, in 2010. In her current work, she is building upon that doctrinal analysis by examining the A1P1 case law through a theoretical lens. She is separately engaged in projects on appearance-based discrimination ("lookism") and the practice of collective worship in UK schools.

Prof Hanri Mostert (University of Cape Town)
hanri.mostert@uct.ac.za

Natural Resources, National Assets and Pre-existing Proprietary Positions

The contribution questions the extent to which the state can / should / must interfere with proprietary rights that pertain to natural resources. In many jurisdictions' extractive laws proprietary and regulatory issues go hand in hand. Questions range from who own the resources and who are eligible to exploit them to how the relationships between various stakeholders (surface owners, mineral title holders etc) are managed and how new or unconventional extraction techniques influence development of the legal framework. A key consideration is the role of the state as regulator of mineral and petroleum resources. Questions about ownership of the resource normally need to be resolved by identifying the applicable holding regime at a macro-analytical level. The two main regimes may be identified from existing comparative analyses: On the one hand, many jurisdictions subscribe to a privatised model, informed by the principle of cuius est solum, in terms of which the surface owner has much control over what is extracted, by whom, when and how. (Daintith

39). On the other hand, jurisdictions may subscribed to a model which places ownership of minerals with the sovereign (i.e. king / state) (Gonzalez 68). Whether the sovereign powers over the resource are absolute would depend on whether a regalist or domanial approach to sovereignty is endorsed.

These two regimes provide the basic approaches for the regulation of exploitation, as well as the proprietary issues that arise as a result of mineral exploitation. This relates to who may benefit from the exploitation of a particular mineral; who bears the responsibility for rehabilitation; and who decides about what may be done with the subsurface if extraction is complete. However, in both privatised and regalist/domanial regimes, it is obvious that statutory regulation of extractive industries is far-reaching. Even in privatised systems, such as the USA, statutory regulation attempts to ensure sustainable and socio-economically responsible extraction. Questions such as whether a compensable taking has occurred (i.e. an expropriation) are likely to be resolved differently, however. The contribution explores the different possibilities in this regard, paying particular attention to the notion of custodianship/stewardship of natural resources which is raised frequently in the context of regulatory practices in the extractive industries.

Recent litigation in both SA and Namibia demonstrate the need for clarification of the notion of custodianship and how crucial this is to resolution of questions relating to the scope of private rights. Further research is needed to give content to the notion of custodianship. In work already undertaken, it is apparent that the relationship between the state's regulatory functions and the social obligation of ownership (prevalent in the constitutions of many civil-law based countries) need to be explored specifically in relation to natural resources. Another aspect would be the influence of public international law in contextualising the custodial duties of the state and the extent to which these may legitimately limit the proprietary positions in the private sector. The inquiry as to the role of the State as regulator is relevant in that it relates the legal frameworks for mineral and petroleum resources to the question about the meaning and implications of the state's custodial duties.

Prof Mostert's undergraduate studies in Humanities and Law at Stellenbosch University piqued her interest in the resource potential of land. She 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. After completing her doctoral studies, 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 currently 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.

Mr Marumo Nkomo (University of Cape Town)
marumo.nkomo@uct.ac.za

Plain Packaging as Expropriation – a Desperate Assertion

Australia implemented its obligations under the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) by passing the Tobacco Plain Packaging Act (TPPA) in 2011. This legislation confirmed Australia's status as the first country in the world to introduce mandatory plain packing for tobacco products and has for this reason been at the centre of much contestation.

The judgment delivered by the High Court of Australia in the matter of JT International SA v Commonwealth of Australia [2012] HCA 43 (5 October 2012) confirmed that the TPPA is consistent with Australian law. In doing so it emphatically rejected the applicant's assertion that plain packaging constitutes expropriation of intellectual property rights under Australian constitutional law. This has resulted in other countries considering the adoption of plain packaging laws.

One such country is South Africa where the question is when rather than if plain packaging laws will be put on the nation's legislative agenda. The paper considers whether there is a basis, as argued by some scholars, to classify plain packaging legislation in the TPPA sense as expropriation under South African law. The paper then expands upon the consideration of South African national law by placing the discussion in the context of international investment law. The purpose of the discussion is to address a key objection that policy makes considering plain packaging legislation are likely to face.

Marumo was recently elected the Southern African representative on the Executive Committee to the African Network of International Economic Law. He holds an LLB degree from the University of Wales (UK) and two Masters degrees. The first, being an LLM in international trade and investment law from the Centre for Human Rights which is a joint centre of the University of Pretoria and University of the Western Cape (South Africa); while the other is a Master of International Law and Economics from the World Trade Institute in Berne (Switzerland). Marumo has worked with leading law firms in South Africa and Malaysia as well as a host of inter-governmental organizations such as the World Trade Organisation, the United Nations High Commissioner for Refugees and the United Nations Development Programme.

Dr Saskia Roselaar (University of Ghent)
Saskiaroselaar@gmail.com

Colonisation and Expropriation: The Legal Consequences of Roman Imperialism

It is taken as given that the Romans usually confiscated a part of the land of their defeated enemies. This could then be used to establish colonies for Roman settlers, either veterans from the armies or the poor in need of land. The legal status of the land that was distributed to settlers is clear: it was usually given in private ownership to the recipient, and would be inherited by his children or other heirs. Citizenship of a colony also carried with it specific,

well-defined obligations, e.g. paying taxes to the local community. The legal status of the defeated people, however, has never been the subject of research. When any attention is given to the expropriation of land, it is assumed that this was done by right of conquest and that no legal justification was necessary. This may have been the case in the early Republican period, but as time progressed matters became more complex. There are many attested cases in which the local population was deprived of some of its land, but was given in exchange land in other areas near the colony; in fact they often were part of the community in the legal sense.

This paper will investigate the development of the right of expropriation from the early Roman Republic up to the Imperial period. By the first century AD, the rights and obligations of the defeated populations had been clearly defined and laid down in legal works. I will investigate how exactly the Roman state justified the confiscation of land and what this meant in theory and in practice for the people who were deprived of it. In this way I hope to shed new light on a crucial element of Roman history, which is all too often taken for granted.

Saskia T. Roselaar has worked especially on the social, economic and legal history of the Roman Republic; her most important work is Roselaar, S.T., 2010. Public land in the Roman Republic: a social and economic history of ager publicus in Italy, 396-89 BC (Oxford: Oxford Universiteit Press). After positions as postdoctoral researcher at the Universities of Manchester and Nottingham, she is now a teaching fellow at the University of Ghent. Her current research focuses on the economic and social aspects of citizenship in the Roman world and on the connection between economic activities and cultural, political and social integration in the Roman Republic.

Prof Jacques Sluysmans (Radboud University of Nijmegen)
Sluysmans@feltz.nl

Expropriation and Good Governance

The principle of good governance is difficult to define. The principle is sometimes described as a set of administrative safeguards which are at the basis of the rule of law, such as the principle of legitimacy, transparency and legal certainty. Perhaps it is too early to say that the principle can be regarded as a human right in itself, but nevertheless, the principle has become increasingly important in the case law of the European Court of Human Rights. The ECtHR already addressed the principle in the framework of the rights connected to a fair procedure (article 6 ECtHR) and fairly recently the principle has also been introduced in the field of the right to property (article 1 of the First Protocol to the ECHR).

The ECtHR has defined the principle of good governance in this latter context as follows: “where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with the utmost consistency”. The principle thus offers a new framework to assess whether or not a deprivation of property is fair. It is this framework – and its implications – that I would like to explore further in my contribution to the colloquium.

Prof Sluysmans has been a legal practitioner since 1999. Currently he is a partner at Van der Feltz, a law firm in The Hague that he co-founded in 2006. He completed his doctoral thesis entitled “The continuing viability of compensation law in expropriation cases” in 2011 at

Leiden University. It concerns the question whether the Dutch Expropriation Act of 1851 is still able to adequately govern modern instances of expropriation, especially as to the way in which compensation should be calculated. In 2013 he was appointed professor of Expropriation law at Radboud University Nijmegen. He is chairman of the Dutch Association for Expropriation Law and adviser to several Dutch courts in matters regarding compensation for expropriation. His interests include, inter alia, how the state may change the purpose for which an expropriation took place after the property has been expropriated.

Dr Shai Stern (Bar-Ilan University)
sternshai78@gmail.com

Taking Community Seriously: The Effects of Expropriation on Residential Communities

When the government takes private property, it usually harms property owners. This statement is nothing new and, indeed, most western jurisdictions recognize this harm and require the government to compensate owners for the market value of the property. The market value remedy is supposed to represent the objective value of the loss incurred by the property owner, regardless of the subjective value the owner attributes to the property. In some cases, monetary compensation in the amount of the property's market value is a suitable remedy. In other instances, however, this "objective" means of valuation cannot fully account for the loss suffered by the aggrieved property owner.

In this article I examine a case of expropriation in residential communities for which market value compensation is an inadequate remedy. This remedy, I argue, fails to recognize that communities enable individuals to fulfill some of their substantive needs for their personhood and to realize their religious, cultural, economic and social conceptions of the good.

Based on a foundational pluralistic conception of property – one that regards community as a fundamental, though not ultimate, value of property – I argue that a liberal state should be obligated to allow its citizens to live in various residential configurations. This pluralistic obligation should apply during each phase of the community's existence: entrance, governance and exit. Yet, the state's pluralistic obligation is most crucial when the state expropriates property owned by individuals who live in strong, tight-knit communities. In recognition of the range of roles communities play in people's lives, I offer an expansion of the range of takings remedies and compensation mechanisms provided by the state. Allocation of these alternative remedies should depend on three factors: the role of cooperation in a property owner's ability to realize a conception of the good he shares with others; the social legitimacy of the owner's community; and the community's political and economic strength.

Shai is an associate professor of law at Bar-Ilan University, where he teaches courses in property law, expropriation law, and law & community. Shai received his LLB (magna cum laude) from Bar-Ilan University and is admitted to the Israeli Bar Association. Before receiving his LLM and PhD from Tel Aviv University, Shai worked as a property lawyer at one of Israel's most prestigious law firms. Shai has published several articles in Israeli and international law journals. He is a fellow at the program for Human Rights and Judaism at the Israel Democracy Institute.

Prof Bernard Stolte (Royal Netherlands Institute in Rome)
b.h.stolte@rug.nl

Historical Roots of Expropriation in a Civilian Context

In the civilian tradition, expropriation as we understand it is a Napoleonic invention, an invention, though, with many fathers. This paper explores some of its antecedents in Roman law, which used various ways to deal with conflicts between the interests of private property and the common weal.

Bernard H. Stolte (1949) read classics and law in the Radboud University of Nijmegen and obtained a doctorate in law from the University of Utrecht (1981). After a lectureship in Roman law in Nijmegen he transferred to Groningen and specialized in Byzantine law, in which subject he has occupied a chair since 1993. From 2007-2012 he was Director of the Royal Netherlands Institute in Rome. His research interests cover the early history of Byzantine law, especially canon law, legal papyri and inscriptions, textual criticism of legal sources, and the history of European legal scholarship, especially of the early modern period.

Dr Stijn Verbist (University of Hasselt)
stijn.verbist@uhasselt.be

Trias Politica in Belgian Expropriation Practice, at Last. Towards a new Flemish Expropriation Decree against the Background of a Judicial Paradigm Shift

The existing expropriation rules in Belgium, which also apply in Flanders, show a clear lack of evolution: the rules are outdated, inadequate, unnecessarily complex and disintegrated. I believe minor changes or ad-hoc interventions by the legislator would not be sufficient to ensure that administrations can continue to use the instrument of expropriation with decisiveness, but also with care. Legal security and legal protection, both for the owner and for the administration, are not supported by the continuing debates about expropriation conditions, or about administrative and judicial procedures. For many years, the legislator has neglected his responsibility and the Flemish administrations are paying a high price for that today.

I would dare to use the word ‘revolutionary’ to describe the new situation of expropriation practice in Flanders. Revolutions are caused by persistent problems that are not addressed in an adequate and timely manner. The emancipation process of owners has been a very rapid development, supported by the widespread availability of information on the Internet. I believe that the tide has turned now, as a powerful response to the unfair expropriation practices of the past decades. In the language of Hegel, I would describe the current period as antithetic. Although revolutions are sometimes necessary, they often also bring a lot of injustice. Today, some well-meaning administrations that want to expropriate for the public benefit and complete the process correctly are the victims of this situation. Some courts are now rejecting fully legitimate expropriation claims as unlawful. Of course, this cannot be the intention.

Hopefully, this period of antithesis will not last for half a century, and the Flemish legislator will enact a well-considered, integrated and balanced decree to establish a synthesis. The paradigm shift was required in practice and came at the right time. The Flemish legislator cannot continue to turn a blind eye to the owner's needs, but will have to give administrations sufficient possibilities to ensure quick expropriation if required.

Dr Verbist is a researcher as well as an advocate and is interested in all aspects of business law. He works at the Universities of Hasselt, Antwerp and also the Free University of Brussels, where he teaches public law and expropriation law.

Prof Leon Verstappen (University of Groningen)

l.c.a.verstappen@rug.nl

The Context, Criteria and Consequences of Expropriation Law

Last year's colloquium had the title "Rethinking Public Interest in Expropriation Law". This second conference, the organizers choose for "Context, Criteria and Consequences of expropriation". In his contribution, the author gives an introduction to each of these perspectives. He elaborates on the legal debate on expropriation, the governance aspects of expropriation as well as the effort to establish standards for expropriation, especially the 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.

Leon Verstappen (born 8 March 1965) has been full professor of civil and notary law at the department of Private Law and Notary Law of the University of Groningen since December 1st, 1998. He is legal advisor to Hekkelman Lawyers & Notaries in Arnhem and Nijmegen, deputy judge at the Court of Appeal in The Hague, member of the board of governors of the Foundation Grotius Academy and of the Foundation for Professional Training of Notaries, member of the Supervisory Council of the Foundation for the advancement of Notary Science in Amsterdam. He was former head of the Department of Private en Notary Law (2002-2005) and former Dean of the Faculty of Law of the University of Groningen (2006-2010). Leon Verstappen is editor/annotator of a number of periodicals (i.e. Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) and Nederlandse Jurisprudentie (NJ)) and joint editor-in-chief of a series on civil (notary) law: Real Property Law, Family Law, Estate Settlement and Company Law. He is founder and academic director of the Groningen Centre for Law and Governance as well as founder and board member of the Netherlands Institute for Law and Governance. He is also founder and chair of the International Alliance on Land Tenure and Administration (IALTA, see www.ialtanetwork.org), member of the Steering Committee of the Land Portal Partnership (on behalf of IALTA, see www.landportal.info) and member of the European Law Institute. Leon Verstappen supervises PhD studies on land tenure security in several South-East Asian and African countries as well as a comparative European study on third party protection in real estate law and a similar study on the public purpose requirement on expropriation. Besides these PhD projects, he supervises several PhD theses on Dutch family law and land law. See for further information: http://www.rug.nl/staff/l.c.a.verstappen/

Dr Sue-Mari Viljoen (University of South Africa)
maasss@unisa.ac.za

Lawful Occupation, a Place for Expropriation and the Role of the Courts

The South African eviction jurisprudence has recently developed a notion that unlawful occupiers should generally not be evicted if they would be rendered homeless in consequence of such an order. To ensure that the private landowner's rights are not restricted in an arbitrary manner, the courts award suspended eviction orders and force the state to provide alternative accommodation on an interim basis. Prior to this development the Constitutional Court has, on more than one occasion, condoned the unlawful occupation of land to the extent that unlawful occupiers were allowed to continue occupying private land for indeterminate periods of time, regardless of the long-term section 25 implications. Interestingly, in these judgements, some of the justices acknowledged the unsuitability of their decisions in the sense that the outcome is not favourable to any of the parties involved. Arguably, in some of these cases the expropriation of the properties would have provided both legal certainty to all the parties involved and long-term solutions to the occupiers' pressing housing needs, especially where the landowner was either absent or in favour of such an order. Nevertheless, the decision to expropriate property in South Africa is an administrative decision, which should be made by the state – the courts simply do not have the power to compel the state to make such a decision.

It is this, seemingly established rule that I would like to reconsider from an administrative law perspective. The point of departure is that the courts must honour the separation of powers doctrine, but this does not mean that the courts cannot force the state to take a decision where it clearly falls under its domain. Land and housing matters are contentious issues, which the state is constitutionally obliged to resolve in a fair and equitable manner. In the eviction jurisprudence the courts have compelled the state to do so in collaboration with the parties involved through meaningful engagement – a process aimed at establishing the ideal resolution for all the parties involved, which the court ultimately approves. From a legality perspective, it is problematic to allow continuous unlawful occupation, while landowners are left in the dark regarding their entitlements to use and exclude. It is the courts' duty to oversee that the state address matters of this kind and propose a solution that is best suited to all involved. Previous decisions suggest that some 'solutions' are ill-fitted, which might narrow the scope of suitable resolutions quite considerably. The expropriation of property might sometimes be all that is left – through a process of elimination the only viable state action that is in line with the Constitution.

Dr Sue-Mari Viljoen (Maass) studied at the University of Stellenbosch, obtained Bcomm (Law), LLB and LLD. The latter with the topic of 'Tenure Security in Urban Rental Housing' under the supervision of Prof AJ van der Walt at the South African Research Chair in Property Law (SARCPL). Also completed a Post-doc at SARCPL in 2011 and has been working as a Senior Lecturer at the University of South Africa since 2012. Current research interests include Property Law, Constitutional Property Law, Housing Law, Landlord-Tenant Law and Administrative Law.

Dr Rachael Walsh (Trinity College, Dublin)
rachael.walsh@tcd.ie

Context in Compensation Law: A Spectrum of Entitlement

The distinction between expropriation and regulation is not sharp in Irish law, but rather dealt with in terms of a spectrum of more - less invasive interferences with property rights, which are assessed by reference to an 'unjust attack' test. Similarly, compensation entitlements and values are not sharply delineated - compensation may potentially be payable at any point on the regulation/expropriation spectrum, depending on the seriousness of the impact. Mirroring this contextual approach, the value of compensation is also context-dependent: expropriation usually, but not always, requires compensation at market value.

The courts in a number of interesting cases have elaborated upon the circumstances in which less than market value compensation is required, and in which more than market value may be required. This jurisprudence is particularly interesting, given that the Irish constitution expressly requires that restrictions on property rights should be imposed in order to realise 'the principles of social justice'. Thus the question of redistribution through compensation decisions has an explicit textual basis in the constitutional property clause, which is invoked by the courts to justify sub-market value compensation. At the same time, the courts have in a number of cases required more than market value compensation, awarding 'make whole' compensation for expropriation.

Accordingly context, and with it contingency, is at the heart of Irish expropriation law, raising familiar challenges for expropriation law internationally concerning predictability and coherence, which the presentation considers.

Dr Rachael Walsh is Assistant Professor at the School of Law, Trinity College Dublin. Previously, she was a Lecturer in Law at King's College London. She researches property law and theory, constitutional law and environmental and planning law. Her most recent publications are 'The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context' (2013) 76 MLR 1010, with Dr Eloise Scotford and Rachael Walsh, 'The Evolving Relationship between Property and Participation in English Planning Law' in N Hopkins (ed), Modern Studies in Property Law Volume 7 (Oxford, Hart Publishing, 2013).

Dr Emma Waring (University of York)
emma.waring@york.ac.uk

Controlling Compulsory Purchase and the Role of Parliament

Written protection for property rights in England was only secured relatively recently with the incorporation of Article 1 of the First Protocol into domestic law via the Human Rights Act 1998. Despite this, property rights in England were not without protection before this point.

The proposed paper would outline a variety of different mechanisms that have historically been used in England to control the compulsory acquisition of property rights. These include

the Crown's use of its prerogative powers, the growth of statutory powers of compulsory acquisition from the time of Henry VIII's reign, the rapid expansion of private Acts of Parliament authorising specific projects such as canals and railways, through to the Victorian Lands Clauses Consolidation Acts in the 1840s.

All of these historic developments were framed and facilitated by the growing constitutional supremacy of Parliament. The doctrine of parliamentary sovereignty has led to a particular legal focus in England on the practicalities of compulsory acquisition, instead of the justifications for disturbing extant property rights. Constitutional law doctrines continue to shape the ambit and control of compulsory purchase powers in England today. Modern authorising statutes are broadly-worded and discretionary in their terms. This, coupled with judicial deference and the wide margin of appreciation allowed under Article 1 of the First Protocol, means that procedural protections have an important role to play in controlling the use of compulsory purchase powers in England.

Dr Waring is a Lecturer at the University of York having previously been a Fellow at St John's College, Cambridge. Her research interests lie in property law, land registration and art law. She is particularly interested in the constitutional protection of property rights and the compulsory acquisition of land. Her research focuses primarily on private-to-private takings in England and America; she is currently writing a monograph on this subject to be published by Hart Publishing in 2015. Dr Waring is also currently undertaking a funded scoping study at the Registers of Scotland looking at the impact of decision-making on the integrity of the registration process.

Dr Ting Xu (Queen's University, Belfast)

t.xu@qub.ac.uk

Expropriation Law: From National Laws to Global Guidelines?

Expropriation usually refers to the taking of property from its owner by the state or an authority for public use or interest. Yet, in the context of globalisation, expropriation is no longer an issue that may only be considered at the domestic level, as more non-state actors not only increasingly become the victims of expropriation, but also are exercising the power to expropriate property. The rise of 'global expropriation' involves different interests, tensions and conflicts whether at the local, regional or global levels. The lack of a level playing field between competing claimants calls for strengthening the role of the international community and involving non-state actors in setting out global standards and rules to redress those imbalances, taking into account marginalised groups such as minorities and indigenous peoples and their property rights. However, how could expropriation law be transformed from national laws to global standards, transcending national and regional differences? Employing the human rights approach has been such an endeavour. However, treating communal property rights as a fundamental human right is highly contentious in the drafting process of international human rights instruments. Central to the controversy is the differing ideological and political considerations and state interests. This paper examines the nature of global expropriation and the possibility, desirability, and limits of using soft law standards to protect the right to communal property. The emerging soft law protection of communal property rights gives rise to debates over the content and scope of property rights, state power regarding expropriation, the legitimacy of expropriation, the sources of state obligation towards property owners, compensation standards, and so on. The challenge ahead is to

leverage global guidance through soft law to increase pressure, legal, political, social and economic, that may shift imbalances in power in the international legal framework.

Ting Xu is Lecturer in Law at the School of Law, Queen's University, Belfast. She holds an LLB from Sun Yat-sen University and an LLM and PhD from the London School of Economics. Her main research interests are in the fields of law, governance and development; property law; property and human rights in a global context; socio-legal studies; political economy; and Chinese law. Her current research focuses on takings of property in a global context. Her first monograph entitled The Revival of Private Property and Its Limits in Post-Mao China has been published by Wildy, Simmonds and Hill Publishing.

The generous support of the following institutions is gratefully acknowledged:

- Groningen Centre for Law and Governance
- Koninklijk Nederlands Instituut, Rome
- Juta Law Publishers
- National Research Foundation, South Africa
- Stichting Rechtenalumni Nijmegen