

Some Aspects of Norwegian Expropriation - Input to Comparative Study of Chosen Expropriation Issues: Germany, Norway and Poland

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SUMMARY

An initiative has been taken including researchers in Poland, Germany and Norway for presenting and comparing different compulsory acquisition systems. Norwegian law allows expropriation for public and even for many private purposes. The author discuss if structures of property and even topography and climate could be variables of importance to the discussion if even private purposes should legitimate expropriation. Norway's use of expropriation is limited by a set of other principles, by procedural and political costs. Norwegian compensations are with a few exceptions based on economical loss as direct effect from the land acquisition: normalised marked value or capitalised loss of yield. Forms of profit share or other valuation principles are exceptional in law, not openly used by courts, but probably occur more frequently by negotiations.

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1. INTRODUCTION

This paper is a first Norwegian contribution of a triangular cooperation between Poland (University of Warnia and Mazurin in Olztyn), Germany (Leibniz Universität Hannover) and Norway (Norwegian University of Life Sciences) aiming for comparative studies between the different national set-ups of compulsory acquisition. The co-operation was inspired by The FIG/FAO International Seminar on Compulsory Purchase in Helsinki, Finland in September 2007, The FIG working week in Stockholm, Sweden in June 2008, and the FIG/FAO International Seminar on State and Public Land Management in Verona, Italy September 2008.

The three papers written to the FIG Congress have the same structure answering the same questions presented as headlines of the reports. In later comparative papers the structure and recommendations of FAO (FAO, 2008) should be included.

This summary of Norwegian situation is based on standard literature on expropriation procedures (Fleischer, 1980) (Lid 1977) and valuation principles (Stordrange and Lyngholt, 2000) (Pedersen, Sandvik and Skaaraas, 1990). It is also based on studies of numerous decisions of the Norwegian Supreme Court (app 5 cases every year). Those are not referred directly and not listed. Relevant Norwegian legislation is mentioned in the text.

The Norwegian legal description of compulsory acquisition (expropriation) follows from the Constitution of the Kingdom of Norway (Act of 17th May 1814) §105:

“If the State’s needs demands that somebody must leave his movable or immovable property for the public use he should have full compensation from the treasury”

The Constitution gives in an old fashioned way a similar definition of Compulsory acquisition as FAO (FAO, 2008, page 5):

“... the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society.”

Generally institutions of compulsory acquisition probably are a part of any property regime. Public or private demands of land can usually be purchased by ordinary sales in the market. If no agreement is achieved with the owner of the preferred land, the purchase agent can look for other sellers. But sometimes there occurs legitimate demand of specific spaces, and the negotiation arena will be skewed. The buyer needs that land. The seller knows and can press

prices to unacceptable levels (monopoly prize: (Official Swedish Report, 2008, page 153)), or delay important projects. Expropriation valuation process could then be described as a simulation of a negotiation where this arena is corrupted as mentioned. Such a definition is probably more relevant for the Norwegian situation.

2. THE INSTITUTION OF EXPROPRIATION IN LAW REGULATIONS

Positive law authorisation for expropriation is given in the Expropriation Act (23rd October 1959 – latest revision by Act of 19th June 2009 no 704). This act lists 55 different purposes that could legitimate expropriation. The Plan and Building Act (27nd June 2008 no 71) gives similar authorisations connected to most of the categories of detailed zone plans. There are even a number of authorisations given in other sector laws (Waterfall, Biodiversity, Railroad etc.).

The procedures that end up in an Expropriation Decision are described in the Expropriation Act. More often planning procedures of other laws replaces this. In such cases the qualitative standards of the Expropriation Act has to be fulfilled.

The Valuation Court proceedings are based on Act of Courts (13th August 1915 no 5) and Act of Valuation Court Proceedings (1st May 1917 no 1). The valuation principles are based on standards of Expropriation Compensation Act of (6th April 1984).

Purchase process (documents, transfer, subdivision, registration etc) follows the same rules as normal sales of land. Prepossession process (land is taken into possession before the compensation process is finalised) follow special rules given in bylaws.

3. THE PUBLIC PURPOSE

The Constitution of the Kingdom of Norway (17th of May 1814) §105 authorise expropriation with “full compensation” for “public use”. Still law includes other public bodies like State agencies and municipalities. Public purpose may concern both direct and indirect effects of the transaction. Examples of direct effects of public interest are public infrastructure, schools, hospitals or spaces for other public institutions. Indirect or secondary public purpose may occur when private parties directly profit from purchase for private housing development, industries etc. Indirectly this could benefit the public fulfilling of housing policies, labour policies, tax income etc. Norwegian law accepts such indirect public interest. This category of expropriations has probably become more frequently performed since the 1990ties both because private land developers has taken over much of Norway’s planning and building activities, privatization of former public functions and a tendency of public bodies acting as or in cooperation with private enterprises or organisations. In all the situations mentioned a public body is the formal expropriator (buyer) of the land, but this will be transferred on to private developers immediately after the process (paying the compensation and process costs).

In some few situations private parties are authorised to be expropriators. Expropriation is then accepted directly by the Court when the private expropriator's benefit is proven clearly larger than the landowners disadvantages. In the past there were a number of acts opening for such private expropriation. Until 1959 we even had a special act of private expropriation by ski-clubs for construction of ski-jumping hills (after all we are Norwegians). Today landowners can expropriate necessary rights to get road access from their plot over neighbours' land into public roads, to solve different water problems on their land etc. If there is any public interest in some of these acquisitions at all, it's probably on the very general level: It's in the nation's interest that most plots of land can be used. Grim neighbours should have limited possibility to block positive use of other people's land or positive joint use.

There is a relationship to other institutions like land consolidation with compulsory land exchange or organisation of joint recourse utilisation. Zone planning, protection of cultural heritage or nature conservation etc may impose restrictions that reduce the owner's land use potential substantially without any compensation (the most strict nature conservation regulations are although compensated in accordance with rules of expropriation). Even if the effects for the landowner could be severe, these institutions are not considered expropriation because the title of the land is not transferred.

So far Norwegian law has not been challenged in any court cases because of its somewhat wide interpretation of "Public interest". Norway has signed both the European Convention on Human Rights and Fundamental Freedoms and The Istanbul Declaration agreements, and by this not only accepted them as Norwegian law, but even superior to domestic legislation.

A demand for expropriation even for private purposes could derive from property structures. Norway has a high proportion of private ownership. 57% of the cultivated and forested areas (Korsvolla, Sevatal, Steinsholt, 2001, page 49) are held in individual private ownership. A large proportion of the other 43% are held in other forms of private (often collective) ownership. This means that most relevant spaces for development are privately owned. Huge tracts of mountains are in State ownership. Even in those areas locals often have private user rights. Except hydroelectric constructions there are few space-demanding developments in the mountains.

Often acquisition is made complicated by complex structures of small and badly shaped plots, confusing structures of usufruct rights, inaccurate registers and diverse owner interests (more than half of the owners of cultivated and forest land are absentees). In one example acquisition (rights to build a footpath influencing less than 1 hectare) was conducted on public calling because the ownership situation was chaotic It included probably 180-250 persons. In another acquisition case in the 1990ties the formal titleholder was once employed on the Titanic and disappeared with the ship in 1912. No heirs were identified. Compensation was disposed in a bank if some heir should turn up later (you never know with sailors...).

Norway's rough topography (haphazard areas, steep hills, and narrow valleys), climate and even spatial planning traditions (protecting major areas and small zones for construction) could add to few second options for locating even private projects.

4. THE PROCEDURES OF EXPROPRIATION

Norwegian law limits the use of expropriation to a fixed number of purposes and plan categories (the Principle of Positive Law Permit). The consequences of the project must be documented (the Principle of Impact Assessment). Consequences for the affected right holders must be specifically investigated and documented. As part of this, both public hearings and specific contact with affected right holders must be carried out (the Principle of Transparency). Agreement possibilities must have been tried out (the Principle of Negotiation First). Before expropriation starts, the right holder normally should have been contacted three times: in connection with the public hearing of the plan or impact assessment, specific hearing about the acquisition, and during the negotiation effort. The provision of Expropriation is given by a specific formal decision after a weighing of public benefit and private problems and losses (the Principle of Proportionality) and a discussion of other options than acquisition (the Principle of Necessity). Landowner can complain on more of these elements. The expropriation court which main task is to calculate compensations should even check up if the provided steps have been carried out and if the qualitative standards of law have been fulfilled (the Legality Test). If not satisfied, the process will be stopped at this level (in worst case "back to start").

Expropriation is not commonly used in Norway. The Norwegian Public Roads Administration resolves app 95% of their purchase cases by voluntary agreements (Norwegian Road Authority, 1991). Norwegian municipalities have a wide range of expropriation possibilities, but hardly use them (Steinsholt, 2008). Agreements dominate. Many agreements are although signed under a (not outspoken) threat of expropriation.

Economically expropriation is an expensive process. In addition to the workload connected to the processes mentioned, expensive lawyers and other experts will be hired into the compensation court process.

Politically expropriation is considered controversial. In particular local politicians prefer to try all other possibilities first. Some would rather stop any project than implement it by expropriation. Some parties even have this as a principle written into their local party programmes.

The procedure of obligatory procedures before decision of expropriation is briefly like this: Project plan or impact assessment – plan/report hearing – negotiations (fails) – hearing related to the acquisition – Expropriation Decision. The Plan and the Expropriation Decision could be complained to higher ranked authority – and even to courts.

It is to be noted that most expropriators use a lot of time, effort and human skills and decency to get to a voluntary agreement. Even if the negotiation fails in the first phase the efforts will normally go on until the Valuation Court has started the proceedings. Even during the proceedings agreement quite often succeeds.

The case is now brought to the Valuation Court. The expropriator has the duty to bring all information needed before the Court. The Court task is to calculate compensations in accordance with the Expropriation Compensation Law. The procedures follow normal court standards with lawyers on both sides. The court's decision (the compensations and the interpretation of standards) can be appealed to higher courts.

When all appeal possibilities are ended the expropriator can acquire the property after paying the compensation sum and all procedural costs included.

5. THE RULES OF JUST/FULL/FAIR COMPENSATION

In projects of some size larger group of land user interests may be affected. Expropriation is still connected to compulsory transfer or exclusion of ownership and servitudes. Servitudes don't have to be formalized or registered to be protected. Land use or land interests based on other types of access are not protected by law. This means that users of open access institutions (free no-motorised roaming in outfields, free angling in the sea, etc.) will have no compensation. Even tourism businesses' uses of this open access to nearby areas (considerable losses when developed) are not protected. Most privileges or concessions or predictions will not be protected. Not even if economical losses are severe.

A kind of exception from this is (Sami minority) reindeer herding. Nomadic or semi-nomadic reindeer husbandry is done within large grazing districts. Within the district grazing is free for customary users even on private land. These herders or district organisations are parties in expropriation cases and compensated rather generously.

The Principle of Direct Effect means that it is the economical effect of land loss that's in focus. This excludes claims from neighbours (don't lose land). If traffic is removed from a shops front door to other routes as part of the project, there cannot be any compensation for the loss of customers (even if land is taken from the owner and the losses are large).

The Principle of Economical Loss means that the owner should be compensated the loss in economical holding: what the owner could get for the property in the marked (normalised marked value) or the capitalized loss of future periodical income. This principle excludes personal affection value: Affections for the property that the general marked won't appreciate. Reestablishment costs could generally (exception mentioned below) only be covered if lower than marked value or capitalized loss value.

The Principle of Reduced Damage means that economical loss should considered after the owner (hypothetically) has done sensible adjustments on the remaining property to reduce the losses. This principle is only relevant if only a part of a property is acquired.

Tree important exceptions from the Principle of Economical Loss exist: If normalised marked value is not enough to buy a new home of similar function for the owner he should be compensated the reestablishment cost. The owner's own use of vacation home, his own business constructions (probably limited to farm houses) and constructions of non-profit organisations (sport-cubs etc) are protected in the same way. This form of reestablishment cost compensation includes costs of transportation of goods and other normal adjustment costs of reestablishment (even curtain size adjustments in homes has been discussed). Standardised marked value does not include such costs. Reestablishment cost compensation is based on prize of another property of similar functions as the property acquired because the market value of the latter property is lower. Transportation and adjustment costs are the added. Reestablishment costs will then be considerable higher than normalised marked value. Secondly if someone expropriates a right to use an existing construction (private road, water

pipeline etc.) and there is hardly any loss for the owners, the expropriator should pay a proportion of the construction cost (as if constructed today. Thirdly we have some few examples of kind of profit-sharing compensations: Waterfall compensation and dependent on circumstances: gravel, soil and timber etc.

There are no standardised methods for the actual valuation. The Courts can decide what calculations or models to use. Due to this, compensations seem to differ in sometimes unpredictable ways. During negotiations larger State agencies like the Road Authority have quite solid prize and negotiation policies (in accordance with law standards) and methodologies, while other actors like municipalities acts more freely (Steinsholt 08).

Norwegian levels of compensation are fluctuating but in general not low. Still some landowners complain. The principle of economical loss sometimes is felt as an abuse to landowner's feelings.

The government of Sweden has recently proposed (Official Swedish Report, 2008) a quite radical change in Swedish legislation that probably will lead to considerable raise in compensations. Among other changes they intend more or less to leave the normalized marked prize as sufficient level for full or fair compensation. Even forms of profit sharing are proposed.

Compensation based on profit sharing has been raised in one court case in Norway. The claim was overruled by the Principle of Economical Loss. With the recently re-elected government coalition (landowners and socialists neutralizing each other) there will probably be no changes in the next four years to come.

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(Stordrange and Lyngholt, 2000),

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