ANTONIO AZUELA
Editor

EMINENT DOMAIN *and* social conflict

in five Latin American metropolitan areas

Eminent Domain and Social Conflict in Five Latin American Metropolitan Areas

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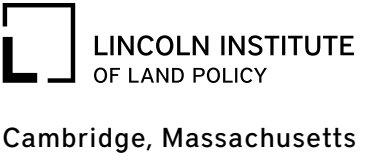

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The book passed through the rigorous editorial process of the Institute of Social Research (*Instituto de Investigaciones Sociales*) of the UNAM. Subsequently, anonymous reviewers prompted us to examine crucial issues in the text. The publications department, coordinated by Berenise Hernández Alanís, provided the highest quality work. Those directly responsible include Lili Buj Niles, for her skilful editing; Cynthia Trigos Suzán, for the cover

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Antonio Azuela

Foreword

In 2006, Antonio Azuela, Martim Smolka, and I had several conversations about the application of eminent domain in developing countries, and particularly in Latin America. Our brief review of the literature found very little research, or even systematic information, on the topic. This finding, and the view that the subject was important, led us to propose public land acquisition as a theme for the Fourth International Urban Research Symposium sponsored by the World Bank that took place in May, 2007. Antonio agreed to prepare a paper on this topic for the Symposium with the support of the Lincoln Institute of Land Policy, and the result, with coauthor Carlos Herrera, was "Policies and Laws for the Expropriation of Land for Urban and Infrastructure Projects: An Exploration of World Trends."

The paper assembled available information and identified more questions than answers. There was very little data on the extent of use of eminent domain because countries that applied it as a policy tool did not produce systematic information about its use. Moreover, existing academic research focused on legal issues and ignored other dimensions of this government practice. This original paper became a catalyst for much additional research on expropriation both in Latin America and in other regions. Antonio became intrigued with the subject and has been a major contributor both as a researcher and as a promoter of work on this topic, often with Lincoln Institute support. This book assembles several case studies of the application of eminent domain in Latin America and is likely to be the definitive volume on this topic for this decade. At the same time, the chapters in this

volume indicate that the issues surrounding eminent domain are not completely settled in any of the countries reported on here, and that changes are likely to continue in the coming years.

The papers presented use a common definition of expropriation and address the two main questions posed by expropriation: under what circumstances is the public taking of land justified; and how is the amount of compensation determined? The case studies reveal different answers to these questions across countries. In particular, there is often much uncertainty about how to value land that is expropriated. In some countries, judges have set compensation amounts well in excess of any plausible market prices—values so high that some municipalities have essentially stopped using expropriation because they are unable to predict with any confidence what the compensation amounts will be. The reasons for this vary, ranging from attempts on the part of judges to ensure that expropriation will not be abused, to a lack of knowledge of judges about property markets and property values.

The justification for the public taking of land also varies across countries, but the major purposes include facilitating the provision of public goods, such as roads; distributing or re-distributing urban benefits, such as affordable lots or housing; promoting economic development, such as industrial parks; and regularizing ownership of informal settlements. While the first purpose is perhaps the most ubiquitous and has the most legitimacy, the cases reveal a skepticism across countries about expropriation for grand infrastructure projects, such as freeways and airports.

Part of the reason for the opposition to grand projects identified in these cases is that they often involve large areas and displace large numbers of households and firms. Opposition to large projects that displace many households and related activities is very common across all countries. Newspapers frequently carry stories about civil disturbances in China related to land acquisition for urban expansion. Resettlement related to large dams has produced long-standing political and social controversies in many countries. And there is still much discontent among those

displaced by the construction of Narita Airport near Tokyo, for example.

The evolving nature of expropriation and its application revealed in these case studies is also a consistent theme. Some Latin American countries are expanding the definition of the social function of property, and this concept has implications for expropriation. For example, an owner's insufficient attention to the social function of property could become a basis for expropriation in some countries. In the United States, the recent Supreme Court ruling, *Kelo v. New London*, clarified that property could be taken from a private owner and given to another private owner to promote economic development. This has led to several states placing strict limits on such conversion. The continuing evolution of the application and justification for expropriation suggests that scholars and researchers in this area will continue to be occupied documenting and debating changing practice in this area for some time to come.

Gregory K. Ingram
President
Lincoln Institute of Land Policy

Introduction

Eminent Domain, Property, and the State in Latin American Cities

Antonio Azuela

Most social science books are written to engage the readers in something that can be defined as a problem—preferably a "big" problem. Others are written to instill a curiosity in the reader for something that cannot be completely understood. This book has some elements of both. In recent years, ample reasons for concern about eminent domain have emerged in the public arena, in relation to a number of Latin American cities: in the Mexican capital, two cases resulted in political conflicts, so great that the mayor was removed from office in what was the first political crisis of our post-authoritarian era. In Brazil, the Constitution has been reformed time and again, to grant local governments more time to pay extremely large debts related to eminent domain compensations that were not covered by municipal budgets; a high court is considering whether these reforms are constitutional. In the Province of Buenos Aires, the legislature repeatedly confiscated land, located in informal settlements to protect its population from evictions initiated by the landowners, in a cycle that seems to never end. In Quito, the owners of rural lands expropriated by eminent domain, in order to create a metropolitan park managed to influence the Inter-American Court of Human Rights, which without even questioning whether the right to property is a fundamental human right or not, ordered

compensation payment at values that are clearly speculative and contrary to the common interest of the city.

Of course, the interpretation of these facts varies depending on the observer's opinion. For those who are very concerned about upholding property rights, this represents no more than another manifestation of the weakness of the rule of law in our societies; for those who are concerned about the need to promote development projects, these are unequivocal indications of a weakened state. Others will be concerned about the lack of mechanisms to ensure "social participation" in eminent domain processes. All parties are concerned about the same issue, for different reasons.

This book assembles results from a series of research projects that attempt to respond to both the concerns and the ambiguities, triggered by the application of eminent domain in Latin American cities. These research projects have been supported by UNAM's PAPIIT[1] Program and the Lincoln Institute of Land Policy, and in recent years have been discussed within the International Sociological Association's International Research Group on Law and Urban Space (IRGLUS).[2] Far from presenting a unified position, the chapters in this book offer different perspectives on the matter, while they also attempt to respond to a set of questions that form part of a general research agenda. The following pages show the components and significance of this agenda, as well as the consequences that our research has revealed.

The importance of eminent domain for developing any city is indisputable. Almost a century ago, a pioneer of urban sociology, Maurice Halbwachs (1928), found it apposite to dedicate an entire chapter exclusively to eminent domain, in his study

[1] Project Number IN303910.

[2] Specifically, there were discussion sessions celebrated in the congress of the Research Committee on Sociology of Law celebrated in Berlin (2008), Milan (2009), and Oñati (2010).

documenting the transformation of Paris during the second half of the nineteenth century. This is because almost by definition, the urban development process constantly reproduces "creative destruction," implying a recurring need to suppress property rights in order to open new urban spaces, even where others already existed. Today, the sensitivity imposed by "good governance" practices tends to view the application of eminent domain with suspicion. And it is true that there is always an unpleasant side to this; some of the stakeholders, as they are now referred to, will be negatively affected. However to date, we do not know of any constitutional regime that has renounced the power of eminent domain. Similarly, it is difficult to imagine cities that remain unchanged indefinitely, without it appearing to embody an authoritarian nightmare. There are, of course, areas with historic monuments that we attempt to preserve without alterations, but even in these contexts, it is sometimes necessary to resort to eminent domain for this purpose.

Outside the urban context, eminent domain is an institution that enables us to simultaneously respect property rights and government. If property rights represent a fundamental aspect of the political covenant of the modern state, eminent domain has always existed as an exception to the rule or perhaps even a guarantee of the state itself.

When we consider the manifestation of eminent domain in the real world, state and property rights appear not so much as general formulations but as social facts, undergoing a process where owners and government representatives interact in a tense environment, resulting in their initial positions being modified during each stage of the eminent domain process: as one owner is substituted by another (or manages to keep his property), the state exerts its power (or refrains from exerting it). With eminent domain, both property rights and the role of the state are re-established.

This very ambivalence is what makes the study of eminent domain interesting in relation to two, seemingly very different,

reasons: first, the formation of the state from a sociological perspective, and second, property as a constitutional issue. The first of these issues has regained strength in a debate that is difficult to classify as part of any discipline, but to all effects combines a rejection of any "essentialist" definition (of the state as a fixed object, as "something that is tangible"), with an interest in how the daily practices of a group of localized actors are essential for causing the "state effect."[3] In the Latin American context, where the type of state being formed still represents an open question, the way the power of eminent domain is implemented reveals the type of government that is becoming established and how order is imposed. This book aims to deal with this aspect and elicit curiosity on the part of social scientists, in terms of the role played by eminent domain practices in the formation of the state.

Likewise, the study of eminent domain is particularly revealing concerning the legal status of property rights (considering their many diverse manifestations) in the Latin American constitutional framework. A particularly unsettling finding of our research indicates that property rights are *not* an important subject on the agenda of constitutional scholars, specifically within what is known as neoconstitutionalism, comprising the trend of legal analysis that introduces general discussions about political systems in the region. It is commonly known that these debates are dominated by questions about democracy and state organization, among others, whereas questions regarding property rights have been relegated to those interested in public policy, increasingly further removed from the constitutional agenda. This book aims to stimulate the constitutionalists' interest concerning development in the context of eminent domain. Without intending

[3] I refer to the discussion initiated by Philip Abrams at the end of the 1970s (Abrams 1977), recovered recently by authors such as Timothy Mitchell (1999), Jean-Francois Bayart (1989), Akhil Gupta (1995), or James Ferguson (1994), to mention only a few. For Latin America, see Agudo Sanchíz and Estrada Saavedra (2011), Joseph and Nugent (1994), and Mallon (1995).

to instill panic, by predicting an institutional crisis with catastrophic consequences, the studies collected in this book underline what should be a cause for concern for constitutional thinkers, because they touch on the social underpinnings of the state, or the *nomos of the earth* as defined by Carl Schmitt (2003). Many of the conflicts described in this book pose difficult questions for the constitutional courts, on which the constitutionalists have had very little or nothing to say until now.

The studies included here discuss two issues. The first asks: how is eminent domain applied in the context of urban policy? What types of conflicts does this give rise to? It attempts to define *what is at stake* when a property is taken by eminent domain. The second section considers: how are these conflicts processed once they enter the legal ambit? What happens when courts become involved in eminent domain conflicts?

When we question traditional public law doctrine regarding what is at stake in eminent domain, the answer directs us to a balance between the individual interests and those of the community. But a more detailed analysis of eminent domain practice reveals that what is at stake does not always conform to this formula. Although sometimes the property owner is the victim who sacrifices to predominant community interest, in other circumstances the owner benefits in a way that triggers public scandal. This subject is as ancient as the studies of Hallwachs (2008 [1928]) and the etchings of Daumier, so well employed in "critical" studies of law. One of these etchings illustrates an individual who meets another on the street and asks why he is smiling so broadly. The other replies: "I just collected my compensation for the property they took by eminent domain!" No doubt, we are observing the common spectacle of corruption, but it also reveals a fundamental question: the ambivalence of property. This represents only one of the many forms of this ambivalence, as depicted throughout this chapter.

About What Is at Stake . . .

Sooner or later, the study of eminent domain forces us to contemplate legal issues. However it is important to attempt to understand what is at stake *before* we transfer our focus to the legal context. In this section, we intend to provide, however briefly, a "pre-legal" definition (à la André-Jean Arnaud),[4] of the issues raised by eminent domain. Some issues are revealed because they burst into the public domain; others are important, precisely because they have not been assigned sufficient recognition in the public debate. Although we are frequently dealing with issues that have a normative implication (therefore eliciting a legal response), we are interested in analyzing these, as matters to be tackled by society as a whole and that would in principle interest us all.

In simple terms, there appear to be two important and very simple problems arising from eminent domain: how to compensate and how to justify taking a property without the owner's consent. These certainly constitute the basic components of any eminent domain system, at least from the Middle Ages onwards.[5] We initiate with a simple and even childish example: leaving aside the symbolic value of things, what is at stake in the process of eminent domain primarily involves money.[6]

In fact, the first conclusion from our research indicates that in Latin America, compensation (both the amount to be paid

[4] Through the concept of "avant-dire le droit," the author introduces the problem of what comes before or what we might term the precursor, to the law-making procedure (Arnaud 1981).

[5] For a classic on this subject, see Gierke (1995 [1881]). A more accessible historic introduction can be found in Harouel (2000).

[6] Applying quotation marks to the symbolic aspect of this issue is, without doubt, an insult to the anthropological tradition, particularly as during the past fifteen years, it has made very important contributions to the study of property. Even so, there are times when social life is effectively governed by the logic of the "universal equivalent" and what people want is to be paid in "real value."

and the terms of payment) represents the greatest source of conflict caused by eminent domain. This does not imply that this is the only important issue or the sole source of conflict; in the following we present others. However without doubt, this is the the most common.

In the following, I describe the way the legal system addresses this problem. Meanwhile, three issues are discussed. First, is the high risk of treating different categories of land owners unequally, a risk that has a structural dimension: the weakest owners will be the most affected because they need money, which pressures them to accept low compensation, either because they do not understand their rights and/or because they do not have access to specialized legal services. This risk is eloquently illustrated by the case of the expropriations for Quito's metropolitan park, described by Maria Mercedes Maldonado and Diego Isaías Peña in chapter seven of this book, where owners with different resources were affected very differently.

Second, there is considerable doubt concerning how to assess the amount of money to be paid for an urban parcel in an eminent domain case. The aspect referred to as the "economic content of property" (i.e., the value of an asset removed by eminent domain) is unknown until the expropriation takes place; in this sense, it is not an exaggeration to say that the eminent domain process "defines" property as a right. When property removed by eminent domain is valued only in terms of a commodity (i.e., ignoring its symbolic value), the owner only recognizes the extent of what he owns, once the compensation amount has been established.

Finally, the problem of compensation is not presented in the same way in all countries. At one extreme, we have the authoritarian tradition of Brazil and Mexico, both extraordinarily erratic throughout the twentieth century, in terms of determining amount of compensation, but also concerning the time it took to pay. During the long period after the Mexican Revolution, this did not represent a big problem, as part of the legitimacy of the

regime derived from the agrarian reform, which was achieved (precisely), by eminent domain. At the other extreme, there is the case of Colombia, whose compensation levels appear more stable and, above all, are paid without major delay.

The second aspect of eminent domain is what Mexican jurisprudence calls the "public interest cause," defined here as the *goal* pursued by eminent domain. Generally speaking, this concerns how to justify the negation of property. We need to determine for what specific goals the power of eminent domain is applied. What are the goals that justify its legitimacy?

In the urban context, the goals of eminent domain can be divided into four categories: the creation of public benefit, the redistribution of urban wealth, the promotion of economic development, and the regularization of land ownership. The creation of public benefit is the most widely accepted justification for eminent domain. We are referring not only to public benefit, in "solely" economic terms, but principally to any physical structure that is available for public use. Nearly all cities in the world remove land by eminent domain, in order to open roads, create parks, and implement infrastructure networks, etc. The list may include hospital and educational facilities, and also assets that are less public (but of "social interest") such as housing estates. This takes place in all Latin American cities, with very few exceptions.[7]

In spite of this, the legitimacy of public works may vary depending on the context. A case that was attributed notable legitimacy is the transportation system known as "Transmilenio" in Bogota, which has become symbolic of the value of public space and collective benefit, associated with a general recovery project in the city, for which a succession of municipal governments have been able to mobilize support from a number of

[7] During our research, it became apparent that Guatemala represents an important exception: here eminent domain is not an instrument applied by local governments. How are public needs as elementary as streets provided for? This may represent a pertinent question for future research.

social groups. In this context, expropriation of land to expand the network of this transportation system has been credited with a high degree of legitimacy. Of the five cases covered in this book, the one from Bogota shows greatest legitimacy in terms of eminent domain application, which should send a message to those who associate eminent domain with leftist governments.

The same cannot be said of the toll system of arterial roads promoted by the military government in Argentina at the end of the 1970s for the Buenos Aires Metropolitan Region, which quickly became a financial fiasco, resulting in the project being suspended, leaving in its wake a large number of litigations over land that had originally been included in the project but not expropriated, as explained by Juan Duarte, Ángela Oyhandy, and Melinda Maldonado in chapters one and two.

However, not only dictatorships have used the power of eminent domain erratically. In chapter three, Emilio Haddad and Cacilda Lopes dos Santos sharply criticize the use of eminent domain, independent of the urban planning framework in São Paulo. The reason is that all three levels of government have currently initiated infrastructure projects requiring land expropriations, but these projects do not appear in their respective urban master plans. The same thing occurs in the Supervía Poniente project in Mexico City, a toll highway that triggered an intense social protest in 2010 and 2011. This represents a problem from the point of view of the definition of public interest. Current laws related to planning tend to open a space for public participation as part of the planning processes. In this context, it is possible to initiate a collective discussion concerning the image desired for the city. However, plans approved in this way usually only address land use rules, rather than the construction of the road network. Therefore, governments are able to initiate large infrastructure projects without the necessary consultations for their legalization, as public opinion only refers to land use.

This means that not all public works, subject to eminent domain procedures, have the same degree of legitimacy. In fact,

large infrastructure projects are triggering more and more social opposition.[8] The most relevant example in the first decade of this century was the cancellation of a project to build a new airport in Mexico City, which depended on the expropriation of five thousand hectares from several agricultural communities, including San Salvador Atenco, which is famous today precisely because it successfully opposed the project. The protest that frustrated the most important infrastructure project of Vicente Fox's government had very particular characteristics too lengthy to describe here.[9] However, the case should not be interpreted as an anomaly, but rather as a sign of the social upheaval that large infrastructure projects can provoke in many parts of the world.

There is no doubt that environmental concerns have taken hold in many Latin American countries and that the opposition to large infrastructure projects is one of the most visible manifestations, often resulting in a positive outcome. It is also true that most of the social protests of this type occur in rural environments and that the projects that generate the greatest opposition are dams.[10] However, despite their distance from urban centers, cities usually benefit most from these infrastructure projects.[11] At stake here is no less than the model of natural resource required to sustain urban life, as we know it.

In summary, although it is true that within the urban centers eminent domain as a means of creating public benefit may procure great legitimacy, this is not so true on a greater scale, where the scope of state intervention and its effect on the local communities generates one of the greatest conflictive issues in modern society.

[8] One example of Cavaillé (2009) illustrates the way social research adopts the cause of property owners in these types of expropriations.

[9] For an interpretation consult Azuela (2011).

[10] Cernea and McDowell, eds. (2000); Cernea (2003).

[11] However, significantly a large portion of the hydraulic infrastructure is allocated to rural irrigation, which tends to be the principal consumer of water, far exceeding urban center requirements.

A second category of expropriations are implemented with patently redistributive aims with two manifestations in the urban environment: those that affect land areas on the urban periphery in order to create new urban areas and provide plots of land to people with limited resources; and the most dramatic, which consist of expropriating apartment buildings in order to transfer them to tenants. For many, this is an expression of something from the past, associated with the terms "populism" and "demagogy." As explained in chapter eight, there was a time in post-revolutionary Mexico, in the mid 1940s, when land was expropriated along the capital's periphery in order to provide subdivisions to those who had no other housing option. Despite the fact that these "working class colonies" (*colonias proletarias*) resulted in the establishment of more than one hundred neighborhoods, these were suspended because among other reasons, the Supreme Court determined that the use of eminent domain for this purpose was unconstitutional. However, in spite of the legal argument, it is surprising to note that although these "justice policy" expropriations were banned, no problem ever emerged in relation to taking land to build large housing estates. It is as if the active intervention of the construction industry and real estate developers was sufficient to negate the use of eminent domain as a redistributive element, when the goal is not to create a public benefit but to benefit a social group that would have very few opportunities in terms of accessing housing in the open market.

The most conspicuous case of justice policy expropriations by applying eminent domain in a Latin American urban context is currently taking place in Venezuela. An article published separately[12] describes the process inherent in the Special Urban Land Act of 2009 (*Ley Especial de Tierras Urbanas*) and the expropriation of apartment buildings enacted by the metropolitan mayor

[12] Azuela (2011). Cultura jurídica y propiedad urbana en Venezuela: Caracas y las expropiaciones de la era del chavismo entre 2000 y 2009. *Politeia* 46(34), first semester.

of Caracas, in 2008. The interesting aspect related to this case for the purpose of this study is to observe the impact of these expropriations on Venezuelan society. In an environment of extreme political polarization, when what seemed to be at stake represented none other than the institution of private property, none of the parties in political opposition to Chavez acted in its defense. On one side, the subject was systematically avoided by the political opposition that won the metropolitan mayoralty at the end of 2009; on the other, a report published by an influential human rights NGO (based in New York) focused on labor rights, subtly ignoring the expropriations, which had been one of the most controversial subjects in Venezuelan public life. It seems that the subject is too controversial to form an explicit part of the political agenda.

The fact is that when discussing the Venezuelan case, the subject of Hugo Chavez immediately surfaces, avoiding any mention of the matter of an urban redistribution. The personalization of this subject eliminates the opportunity to discuss the viability of redistributive land policies and to address the issue of property rights and its legal implications.

More important than the differences between cases and historical moments is the use of eminent domain to distribute land among the poor, indicating the social position of the "popular class" or the masses in the urban context. If "the people" can be identified as a clear and perfectly manageable constitutional category, representing the source of a country's sovereignty, the real people of Latin American cities (those who live in places that seem horrendous even to some "progressive" groups) form a social universe, whose relationship with the rest of society has always been problematic. A specific aspect of this relationship involves access to the land where people live. It is obvious that finding a place to live by direct occupation or ("illegal")[13] purchase of a lot

[13] Quotation marks indicate that in many cases, it is possible to argue that the illegal act is committed by the seller, rather than the buyer of urban land, who is attempting to satisfy a basic need.

is not the same as receiving it formally from a state agency. In all cases, access to land implies a relationship with the government; be it as part of an eradication policy, as beneficiary of a grant, or as a landowner who requests that the government protect rights accredited to him in the marketplace.

The Latin American elite have always had problems recognizing a specific place in society for low-income urban groups and have generally preferred to promote social "redemption" policies that aim to convert low-income people into exemplary citizens. Nowadays, the "citizenship building" discourse forms part of the agenda of the best-intentioned NGOs, with the same implications, and any mention of the use of eminent domain for social redistribution has become politically incorrect. Overall, this is still an apposite subject, not only in the activism of Hugo Chavez, but also as shown in chapter six, in the recent legislation in Ecuador, where land is expropriated for housing cooperatives.[14]

The third category deals with expropriations for the purpose of economic development. This is not exclusively or predominantly aimed at the creation of public assets, but rather to create the conditions for promoting economic activities that benefit a city or region. For example, this is the case for industrial parks. Usually part of the land expropriated for this purpose goes to a third party and not to the government. In 2005, the Supreme Court of the United States ruled on the celebrated *Kelo v. New London* case, adjudicating that land expropriation by eminent domain was not unconstitutional, provided government legislation approved it, even though some of the land may end up in private hands—certainly a remarkable act of deference toward an elected authority. The reaction created by this opinion mobilized forces from the left and the right, resulting in measures being taken

[14] The subject of low-income classes ("*lo popular*") is gaining strength in Latin American sociological literature, precisely focusing on neighborhoods where the most vulnerable groups reside. For the urban theme, see Merklen (2010).

against these types of expropriations in more than twenty U.S. states (Jacobs 2010).

The purpose of this brief reference to *Kelo* is to clarify that the problem tackled in this case does not appear in eminent domain cases in Latin America. At least in the five cases covered in this book, this issue does not seem to cause any apprehension, allowing us to discard any suggestion of an "Americanization" of the law in our region.[15] Even without considering legal aspects, it should be emphasized that the problems of public spaces in relation to eminent domain are defined by processes specific to each society and even each city.

This does not imply that cases do not manifest common elements. Similar issues are found in a variety of countries, although they may be presented differently. Besides the issue of the "populace," which we already mentioned, there is a fourth reason for applying eminent domain: in order to regularize land ownership. One of the most interesting facts to emerge from a straight-forward comparison between our five cases is a marked difference concerning the application of eminent domain to regularize ownership on the part of those people who live in so-called "irregular human settlements." In professional and academic circles, dealing with the urban context, it is generally agreed that some type of tenure regularization is necessary, however the main debate centers on whether this should be resolved by issuing individual property titles or seeking some other alternative. Discussion does not appear to focus on whether eminent domain is an appropriate mechanism for implementing this. As a starting point, it is interesting to observe the contrast between Mexico, which has used eminent domain for decades and Colombia, which has hardly used it at all.

Likewise, it is interesting to observe that eminent domain was used for this purpose in the Province of Buenos Aires, following

[15] During research, the only relevant example we discovered in Latin America and the Caribbean representing an exception to this statement is Puerto Rico (possibly not a coincidence). See Morales-Cruz (2007).

the return to democracy in the 1980s. In chapter one, Juan Duarte and Angela Oyhandy describe the sociopolitical conditions in which these expropriations took place. The fact that, under the Constitution in Argentina decrees that expropriation generally has to be enacted by statute enables political parties to apply legislative process for their implementation. As a result, hundreds of expropriations were ordered, in order to deter legal procedures, filed by owners of illegally settled properties. This is a very interesting configuration, not evident in other Latin American cities, where elected officials protect the tenancy of land occupied by low-income populations, at least potentially creating a conflict with the judicial branch, which principally tends to protect the property owner.

Although the political and legal context of urban management in Argentina may generally appear very different from that of Mexico, these are the only two countries where eminent domain is used to regularize land ownership. In the case of Mexico, the popularized use of eminent domain to produce land titles in the 1970s was regarded as something "natural," because eminent domain was a fundamental instrument of the post-revolutionary period. Similarly, in the context of a strong urban development process, the granting of titles was viewed as an act of social justice,[16] and therefore nobody challenged the use of eminent domain for this purpose. Importantly, in order to initiate an expropriation process, it is obligatory for the landowner to be present. Regardless of his legal status (he may either appear as the person responsible for the informal settlement or as its victim), the essential requirement is that he should represent one of the parties involved in the process of creating a land title. Rather than negating property ownership, the expropriation process

[16] The Mexican presidents (including Vicente Fox) were accustomed to presiding over large masses and handing over property titles in a folder engraved with the national emblem and the name of the president himself. The charity character of the ritual could not have been more evident.

revives this and makes it crucial. Therefore, eminent domain is used by the state as a mechanism for mediation between the original owner and the new land occupants. This subject is reconsidered in the following.

For all intentions, this remains an open question. As explained by Haddad and Lopes dos Santos in chapter three, eminent domain has recently been applied in São Paulo, as part of urban development by the federal government. Obviously, the implementation of these programs will bring to light the balance that can be achieved between the interests of the original owner and neighborhood occupants.

Apart from two classic problems associated with eminent domain (the reasons for its justification and conditions of compensation), our research has revealed another problem worthy of mention. This relates to the fact that owners affected by the apparently noble purposes of eminent domain do not always consist of landlords or speculators. Maldonado indicates that in Bogota, urban renewal programs, affected owners may be longtime residents, who in some cases have businesses that depend on local customers. In these circumstances, it is not sufficient to simply compensate the losses suffered by land expropriation, even with relatively generous assessments of commercial value. Even if the destruction of the social fabric caused by these projects is not taken into account when calculating compensation representing a factor that is real, but difficult to assess, it is obvious that some owners are much more vulnerable than others to expropriation. And, without becoming sentimental, we are all conscious of classic neighborhood personalities, such as the carpenter, the cobbler, or the beautician, who see their livelihood slashed because the neighborhood they depended on is in danger of disappearing.

Obviously, equivalent vulnerable groups in rural areas receive much more attention: whether these are agricultural communities or the indigenous peoples whose relationship with the land is regarded as almost sacred. In the cities, the subject has a more

mundane connotation; however it affects many people, particularly when the gentrification process is accelerated. In any case, this adds yet another problem to the legal agenda because "property" ceases to represent an abstract category and instead refers to a special type of owner, distinguished from the rest in terms of their vulnerability.

Up until now, we have attempted to indicate that many very relevant aspects are involved when applying eminent domain in Latin American cities, including the idea that "public interest," especially when associated with large infrastructure projects, is no longer unanimously supported, and instead inspires intense debate concerning how we use natural resources and land to satisfy the needs of urban life. Thus, the use of eminent domain to distribute wealth not only remains unresolved, but brings to mind the old argument disputing the position of low-income groups in the urban order; that the application of eminent domain as the most appropriate mechanism for providing land title has not been dealt with; that a particular mundane subject, comprising the amount of money to be paid to the property owner is one of the most important sources of conflict in eminent domain cases; that social groups exist whose vulnerability to expropriation make them very different from other categories of owners, forcing us to reconsider nothing less than the principle of equal treatment under the law. All this should be a matter of concern for jurists and other law practitioners.

Before we consider how these and other issues are dealt with in the legal context, in practice it is evident that eminent domain cases do not always constitute "behaviors" that can be dealt with by applying certain normative frameworks (such as the constitution). Instead, what we are observing is the interaction between private property and the government, as neither of these two big institutions exists *per se*, isolated from their social function. Following a widely recognized sociological tradition, we need to remember that it is repeated social practice that continues to produce the institutions (Giddens 1979). Therefore, every time

there is a case of eminent domain, the relationship between private property and the government is redefined at the local level. At times, it is only slightly modified, and occasionally it is significantly modified, while in other circumstances, even the terms for modification are re-established. When relationships regarding property are modified even just a little, the state is also transformed, as the state is shaped, among other things, by the way property is organized.

After reading this book, it will not be difficult to appreciate that, in the case of Mexico, the post-revolutionary state was built on successive expropriations, and that each one of these, besides producing a new landowner, also placed one more brick in this edifice we recognize as the state. The challenge for the social sciences in predominantly urban societies will involve determining how each act of eminent domain (representing a quintessential expression of sovereignty) also contributes to the formation of the state; a state whose new configurations we do not understand with sufficient clarity; a state, which like the society that constitutes its substrate, is predominantly urban.

. . . And Its Passage Through the Legal System

Until now, we have referred to issues that necessitate eminent domain as "pre-legal." In other words, we have addressed the subject from the perspective of any social actor, be it as participant or as observer. We have referred to issues, which lacking a legal framework, require objectivity. We now address the approach taken to these issues in the legal context. Following Bourdieu's tradition, we conceive this to comprise a number of actors who are contending a specific form of capital;[17] in our case, the matter in dispute is "judicial authority," i.e., the capacity to legitimately define a version of what "represents" the law. It is interesting to determine what the legal approach to these problems adds (or subtracts),

[17] For the application of social concepts to the field of law, consult Bourdieu (1986), Madsen and Dezelay (2002), and García-Villegas (2009).

according to, or as experienced by, actors outside of the legal context. In other words, we are questioning the "judicialization" of certain conflicts, specifically, those derived from eminent domain.

Instead of concentrating on the actors in each case, we will analyze the problem as a *process flow*; thus, we consider that when cases enter the legal system, they are transformed by the proceedings, later reappearing in the public space as "judicial solutions" to these issues. How does the law (considered *not* as a set of norms, but as a set of normative practices) transform (transfigure, and sometimes disfigure) the conflict that can be objectively perceived in a certain way?

We should first remind ourselves of the diversity of processes that comprise the judicial system (ranging from the constitutional to the jurisdictional, passing through the legislative and the administrative). As for eminent domain, the Latin American constitutional framework of the past decades highlights two questions: the discussion concerning property status and the relationship between different levels and branches of government.

Although Latin American constitutionalists seem to have forgotten, property represents one of the central issues in terms of any constitutional order. The issue of property has been addressed in many of the constitutional reform processes in Latin America, recognized as part of the transformation of political systems in the region. Without doubt, the cases of Brazil (1988) and Colombia (1991) are the most significant. In Brazil, the introduction of the social function of property as the organizing principle for the urban framework underlies a new relationship between the government and property owners in the urban development process. This has important consequences for eminent domain, but probably even more interesting are the new legal regulations that enable the use of eminent domain to sanction an owner for not complying with the social function of the property, as stipulated by the corresponding planning instruments.

In the case of Colombia most notably, property is no longer defined as a right with "a possible" social function—following

the old Duguit (1920) doctrine (which will not be discussed here), it now states that property "is" a social function. Even more notable is the fact that the high courts in this country have reinforced the constitutional precepts, explicitly establishing that property is not a fundamental right, or a social function (chapter four).

Obviously, this is not the place to undertake a constitutional analysis of this question, but we should consider several situations documented in this book. In Mexico, there have been no relevant changes to the Constitution referring to the application of eminent domain as it affects property; in Argentina, the situation is similar, but this may be attributed to a certain taboo, as the idea of the social function of property (which was part of the Constitution between 1949 and 1955) was strongly associated with Peronism; and in Ecuador, the 2008 Constitution incorporated clauses similar to those of Colombia and Brazil. In other words, the question of property has not always been part of the consti-tutional agenda of the so-called democratic transitions in the region, and when it has been done, it has not always caused the same outcome. This diversity represents a challenge to legal research focused on this matter.

The fact that constitutional provisions exist in relation to property does not guarantee that the judicial branch will act accordingly (we see a prime example of this in Brazil). However, the very fact that they exist offers the possibility that under certain circumstances, its invocation could influence the outcome of a conflict.[18]

However, not only those constitutional provisions that explicitly address or define property ultimately affect eminent domain. Changes related to the assignment of responsibilities between levels of government (on a subnational scale), as well as the relationship between the executive and judicial branches have

[18] The specific problem encountered in social-legal research involves defining these conditions.

also played an important role. We know that decentralization has been an important aspect related to the transformation of the governments in the region; and the consequences for eminent domain have been very clear: in the cases of Colombia and Brazil, it has strengthened the powers of expropriation on the part of municipal governments. In Mexico, the most important transformation took place in the country's capital in 1996, with the replacement of a local government designated by the President of the Republic to a system where the mayor (Jefe de Gobierno) was elected by universal vote. Chapter eight analyzes how this new government order (which since 1997 has been in the hands of the opposition to the party in power at the federal level) has had to "earn" the power of eminent domain through a painful learning process.

Eminent domain certainly represents a fundamental aspect of the political agenda, promoting general transformations in state structure. This is reflected not only in the power of subnational levels of government, but also with the role of the judicial branch. Most countries in this book embrace the French tradition, where the eminent domain process is initiated by an administrative authority and concluded by a judge, who is mainly responsible for setting the amount of compensation, but is not empowered to authorize the public interest cause invoked by the authority, as justification for the eminent domain measure. The two systems that deviate from this scheme are Mexico and Argentina. In Mexico, the administration takes total charge of the process and is able to implement the transfer of property with a mere decree, issued by the executive branch (although no judge participates in the process, a federal judge has the capacity to refute it with an injunction, and frequently does so by disqualifying the public interest cause invoked as justification). Contrarily, in Argentina most of expropriations are enacted by statute; thus, the matter becomes more overtly political.

It is thus apparent that general changes in constitutional law can modify the conditions that sanction eminent domain, even though this may have not been the principal intention. More interestingly, this poses the question as to whether the reverse process is not also occurring; in other words, is the eminent domain practice having impact on the constitutional order itself? In the following, a close inspection of the eminent domain practice may clarify this issue.

Subsequentely, we consider how conflicts relating to eminent domain are processed by the judicial system, representing the legal context.[19] Generally, it is apparent that the judicial processes tend to aggravate these conflicts, instead of resolving them. Although some cases may be truly perplexing for the judge, in many instances conflicts do not appear to be particularly complex. Once again, the first issue to be resolved concerns the amount of compensation that the affected owner will receive for the property expropriated by eminent domain. Besides being the problem that causes most judicial activity, it also causes most uncertainty for all involved.

Besides the ideological aspect that may influence judicial activity, there is also the complex issue of property valuation, which, as summed up by Cacilda Lopes dos Santos, represents a veritable "black box" for the judges (Santos 2010). From here, we could transfer to the subject of the inherent uncertainty of modern law, and even establish parallels between the judicial experience and risk society as described by Anthony Giddens, Ulrich Beck, and all the acolytes of contemporary sociology. However, before considering these extremes, we need to recognize that we are dealing with something more elementary: the difficulty on the part of many judges to understand the logic of the professional

[19] This occurs because, as opposed to the legislative process (where the law is subservient to politics) and the executive process (where it is subservient to policies), judicial reasoning offers the only source of legitimacy in the exercise of power, or at least the most important.

assessor (whose opinion is, or should be, what defines the "final amount" or value of a parcel), not made any clearer because of the incomprehensible language used by these experts. As a result, judges tend to accept almost any expert suggestion or resort to arbitrary processes, such as averaging the highest and lowest valuations.

The authors of this book agree that judges tend to grant affected owners greater compensation than suggested by experts, when they attempt to assess the commercial value of the expropriated properties, possibly as a result of the conservative ideology that prevails in the courts. Obviously, those who sympathize with the judicial profession might argue to the contrary that judges represent the last line of defense of those suffering from abuse of authority. In any event, in the different chapters of this book great effort has been made to document this trend as thoroughly as possible, and the reader will find many indications, including clear evidence, to support the first hypothesis.[20] From individual cases that triggered public scandals, for example, that of Paraje San Juan in Mexico City, to more general processes in the case of Brazil's *precatórios*, where the court judgments resulted in a true fiscal crisis in several municipalities of the state of São Paulo (Maricato 2000), and some less well-known cases such as the one initiated by the Salvador Chiriboga family, following an expropriation to create a metropolitan park in Quito, which reached the Inter-American Court of Human Rights. In this case, offering no explanations about which criteria has been used to determine the amount, the Court ended up granting an unjustifiably high compensation, applying an absurd methodology that averaged the valuations made by the various conflicting parties.[21]

[20] The most important obstacle, apart from lack of information, is the problem of determining "the correct value" for each case, in order to make statistically significant inferences.

[21] This is the criticism of three members of the HRIC, who represent the minority directed at the majority opinion, as documented by María Mercedes Maldonado in chapter seven.

Against this backdrop, it is remarkable to observe the generalized indifference shown by legal experts in relation to this matter. Apart from the work by Sonia Rabello (2007), applying extremely original judicial arguments to question criteria currently applied to assess compensation, we have not discovered any judicial analyses that refer to this subject. It is not clear whether this is due to the proverbial incompetence in the case of legal experts when dealing with numbers or disregarding "matters of money," which certainly seem mundane in comparison to important questions of judicial rhetoric, human liberty, or the social function of property. In reality, there is an evident lack of knowledge among both legal analysis and operators, to authorize (and in particular to explain) the reasoning behind one amount of compensation as compared to another. Anyone who scrutinizes the way these amounts are decided comes away with the impression that this is not the judge's decision. Likewise in some instances, the judge ignores expert opinion and arbitrarily determines the amount of compensation. It is questionable which of the two represents the most perturbing scenarios.

In this book it is not possible to examine all the problems that arise during the process involved in determining the compensation amount; one fact illustrates the idea that eminent domain also has an overall effect on constitutional processes. As explained in chapter three in the case of Brazil, the crisis of the *precatórios* triggered a constitutional reform in 2009, resulting in debt payments accrued by local governments being deferred, including those resulting from expropriations. Does the Constitution define practice, or the reverse?

Subsequently, we consider how public interest causes are processed by the courts. Generally, even though Latin American judges manifest certain belligerence when determining compensation amounts, when considering the validity of public interest causes as justification for eminent domain actions, they have been rather deferent, with the clear exception of Mexico. In Mexico there is no judicial intervention *per se* in the eminent

domain process, however, all expropriations can be challenged by a writ of injunction, and federal judges have become increasingly demanding with the administrative authorities over the need to express clearly and thoroughly the cause of public interest, and in particular why this specific property is destined for expropriation and not another.

An apparent general trend indicates that eminent domain cases in the courts do not manifest the same growing social unease that accompanies large infrastructure projects. Dams, airports, large road projects, and waste treatment facilities, all represent a regional source of conflict and social mobilization, similar to the rest of the world; eminent domain is frequently the legal instrument used for their implementation. The fact that this opposition is not expressed in court proceedings is often explained, referring to the limitations imposed by statutes, in terms of accessing the court system, particularly a restricted definition of the "judicial interest" required in order to justify the engagement of judicial bodies. As always, there is a significant contrast in terms of the atmosphere in the public space to that in the legal context. Once again, we do not have adequate space to broach the relevant sociological discussions;[22] however, it is important to make clear that an important component of social conflict is not dealt with by the legal system.

Of particular interest in this context are expropriations to regularize land ownership, not only because, as previously mentioned this is not widely applied in Latin American cities, but likewise judges rarely assume responsibility for the implications. Perhaps the only judgment that explicitly pronounces on the legitimacy of regularization as a cause of public interest is the one

[22] We particularly refer to the possibility of using this example, in order to argue from the systems theory perspective that the law is an "autopoietic" system, whose logic prevents it from resolving many social problems. The problem here is that the definitions of judicial interest are constantly changing in a radical way, inhibiting any possibility of processing particular social problems that are presented as judicial problems.

described by Angela Oyhandy and Melinda Maldonado in chapter two, in the Province of Buenos Aires. However, the most interesting aspect is that, although judges are sometimes criticized for being too faithful to the "civil law" tradition, they are in fact going against one of the basic tenets of civil law, when they recognize the legitimacy of eminent domain to regularize land ownership: the principle of prescription or usucaption. This type of expropriation is effectively contrary to the interests of the people who reside in these informal settlements (typically the most vulnerable social groups), as it interrupts the process by which they can become property owners by living on the land for a certain period of time. We know that, in reality, poor people living in cities do not have access to the right of acquisitive prescription or *usucaption*, for reasons too complicated to explain here. What happens is that, upon expropriating a property, someone is recognized as the owner of that property, so that the occupier is placed in a vulnerable position, similar to the first day he/she occupied the land.

In fact, there are notable cases, when the actions of the original owner, who will benefit from the compensation, are conveniently disguised. This is evident in the case of Paraje San Juan, in Mexico City, where the judge granted compensation to the heirs of the original owner of an urban area that had been developed during more than half a century, now home to more than fifty thousand people (with large avenues, pizzerias, Tae Kwon Do schools, etc.), granting an amount that took into account the current value of all the edifications in the area. Most importantly, the judge never questioned what the original owner had contributed in respect to the urbanization of his land. We cannot know (because the case file does not reveal) whether the owner assumed any responsibility for the urbanization of the area or if he considered himself a victim of an invasion; what is certain is that the judge ignored the rule, based on civil law that permits someone who occupies a parcel to become the owner. The judge simply followed what the administration's eminent domain decree had

initiated: the restoration of property rights, which following the principle of adverse possession would have ceased to exist four decades earlier.

It is clear that we are witnessing a "selection" process, forming part of the normal legal process. Paradoxically the protection of private property requires that the owner remain in the shadows. The owner ceases to be a flesh and blood human being, who has either transformed (or not) his land and becomes simply a legal figure, a party who has been "aggrieved" by expropriation. This "under-recording" is surely related to another aspect: a lack of willingness to recognize that what is at stake is the relationship between the original owner and the low-income groups, in our metropolis.

The regularization of land ownership allows us to shift attention from the issue of public interest to consider those people affected by expropriations. An aspect revealed by our research indicates that it is completely inadequate to consider "the owner" as a social category who by definition should receive benefits that must be upheld in the name of social interest. A category of owners exists who do not fit this image: those whose only property is the house or apartment (or tenement) in which they live. The vast majority of the people in this category do not belong to the privileged sectors of society and surely constitute those who are most affected by expropriations. There is no statistical study on this subject; however it is reasonable to assume that the majority of people affected by eminent domain are not the owners of parcels in the urban periphery, usually constituting very few people, but rather those who have to leave their houses to make way for infrastructure projects. This subject is explicitly addressed in chapter four, which describes urban renewal projects in Bogota. However, this obviously indicates a general problem: shouldn't criteria exist to award more generous compensation to those who are forced to abandon their homes to make way for an infrastructure project required by the city?

To our knowledge, the only judicial court to address the problem has been Colombia's Constitutional Court, which, as explained

in chapter five, declared in a 2002 ruling that there were different criteria to determine compensation, one of which precisely referred to the condition of the party subject to expropriation.[23] This constitutes legal recognition that the highest social cost related to expropriation is paid by those who are forced to abandon the place where they reside, in order to satisfy the needs of society as a whole, as in the case of dams that displace rural populations.

The uniqueness of the Colombian situation can be interpreted as an exception in a depressing context. On a more optimistic note, we might take it as proof that there is a real possibility of developing a judicial perspective concerning what is at stake in eminent domain cases.

Similarly, it is important to focus on a problem that occurred in the cases of Mexico and Brazil where the administration failed to comply with the court rulings. In Mexico, the problem was that the agencies in charge of implementing eminent domain had already finished the project by the time the courts decided to annul the expropriation. This problem of a "*fait accompli*" triggered a specific provision in the constitutional reform of 1994, known as "non-execution of an injunction," which thus enabled the Mexican Supreme Court to gain the prestigious status of "constitutional court." In this instance, the problems faced when implementing eminent domain triggered a constitutional reform, which likewise failed to consider the subject of eminent domain;this resulted in the problem of federal judgments that the government refused to comply with. It is also the problem of eminent domain formulated in a different context: the relationship between branches of government.

The same problem is evident in the crises concerning *precatórios:* revealing government shortcomings in terms of satisfying obligations derived from eminent domain. In both instances,

[23] As apparent in chapter five, the judgment comprises much more than this. In the cities covered by this book, this no doubt represents the most original judicial resolution referring to this subject in recent years.

this problem relates to governments that do not follow the judges' orders; although they have followed different procedures, in both countries this has ultimately resulted in constitutional reforms.

Returning to the original question: how is the court system interpreting what is at stake in eminent domain? Besides the bias concerning the amount of compensation, there are questions that are socially relevant, but not recognized as problems in the legal context. First, the growing social controversy related to large infrastructure projects (airports, dams, roads) is not taken into consideration by the courts concerning eminent domain conflicts; second, the difference between the level of vulnerability of the parties whose properties are expropriated, which is obvious from social experience, but ignored by court proceedings, no doubt due to the principle of equal treatment under the law; and third, in cases of land titles, what the owner has accomplished with his property becomes invisible in terms of a cognitive operation, where he becomes a party adversely affected by an act of authority.

Similar to the way that the court proceedings redefine what is at stake, they also introduce an additional element: the problem of judicial authority. The judge adopts an active role to determine the role and power of the state. This does not only refer to the tension between the right of the owner and the public interest; this is now complemented, and sometimes supplanted, by the search for an adequate balance between the branches of government in order to regulate that tension. Likewise, this means that eminent domain gives a precise meaning to the term "judicial activism," currently a particularly worrying aspect for some constitutionalists.[24]

[24] A recent dicussion on the subject can be found in *Texas Law Review* 87(7), 2011.

Looking to the Future

The contents of this book should represent a source of concern for legal doctrine. Precisely the lack of serious legal reflection on the subject of property makes it very difficult for legal operators to resolve the dilemma posed by eminent domain in an urban environment. Perhaps the point of initiation should recognize the enormous distance between two areas of judicial research: specialized studies in urban law on one side, and constitutional law on the other. Those dedicated to the first subject have insisted on the social function of property as representing a central thesis. Thus, the recent constitutional texts from Brazil, Colombia, and Ecuador represent notable expressions of this thesis. These texts, besides the secondary legislation they have spawned, have generated ample literature about the need to change the role property plays in the urban development processes.[25] However, this does not imply that this is included in the constitutionalist's agenda, as they have generally been more preoccupied with political representation and other problems more directly related to democracy. This surely varies from one country to another, so I limit myself to the case of Mexico, where I can firmly assert that the subject of property is not part of the agenda. As part of our research, we have built a database of 400 works published by six Mexican constitutionalists, which can be accessed via the Web. Not one of them addresses the subject of property.[26]

One interesting aspect of this distance between urbanists and constitutionalists is the fact that one of the most influential of the so-called neoconstitutional authors, Luigi Ferrajoli, has

[25] See, among others, Alfonsín, Fernandes et al. (2002); Fernandes (2001); Maldonado (2003) (including her contribution to chapter five of this volume); Rabello (2007); and Saule-Júnior (1999).

[26] The authors are Miguel Carbonell, Jorge Carpizo, Lorenzo Córdova, José Ramón Cossío, Pedro Salazar, and Diego Valadez, who no doubt represent the best in a generation of Mexican constitutionalists. The database was constructed by Lidia González Malagón in February of 2011.

maintained that property *is not* a fundamental right; his thesis is particularly convincing, within the canons of the legal doctrine (Ferrajoli 1995 and 1999). However does this provide a satisfactory explanation for why constitutionalists do not address the subject? At least from a realistic perspective (and even in fact, from the point of view of legal realism), it remains unacceptable to fail to address problems relating to property, by arguing that in theory, this does not represent a fundamental right. In fact, many practices in the legal context repeatedly recognize the right to property, and the term "property" is a central theme in the discourse of legal operators, although no one has bothered to explain whether or not it represents a fundamental right.

Once more and without attempting to summarize, the accumulation of issues related to judicial practices in Latin America possibly justifying the constitutionalist's concern is sufficient to remind ourselves that this doubltlessly represents the tip of the iceberg. I refer to the recent judgment by the previously mentioned Inter-American Court of Human Rights, indicating how a prestigious court can be completely disoriented when it comes to the matter of property. Perhaps the most eloquent aspect of that decision was the opinion expressed by Sergio García Ramírez, one of the dissenting justices, who said he did not remember in the court's entire thirty years existence, another case where such a high compensation was granted for violating a human right. In fact, compensation was granted to a prominent family, who had owned some undeveloped rural land for almost eight decades without cultivating it, and who subsequently received compensation that enabled them to benefit from an important part of the value added to the land by urban development.

If this aspect is perturbing for the world of legal doctrine, it only serves to feed the curiosity of social-legal researchers, as if forming part of a scientific project. The problem is that the world of social sciences comprises numerous debates, many of which are disconnected, and we need to select a context for this project. My perspective suggests that the most fruitful discussions related

to eminent domain research are those that refer to state transformation. It is in this context that eminent domain conflicts are most significantly socially productive. As we attempt to argue, and as the reader will perceive in the chapters of this book, the most important sequel to each expropriation concerns the transformation of property relationships and its impact on the state. By claiming that eminent domain is one of the contexts where state and property are recreated, we open a dialog between the social-legal studies and one of the most productive trends in contemporary social thinking: the understanding of the long term process of state formation.

This may appear to represent an academic abstraction, but it is replete with historical content and judicial ambiguity. Historical content implies no less than the material conditions for society's reproduction in a continuous process of urbanization and there is no doubt that currently eminent domain tends to be at the center of the most polemic processes of urban transformation, with all its distributive outcomes. The impact of judicial ambiguity in the matter of eminent domain is also evident and assumes at least three forms: first, it can be used to impose the collective interest over individual interest or to benefit the owner to the detriment of society; second, it can be used as an instrument to distribute wealth, or contrarily to harm the most vulnerable social groups; and third, it is a way of destroying property, implying a corresponding recognition of its existence.

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Chapter One

Urban Policies and Eminent Domain in Argentina: Cases from the City of Buenos Aires and the Province of Buenos Aires (1976–2007)

Juan Ignacio Duarte and Ángela Oyhandy

INTRODUCTION

In this chapter, we consider eminent domain as an indicator of public policy that generates public benefit in the urban context. Eminent domain is one of the fundamental powers of any state, enabling it to legitimately suppress a property right in the name of a higher interest (Azuela, Herrera, and Saavedra 2009).

During the greater part of the twentieth century, eminent domain played a fundamental role in urban policy of the so-called industrialized world. Its role in Latin America has not been extensively studied; however, it is possible to identify a series of trends and processes that affected its application in a number of countries. In order to explore the gaps and continuities concerning the use of eminent domain in Argentina, we must first analyze the changes that occurred during the process of transition to democracy, marked by new political and social demands for housing among emerging sectors of the population.

Likewise, a common feature of government reform in Latin America was the redistribution of the powers and functions of national, provincial, and local governments; a process commonly referred to as decentralization. Similarly, political and institutional

transformations that occurred as a result of the increase in foreign trade required the creation of new legal and jurisdictional frameworks. These must be studied in order to analyze the effect they have on state power, in terms of the application of eminent domain. Lastly, due to the growing importance of the judiciary in new Latin American political regimes, we need to review the changes and continuities of eminent domain in the light of the relationship between the executive, legislative, and judicial branches of government. In the following pages, we explore the incidence of these processes in Argentina in recent times. Whereas in the next chapter the legal debates involved in the process of eminent domain are assessed, this chapter addresses political aspects.

The first section presents a quick review of the context that characterized urban policies and the transformations undergone by the state, in the framework of eminent domain policies in the province of Buenos Aires during the period from 1983 to 2006. The second section describes the most frequent applications of the eminent domain instrument in the past thirty years. Finally, section three explores the evolution of eminent domain between 1983 and 2006, and its possible significance.

Political and Economic Process in Argentina and the Province of Buenos Aires (1976–2006): The State, Urban Policies, and Eminent Domain

This section deals with four historical stages that almost precisely coincide with the sequence of national administrations during the period analyzed. The first stage extends from 1976 to 1983, and although not part of our study, corresponds to the dictatorship that preceded the democratic stage being analyzed here. As will become apparent, the dictatorship period generated a series of economic, political, and social transformations, as well as transformations to the state itself, that strongly influenced the following stages. The second stage is termed the "decade of the 1980s," extending from 1984 to 1989, and coinciding with the

first national democratic government after the dictatorship. The third is the decade of the 1990s, which covers the period from 1989 to 2001. During this stage, neoliberal economic policies were implemented, in line with those initiated by the last dictatorship, ending with the fall of the "Alianza" government in 2001 that created a deep social and economic crisis in the country. The period after 2001 is not marked by great modifications in urban policy and state reform because the focus was on managing the crisis; thus, this period is omitted from this analysis. The fourth stage consists of the period from 2003 to 2006. This stage does not exactly coincide with the provincial government actions that are described later on, but was selected to permit a more general analysis of changes in urban policy and the concomitant transformation of the state.[1]

THE DICTATORSHIP: THE SUBSIDIARY STATE AND NEOLIBERALISM

Argentina restored its democracy at the end of 1983, after seven years of a bloody dictatorship that is referred to as a "Process of National Reorganization." Although the period for which we analyze eminent domain practices initiates in 1983 (the first eminent domain law was passed in 1984), we cannot reconstruct the evolution of the transformations of the state and those of socio-economic (and urban) policies at the federal level and at the Province of Buenos Aires, without considering the legacy left by the dictatorship—both in terms of the way it transformed the state and also considering the changes made in land and urban policies, including legislation defining eminent domain.

[1] The governors of the Province of Buenos Aires (and the acronym for their political party) during the periods considered in the following sections, were: 1). 1984–1987: Alejandro Armendáriz (UCR); 2). 1988–1991: Antonio Cafiero (PJ); 3). 1992–1995: Eduardo Duhalde (PJ); 4). 1995–1999: Eduardo Duhalde (PJ); 5). 2000–2003: Felipe Solá (PJ); and 6). 2004–2006: Felipe Solá (PJ).

The socioeconomic transformation of the country and of the urban processes in the Buenos Aires Metropolitan Area (*Área Metropolitana de Buenos Aires* or AMBA)[2] was so important that it cannot be ignored. For a number of years the "legacy" of the military regime would define the country's political and economic processes and, as already indicated, its land and urban policies. According to Forcinito and Tolón Estarelles (2008), the legacy of the dictatorship was defined by two basic tenets that were applied simultaneously: first, the social and political discipline imposed on society, in the form of state terrorism, which included systematic violations of human rights and left 30 thousand "disappeared persons" (*desaparecidos*) among other atrocities; second, the implementation of a new neoliberal economic model prioritizing the financial aspects of the economy (Forcinito and Tolón Estarelles 2008). These policies were basically financed with foreign debt. When the *de facto* government assumed power in 1976, the external debt had reached US$7,875 billion; when it ended in 1983, the debt had ballooned to US$45,087 billion.

The indiscriminate opening of the economy had significant impact in terms of urban social processes. In this context, the decision to allow interest rates to float had particular influence, consistent with the strong expansion of the financial sector. The financial model was based on overvaluing the peso and setting high interest rates, permitting the financial system to capture internal savings, and thus displace investments made on the part of

[2] The Buenos Aires Metropolitan Area (AMBA or Greater Buenos Aires) is composed of the City of Buenos Aires and 24 surrounding municipalities. In this chapter, we refer to AMBA when describing the 24 municipalities plus the City of Buenos Aires, and to "suburbs" or "24 AMBA municipalities" when describing only the communities that surround the City. These 24 municipalities constitute part of the Province of Buenos Aires, together with another 110 municipalities in the rest of the province, however the City of Buenos Aires is autonomous (having its own legislative and judicial branches) that have existed since the constitutional reform of 1994; until then, it was a municipality whose mayor was designated by the national executive branch.

small and medium savers on housing for the middle class, where an average of sixty thousand housing units had been created during previous years (Wagner 2008). Economic measures, including rule 1050 of the Central Bank, permitted the indexing loan principals according to inflation, resulting in extremely high interest rates that favored high income groups. Another measure of singular importance was the new rent law (Act No 21342) which eliminated state controls on rent that had been in place since the beginning of the 1920s. This measure left thousands of tenants unprotected because residential rents sharply increased.

Together, these economic policies reduced salaries as a proportion of GDP from 48 percent in 1974, to 26.1 percent in 1983 (Lindemboin, Graña, and Kennedy 2005). In 1976 alone, wages fell 35.6 percent in real terms from the previous year. These factors reduced the potential for workers to gain access to urban land.

Both the federal government and the governments of the province of Buenos Aires and the federal capital (the city of Buenos Aires) issued important law decrees in 1977 (bypassing legislative approval) affecting land policies. These decrees are still in effect: the federal government enacted the National Expropriation Act, Act 21499 (which we will analyze subsequently in greater detail) that modified Act 13264, in effect since 1948; the *de facto* provincial government enacted the Territorial Planning and Land Use Act, Act 8912/77, which created a legal land use framework for the entire provincial territory;[3] and the municipality of Buenos Aires enacted the Urban Planning Code, modifying the urban code that has been in effect since 1944.

Act 8912 of October 1977 put a stop to the creation of new subdivisions in the province of Buenos Aires (particularly in the metropolitan area) and this has remained in force up to the present. Although at that time, there were many vacant lots, this stock was slowly depleted. For its part, the government of the city of

[3] Until 2008, when the Province of Mendoza sanctioned its master plan, Act 8912/77 was the only provincial law pertaining to subdivisions.

Buenos Aires initiated a massive plan to eradicate informal settlements by demolishing informal houses located in the city and transferring settlers out of the capital in trucks. This plan was applied with surprising brutality and efficiency. When the dictatorship assumed power in 1976, there were 224,885 informal settlers in Buenos Aires. By the end of 1981, this population had diminished to 16,008. The great majority of these settlers ended up living in crowded housing projects built in suburban municipalities during that period, or in informal settlements on vacant land, in same suburban municipalities.

In 1981, a new phenomenon emerged in a number of suburban municipalities: the occupation of land to create a new type of informal settlements[4] (*asentamientos*). This was not only the result of policies of eradication of informal settlements in the capital, but was also influenced by several other government policies including the aforementioned floating of interest rates, the indexation of loans, the new rent law, and a dramatic fall in real wages, combined with the lack of new subdivisions in the suburbs. All these factors created severe problems for the low-income population who required urban land for housing, triggering the irregular occupation of public and private lands to create new neighborhoods. When democracy was restored, many of those settlements would be (and still are) the target of eminent domain procedures initiated by the

[4] Until that time, land invasions were carried out in order to form what is termed in Argentina a *villa* or *villa miseria*. These were occupations of vacant urban land (in general, public land) that produced irregular urban settlements. They are not drawn as city blocks but have narrow passages, where generally vehicles cannot pass, and were the result of different settlement practices over a period of time. In contrast, the settlements created in the 1980s have urban grids that tend to be regular and planned, similar to lot subdivisions in the formal real estate market. In these cases, the occupation of land is decided and organized collectively as a result of a planned strategy (collecting cadastral data, creating a group that will launch the occupation, seeking support from neighboring organizations, etc.) and are mostly located on private land.

provincial government (through the legislative branch) in order to prevent legal action on the part of landowners against settlers.

Before assessing changes in policy following the restoration of democracy, it is useful to consider two projects that were particularly important in terms of their impact on the land management, and the massive use of eminent domain proceedings they generated. These were the construction of new toll highways in the city of Buenos Aires, and the creation of a series of landfills for the disposal of rubbish from AMBA, together with the construction of a green or ecological belt for the metropolitan area.

CONSTRUCTION OF URBAN TOLL HIGHWAYS

The municipality of Buenos Aires, led by Brigadier Cacciatore, introduced an ambitious plan to build toll highways crisscrossing the city in several directions. However, to implement such a plan, 15 thousand properties had to be expropriated, most of these consisting of multifamily apartment buildings. This project was announced by the mayor in March of 1977, coinciding with the introduction of a new Urban Planning Code (*Código de Planeamiento Urbano* or CPU) for the city, which included the plans for future arterial roads. The announcement of the project produced commotion among the population, whose homes lay in the path of the proposed roads.[5]

Originally, the toll highways project was not part of the CPU, but was an old project designed by the civil engineer Lauro Olimpo Laura, who worked for the National Highway Department (*Dirección Nacional de Vialidad*). In 1970, this project was revived and adapted by his son, Dr. Guillermo Laura, and published that same year, as book entitled *The Arterial City* (*La ciudad arterial*). Dr. Laura had been the Public Works Secretary for the municipality during the dictatorship, and became the project leader.

[5] For a detailed description of this process, and criticisms on the part of affected owners and professional associations, see Oszlak (1991).

In his 1970 book, Laura proposed a modification to the national eminent domain law in order to accelerate the process of expropriation and allow property owners to immediately receive their compensation, with an additional 10 percent to cover other expenses (such as moving). The highways would be financed by tolls, with 100 percent investment from private investors. The municipality was in charge of processing the expropriations and paying compensation,[6] but the money spent on this would be returned in full (indexed for inflation) by the concessionary of the toll highways. In October of 1977, the municipality called for bids, and before the year ended, the project was contracted to two Spanish and two Argentine companies that founded the Urban Arteries Corporation (*Autopistas Urbanas Sociedad Anónima* or AUSA).

The old expropriation law of 1948 was modified according to the terms proposed by Dr. Laura in his 1970 book and his article "The Ecological Belt" (*El cinturón ecológico*) published in 1978. This last publication, proposed a change to the way urban solid waste was managed and reiterated the need to modify the old eminent domain law in order to accelerate the implementation of the urban toll highways project.[7]

With the new legal framework in place, the municipality advanced decisively and efficiently in the construction of the first two urban highways: the Southern Artery (today called *25 de Mayo*) and the Perito Moreno Artery. When the statute for expropriation No. 1000 was signed, the authorities called a press conference to point out that not one owner had initiated legal action against them. In the nine months from March to December of 1977, almost 2200 properties were expropriated and compensation paid (Oszlak 1991). A report by the Buenos Aires munici-

[6] The original budget allocated for this activity was 50 million dollars. We have not been able to determine the actual amount paid in compensations for the expropriations.

[7] In an interview with Dr. Laura, he confirmed that the law decree that modified the previous expropriation law was written by Dr. Cassagne, based on Laura's proposal, who also wrote some of the general points in the law decree.

pality stated that 97 percent of the expropriations for both highways (3000 properties) were executed voluntarily, i.e., without legal action on the part of landowners; these highways were inaugurated in December of 1980. However, the project generated considerable criticism and experienced serious financial problems. As a result, the project was suspended and the remaining expropriations that were planned were cancelled.

In order to ensure the execution of projects that had been declared of national interest by the executive branch, the municipality and the federal government signed a protocol by which the federal Treasury issued guarantees to finance the urban toll highways project. Due to increased construction costs and the concomitant devaluation of the peso, the federal Treasury paid well over US$600 million in guarantees. A report on the Argentine foreign debt during the years 1976–1983 indicates that more than US$6 billion of private debt was transferred to the government using two mechanisms: the currency exchange guarantees and the guarantees issued by the Federal Treasury for the urban toll highways project. The same report indicates of the US$951 million in external debt, 15.8 percent corresponded to private debt incurred by AUSA (which build two of the toll highways) that was transferred to the government.[8] The AUSA debt was transferred when the corporation defaulted on its payments, triggering the Treasury guarantees.

METROPOLITAN ECOLOGICAL BELTWAY

In 1977, the municipality of Buenos Aires and the government of the province of Buenos Aires decided to implement a public

[8] It is worth noting that in the contract signed with the corporation, the municipality guaranteed a minimum number of vehicles that would use the toll highways daily. Once the highways were completed, the daily circulation turned out to be 20 thousand fewer vehicles than this guaranteed minimum, forcing the municipality to pay AUSA between 4 and 5 million dollars in compensation each month.

waste management policy for the entire metropolitan area. This policy was based on a new trash collection scheme at the metropolitan level, still in effect today, by which all solid waste from the city and the suburban municipalities of Buenos Aires and Gran La Plata (Municipalities of Berisso, Ensenada, and La Plata) would be disposed of in four landfills (or *rellenos sanitarios*) to be buit in the municipalities of San Martín-Tigre (Bancalari), Avellaneda (Villa Domínico), La Matanza (González Catán), and Ensenada (Ensenada). This project would eliminate all the burning of rubbish in the city of Buenos Aires, thus reducing air pollution. It would also halt the disposal of solid waste in open fields in the suburban municipalities contaminating the soil, water, and the atmosphere. The new policy required all the municipalities of the metropolitan area, including the city of Buenos Aires to transfer their domestic waste to one of these landfills, paying the corresponding fee to the management company.

Complementing these actions, government policy prescribed the construction of a Metropolitan Beltway, surrounded by green spaces, with interspersed forested public parks to serve the population of the AMBA. The ecological beltway would guarantee that vehicles would not have to cross the city of Buenos Aires when going from north to south or vice versa. The greater part of the ecological beltway would be built on low-lying land, which would be infilled with rubbish and then forested to transform it into recreational parks. This project would use a large amount of public land, plus an impressive amount of private land that would be expropriated. In fact, the area subject to eminent domain was equivalent to one and one-half times the size of the city of Buenos Aires, or 75 thousand acres.

To implement the ecological beltway project, devised by Dr. Laura, the municipality of Buenos Aires and the government of the province of Buenos Aires signed an agreement to create a public enterprise called Metropolitan Area Ecological Beltway State Partnership (*Cinturón Ecológico Área Metropolitana Sociedad del Estado* or CEAMSE). This public enterprise, constituted a

decentralized agency which was able to overcome the difficulties of managing a project for two different and separate jurisdictions, thus providing CEAMSE with a great deal of autonomy for the implementation of the project.

A particular provincial law granted CEAMSE the power to expropriate the land needed to create the landfills, the public parks, and the highway. The enterprise advanced, first by expropriating land occupied by low-income populations (informal settlements) in a vast area along the bank of the La Plata River, in the municipalities of Avellaneda and Quilmes, where numerous farmers who owned river bank vineyards lost their means of income—consisting of wine production—as a consequence of the expropriation proceedings.

Numerous settlers in low-lying and flood prone villages were evicted from the expropriated lands and had to move to other neighboring villages. The slum population and tenants from informal settlements did not have the capacity for resistance shown by higher income groups that would be similarly affected by the project.[9] Oszlak (1991) notes:

> The incapacity to organize resistance to these measures on the part of the affected owners was in sharp contrast with the tremendous efficiency demonstrated by the neighbors of the most conspicuous area of San Isidro who prevented the construction of a highway along the bank of the La Plata River, between the federal capital and the Tigre neighborhood. (251)

The company contracted to build the beltway was also in charge of managing the public works. Financing was to be provided by collecting tolls and selling the land that was recovered from the adjacent area, which would have appreciated in value due to the project. The first segment of the beltway was inaugurated at the end of 1981, together with one of the parks; but the failure of

[9] Although their properties were not going to be expropriated, they objected to the construction of a river bank highway that would affect the landscape and consequently the value of their properties.

the riverbank highway project and the economic crisis affecting the country paralyzed the rest of the project, which was never concluded. Currently, the federal government has called for bids to continue building the beltway, for which it is calculated that some 2,300 further properties will have to be expropriated.

The Decade of the 1980s (1983–1989)

The policies of the dictatorship deeply affected the economic structure of the country, so the main economic and social challenge facing the Democratic government headed by Raúl Alfonsín was to meet the social demands that had accrued and been disregarded during the seven years prior to 1983. However, given the foreign debt burden and strong pressure from economic groups, plus the inability of the government to gain the degree of freedom required to make bold decisions, the economic policy that was implemented ended up consisting of what has been generally termed an "adjustment in democracy" (Forcinito and Tolón Estarelles 2008).

Housing for the low-income population in the suburbs was one of the most urgent urban problems in the government agenda. President Alfonsín had even made campaign promises to address the issue, promising to solve the problem of illegal settlements in Quilmes. This form of land occupation, initiated in 1981, was widespread in the municipalities of Quilmes and La Matanza, and the settlers were forcefully advocating their right to have access to property titles. The regularization process advanced very slowly at first, but with greater success from 1987, when Antonio Cafiero became governor of the province of Buenos Aires.

The issue of a metropolitan government reemerged in 1984 when an agreement was signed between the federal government (Ministry of the Interior), the province of Buenos Aires, and the municipality of Buenos Aires. In 1987, the National Commission of the Buenos Aires Metropolitan Area (*Comisión Nacional Área Metropolitana de Buenos Aires* or CONAMBA) was created, but this agency was never able to actually function as a metropolitan governing agency.

The provincial government of Antonio Cafiero produced a Triennial Plan (1989–1991), the main components consisting of water supply works and two programs aimed at improving the housing situation: *Pro Tierra*, a program to occupy vacant urban land and grant property titles; and *Pro Casa,* aimed at solving the housing problem of low-income people. Cafiero tried to reform the provincial constitution in order to grant greater autonomy to municipalities, initiating an extensive decentralization process, but this reform was voted down in a popular plebiscite.

A proposal made by the federal government that injected great enthusiasm into the debate concerning land development during those years was the idea of moving the federal capital to Patagonia. Many thought this was the most exceptional project of 20th century Argentina because it would modify the country's territorial structure, promoting a new regional configuration. This plan, announced in March of 1986, contemplated the construction of a new federal capital in the area occupied by the *ejidos* of the cities of Carmen de Patagones (in the province of Buenos Aires), and Viedma and Guardia Mitre (Province of Rio Negro), where these two provinces intersect with the Atlantic Ocean. This project led to important agreements between the federal government and the provincial governments involved. In July of 1986, the Rio Negro legislature approved Act 2086 which transferred to the federal government the land required for creating the new capital. The province of Buenos Aires did the same in October of that same year, by implementing Act 10454. On May 27, 1987, the national Congress passed Act 23512, which declared in Article 1 that the capital of the Republic would be seated in the territory identified in the previously mentioned provincial laws.

Act 23512 created an agency known as ENTECAP that was in charge of transferring the capital. Among its functions and attributes[10] was to carry out the necessary expropriations through legal and extralegal measures (such as negotiating with the owners

[10] Stipulated in regulatory decree 1156/87.

and consolidating agreements). One of the central provisions of the federal law, in terms of eminent domain, was its Article 7, which declared of public interest (utilidad pública) any private property that had to be expropriated in order to create the federal capital. Article 7 stated:

> *To hereby declare of public interest and subject to immediate or deferred expropriation* any properties in private hands located in the territory defined in Art. 1 which are required to establish the new Federal Capital, *as well as all others that are required for plans, blueprints and specific projects, either materially or for financial reasons, towards the same purpose, provided that the estimated benefits will be used specifically to execute the program as defined in this declaration or* for the integral development or settlement of population in the area. (Federal Act 23512 of 1987, Article 7; emphasis added.)

In other words, the federal law authorized the expropriation not only of any property that was strictly necessary for the building of infrastructure in the new capital, but also any other expropriation that would help finance the project, by recovering the land value increments resulting from the project and subsequently selling the land. A legal debate concerning this strategy had already taken place 100 years earlier, in the 1880s, pertaining to the opening of Avenida de Mayo in the City of Buenos Aires.[11] If the project to move the federal capital had materialized, the legal situation would probably have been discussed in the same terms. However, due to the economic difficulties that the country was experiencing at the end of the 1980s, this project was never implemented.

[11] The Supreme Court ruling was implemented in 1886. The principal arguments and central questions at the time are described in the following chapter. Then, there was a federal law that authorized the municipality of the federal capital to expropriate properties in order to open an avenue that would join the seat of the executive branch of the federal government with the Congress building, as these were separated by 14 city blocks. However, the law authorized the expropriation of all the properties between Rivadavia and Hipólito Yrigoyen streets, and once the municipality finished the construction of the avenue (32 meters wide), it was able to sell the lots that were facing the new avenue at a higher price, as this project financed by the municipality resulted in higher

THE DECADE OF THE 1990S (1989–1999)

The Alfonsín government ended in July of 1989 due to a crisis generated by hyperinflation, although its mandate extended to December of that year. The country was heavily dependent on external credit, and was being put under pressure by the international financial system to remedy the situation.[12] The new government initiated rigorous reforms, following neoconservative principles to which President Menem subscribed. The idea of a smaller government returned to center stage. The previous dictatorship had introduced this policy, but the Menem government went even further, strengthening many of the measures that had been implemented at that time, such as the indiscriminate liberalization of the economy. Progress was made concerning privatization of state-owned companies, based on approval or assumed approval to reform the state and deal with the economic emergency. Many of the privatized companies were emblematic of the country, for example YPF (the oil company) and Aerolíneas Argentinas. Likewise, the economy was deregulated, eliminating a large part of the government structure. Most public utilities were privatized (telephone service, mail service, electricity, gas, and water, among others). This strategy meant that the government ceased to lead the development process and instead became a facilitator of business by implementing neoliberal principles. This economic policy was upheld by a one-to-one exchange rate between the peso and the U.S. dollar. The parity of the peso to the U.S. dollar was maintained for ten years (1991–2001) sustained by external financing. As a consequence, the country's foreign debt reached unprecedented levels.

property values. The case reached the Supreme Court after one of the affected owners filed a lawsuit opposing the expropriation. The Court ruled that it was not in the public interest to proceed with this particular expropriation as prescribed by this law; thus the municipality could only expropriate properties that were strictly necessary for the opening of the avenue.

[12] Many authors consider that the hyperinflation process was triggered by a "market coup" caused by powerful local economic groups.

These economic measures opened up business opportunities in the financial and real estate sectors, in particular for large local and foreign economic groups. The real estate developers progressed in building shopping centers, gated communities, and other urban projects. The construction of a toll highway system contributed to the development of this type of business. The new highway system[13] added almost 280 miles of roads, including both new highways and the widening and improvement of existing roads in the AMBA, increasing the speed of travel to the city center.

The process of structural adjustment and the reduction in the size of government produced a fair amount of real estate business, as the stock of public land in the hands of the federal government was privatized. The sale of public land enabled many of the large real estate developments that occurred in the AMBA.[14]

There was substantial expansion of gated communities, totaling 400 by the end of 2000, covering a total area of 74,000 acres in which there were 25,000 homes built, and with a resident population of 7,000 families.[15]

In the midst of this process of government restructuring, the public lands that belonged to the federal government, but that were occupied by low income population became an issue. In this context, a presidential decree in 1991 created the National Commission to address matters related to public land together with the Take Root Program (*Programa Arraigo*) aimed at transferring the occupied public land to its occupiers. This program surveyed

[13] As opposed to Dr. Laura's plan of the 1970s for the city of Buenos Aires, these new highways were constructed in the suburban municipalities and permitted access to the city.

[14] Several land sales were denounced in court due to their ridiculously low sale prices. Among the best known are the 500 acres occupied by Radio El Mundo in the municipality of Tigre where the Santa Bárbara gated community was developed and the land in the neighborhood of Palermo sold to the Rural Society. In both cases, the officials that participated in the sale were prosecuted, including a former president of the Republic.

[15] For purposes of comparison, the city of Buenos Aires occupies 50 thousand acres and there are almost 3 million people living there.

the families living on public land and recorded these properties in the land register.

In 1994, Act 24464 modified the role played by government with respect to housing policy. This Act created the National Housing System, comprising the National Housing Fund (*Fondo Nacional de la Vivienda* or FONAVI), the Provincial Housing Institutes (*Institutos Provinciales de Vivienda* or IPV) and the National Housing Council (*Consejo Nacional de la Vivienda* or CONAVI). Simultaneously, the Housing and Construction Financing Act (Act 24441) created a series of financing mechanisms, although in practice their application was limited. The other measure that had great impact on housing policy was the privatization of the National Mortgage Bank (*Banco Hipotecario Nacional*).

Regarding programs for regularizing land tenure, in 1993 the national Congress passed Act 24374, which permitted granting titles for land occupied without violence, as well as for lots that had been sold, even though these lots could not be legally transferred to the new owners.[16] Act 24374 was the only housing policy enacted for the low-income population in suburban municipalities during this decade, as the provincial government decided that FONAVI could only finance the construction of houses within the province, as a way of rebalancing the distribution of the population.

Another urban policy affecting the suburbs of the metropolitan area consisted of a massive public works program, financed by the Historical Reparation Fund of the Buenos Aires Metropolitan Area (*Fondo de Reparación Histórica del Conurbano Bonaerense*). Through this fund the federal government transferred a total of 600 million pesos annually (equivalent to US$600 million) to the provincial government to be used exclusively for public works

[16] The reasons for not legally transferring the land varied according to each case. There were land parcels without legal subdivision blueprints, located in flood zones, as well as those that had been bought in 150 monthly installments between the decades of the 1960s and the 1980s.

(paving roads, water projects, education facilities, among others) in the suburban municipalities of the AMBA.

In 1994, the Federal Constitution was amended, with consequences for AMBA territory. First, the status of the city of Buenos Aires was modified: the city became autonomous, with its own legislature and direct elections for its government. This constitutional reform did not produce changes to the property system or eminent domain, although it made advances in environmental policy. In addition, Article 123 of the 1994 Federal Constitution stipulated that the provinces must guarantee the autonomy of municipalities. However, the constitution of the province of Buenos Aires, which was reformed that same year, restricted the extent to which municipalities could have autonomy within the province.

These new urban reforms generated tensions in the land markets due to increased demand for new high-end properties combined with the availability of capital for investment in real estate. Gated communities became a new competitor to low-income groups that had historically resided in the periphery of the metropolitan area where land prices were lower. The government housing policy abandoned the mandate of affordable housing (Cravino, Wagner, and Varela 2002), and privatized public land in highly profitable areas, allowing for large urban and real estate developments (Clichevsky 2001).

The Menem government ended in 1999, and was followed by Fernando de La Rúa (from the Radical Party), who attained power through an alliance with other parties. The last years of the Menem government had been very hard on the lower income population. The government of the Alliance intended to follow the same economic model as Menem, but without corruption. This resulted in a high price being paid because changes in economic policy were not made. Two years of government were consumed trying to manage a crisis that became ever more acute. The currency parity with the dollar was maintained and eventually the government was forced to resign in December of 2001.

After a succession of five presidents in a single week, the National Congress elected Eduardo Duhalde as the new president. His government started by abandoning the currency parity to the U.S. dollar and installing a fixed exchange rate of 1.40 pesos per dollar. What followed was a brutal devaluation that took the peso down to almost 4 pesos per dollar. The Duhalde government dedicated its efforts to managing the crisis, but after the death of two demonstrators in the hands of the Buenos Aires police, the president decided to call for elections in April, 2003, when Néstor Kirchner was elected.

RECOVERY FROM THE CRISIS AND THE ROLE OF THE STATE (2003–2007)

After the 2003 elections won by Néstor Kirchner, his government adopted a strategy for strengthening human rights by reversing a series of laws that had prevented the prosecution of other members of the last dictatorship[17] and cancelling decrees that pardoned those who had committed crimes against humanity.

With respect to the economy, the government adopted policies to foster economic growth based on an expansion of tradable goods. Between 2003 and 2007, the country grew at an average annual rate of 9 percent, and the government supported measures to improve the income of workers and retirees. Almost from the start, a fiscal and commercial surplus was created, which strengthened public finances and made possible the renegotiation of the foreign debt (then at about 150 percent of GDP), extracting a rebate (or *quita*) of US$67 billion from lenders, representing approximately 46 percent of GDP in late 2011. In this context, the government was able to initiate a process of state reconstruction, which increasingly began to have influence on key sectors of the economy.

[17] Only the higher command had been prosecuted and sentenced in 1985, but Menem pardoned them during the first years of his government.

Strong recovery, economic growth, and production affected real estate markets. The price of land increased significantly during this period, and conflicts related to the access to land multiplied. This was particularly noticeable in the metropolitian area of Buenos Aires. No new subdivisions were developed for low-income people, exacerbating the problem of access to land for the poor. The federal government launched a series of new housing programs, other than FONAVI, and took an active role in public works. There was also a shift in the location of new housing, from within the province of Buenos Aires back to the suburbs (Del Río and Duarte 2010).[18] This change in housing policy signaled a more active and centralized role for the government.

In terms of urban policy, the government recovered decision-making power over the entire national territory, defining how and where investments were to be made and who should be in charge of projects. The privatization of public enterprises was largely reversed, resulting in the cancellation of several service contracts (water and sewage, several commuter train lines, and others). Simultaneously, important road projects were accelerated. Although there were no major changes with respect to eminent domain, an important change occured thereby expropriations could be used to transfer ownership of businesses to their workers, if the business had been abandoned by the owners during the severe economic crisis, as described later in this chapter.

Applications of Eminent Domain

When discussing the applications of eminent domain, we are referring to the various targets and goals, defined in terms of public interest (*utilidad pública*). The concept of public interest is not absolute; on the contrary, it varies depending on the place, the era, and the legal framework, because what is considered public

[18] Between 1976 and 2003, 39,856 affordable housing units were built in the AMBA, while in the period from 2004 to 2008, only 37,679 units were built.

interest at a given place and time, may not be in another. Public interest is contingent and circumstantial in nature, depending on the historical, social, or political situation of each society (Casas and Villanueva 2005). Act 5708 of the Province of Buenos Aires, in its Article 1, equates public interest with "general interest" while the Federal Act 24491 defines public interest as "fulfillment of the common good, either materially or spiritually." In this context it was stated that"usefulness" should not be confused with "need" as "not everything useful is necessary."[19] Early on, both jurisprudence and legal theory emphasized the relative character of this concept and the wide array of aesthetic, cultural, and social considerations among others that are opposed to a strictly material concept of usefulness.

During the period that begins in 1984 and ends in 2006, in addition to the aforementioned definition of public interest, which is associated with the idea of "public works" or for common use potentially beneficial to everybody (such as the construction of public schools, recreation centers, roads, or water supply systems), there are other meanings of "public" worth mentioning. This point is of particular interest because the varying definitions of public interest reveal a variety of problems or issues that are politically and institutionally related to the state. Paraphrasing Nora Rabotnikof, these different problems arise:

> [I]n the context of varying political vocabularies, for constructing or identifying problems that are also different, resulting in disparate assessments and courses of action . . . we do not always keep in mind that the boundary between private and public varies during the course of history. We also fail to observe that the conflict concerning the definition of these limits is expressed in the specific way that political life is conceived. (2005, 27)

[19] Casas and Villanueva (2005), 17.

If we consider the entire period from 1983 to 2006, there were 464[20] eminent domain laws authorizing expropriation of properties in the province of Buenos Aires (graph 1). To these we need to add more than 100 laws that extended the effective period of public interest declarations, as the great majority of projects addressed by the expropriations were not implemented within the original time schedule.

Eminent domain laws dealing with education infrastructure were the most common in this context. In second place came laws for regularizing land tenure, and in third place but in smaller scale and only during the later years of this period, there were expropriations involving manufacturing plants and production centers aimed at supporting production and preserving jobs.

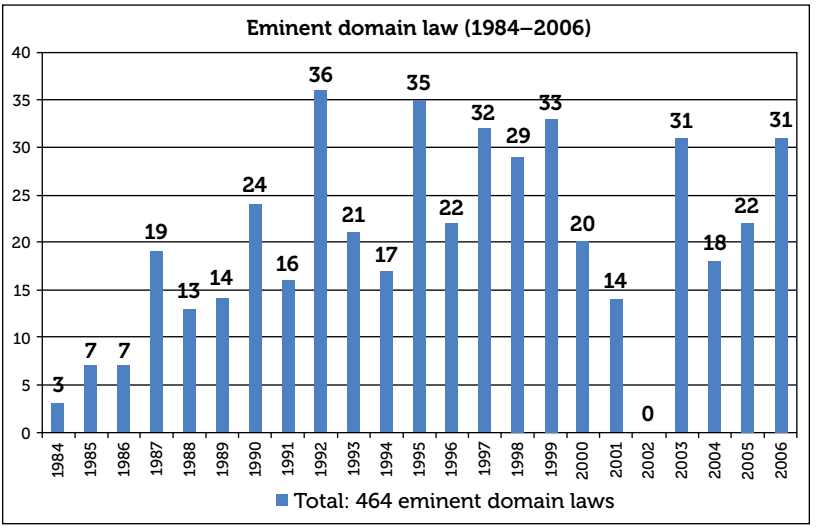
The concept of public interest underlying the rationale for expropriations for educational facilities is based on multiple references. It shares the definition with "public works" in the sense of common use, or potentially accessible to all, but also recognizes public interest as one of the duties of the state that cannot be delegated. When properties are expropriated for education purposes, an eminently descriptive style is used, mentioning the lack of educational facilities, and in some cases, the damage this causes to the learning process and how it curtails access to education itself:

> [P]ublic kindergartens are often located at a distance, with their capacity saturated, forcing people to find others that are even further away, creating problems of uprooting, transportation, etc. The result is that a large number of children are unable to attend kindergarten, so that when they enter first grade they tend to experience problems of adaptation. (Considerations of Act 12560, 26/12/00)

The lack of discussion or critical arguments aired in public is a signal of how indisputable this form of public interest is. Education projects are the most common reason for applying eminent

[20] A systematic search of the Official Bulletin of the Province of Buenos Aires enabled us to identify and analyze all the eminent domain laws approved during the period from 1983 to 2006, along with their fundamental aspects.

GRAPH 1
EMINENT DOMAIN LAWS BY YEAR (1984–2006)



Source: Oyhandy 2010. Laws that extend the effectiveness of public interest declarations (about 100) are not included.

domain in absolute terms during the period examined, with a total of 141 laws. Clearly, for the legislative branch of the province of Buenos Aires, the application of eminent domain law in this context did not require further justification.

The second thematic group targeted by eminent domain laws throughout the entire period (134 laws) is land tenure regularization. In historical terms, it must be noted that this type of expropriation is a result of new demands and social activism resulting from the restoration of democracy. In contrast to the previous group of laws, these include more extensive arguments and new elements, such as the designation of the state agency in charge of the regularization process, and a new process for identifying and relating with the beneficiaries who are, in all cases, the current occupants. In this case, the government not only has to manage

the expropriation process, but also to organize lot sales or donations, depending on the mode of land transfer adopted when expropriated properties are handed over to their occupants.

In general, the laws order municipal authorities to carry out a census of the occupants of the land prior to the subdivision and transfer of lots. The most frequent mode of tenure regularization is by "direct sale of land and purchase of a title by the occupants," whereas in exceptional cases the properties are donated or transferred without charge. In contrast with expropriations for educational purposes, where the scope of public interest is universal, in expropriations for the regularization of land tenure, the emphasis is on the role played by the state in making it possible for low-income groups to access land and housing from which they were previously excluded. For this reason, public interest is linked to social welfare and the role of the state in aiding the poor and intervening to impose social justice:

> One of the main goals of the government program announced here is to grant the population, and primarily low-income families, access to proper housing. The project attached to this law follows this policy, and establishes adequate mechanisms for regularizing the legal situation of properties where organized settlers are living, with the aim of letting them stay there, while improving their living conditions and those of the surrounding community. (See chapter two.)

As mentioned above, the predominant mode of land transfer is by direct sale to the occupants, and the purchase price is the amount needed to cover the cost of expropriation. However, there are certain conditions attached to this transaction, for example, monthly payments may not exceed 10 percent of the family income, and the period of payment should not be less than ten years. The mere reading of the justification of these laws reveals the tensions generated by these expropriations. While the intent is to cover the cost of the expropriation with payments made by the beneficiaries, these payments are limited due to considerations of social justice that are at the "core" of the notion of public interest in this case.

Thus, the legal procedures of expropriation for the regularization of land tenure protect the right of families to access housing by substituting one private owner for another, but the beneficiary of the expropriation receives property rights that are limited by certain obligations (charges) applicable during a period of time, such as the requirement not to sell the property, an obligation to build the family house, and not to rent the property. In this sense, one of the most interesting aspects of this type of declaration of public interest is that the state substitutes one property owner (after paying compensation), not in order to acquire the property and offer it for general use, but to transfer it to a private party (by means of a sale based on social justice considerations or occasionally as a donation). Returning to our analysis of the different definitions of public interest, in this case public interest is linked to exercizing social justice, rather than providing for free and common access to the land (such as in the case of a school, a park, or a highway). This is a definition of public interest that does not align itself exclusively with government use or disposition of the land, but with its role in safeguarding the rights of the people and satisfying their needs.

For all these reasons, the rationale for these types of expropriations is particularly complex, as it anticipates the problem of justifying the transfer of property from one private owner to another as complying with "public interest." The notion of social justice, of a state that intervenes directly to benefit disadvantaged groups is what makes these types of expropriations valid in public opinion. Justification for these laws is found in the Federal Constitution (in particular, Article 14) and the Provincial Constitution (Article 36), as well as in a description of the social and economic crisis in the province and the housing deficit in the Buenos Aires Metropolitan Area. Arguments point to the already mentioned right to housing, to the need to provide for minimum conditions for a full social and family life, to the conditions of the low-income workers who occupy the land, and above all, to the fact that they represent good faith buyers and occupants, who

lack property titles. Although themes relating to social justice and the idea of the public interest as a vehicle for compensating social inequities is the most visible aspect of this type of definition of public interest, it is interesting to analyze how from 1999 (when the housing emergency was declared), arguments describing the specific characteristics of a settlement and its occupants become more dominant as a result of the devastating effects of the crisis on the province. The fact that this situation relates to a global crisis that affects society as a whole justifies this kind of expropriation as complying with the universal meaning of public interest applied in the case of expropriation for educational facilities, thus reestablishing the idea of "public" as something common and general.

This definition articulates a concept of public interest that was absent during previous decades,[21] making the provincial government responsible for satisfying the housing needs of the most vulnerable members of society. These laws are first enacted in the 1980s, increasing in frequency during the 1990s and are still being implemented today, although mainly in association with extending previously enacted eminent domain laws. With rare exception, expropriations provided for in those laws have not been executed and proceedings are still pending. However, as described in the next chapter, the fact that these laws proved ineffective for substituting one property owner for another or granting the occupants property titles does not mean that their social impact was irrelevant. The same can be said of the expropriation laws of the so-called "recovered factories," whose definition of public interest we subsequently review.

Expropriation aimed to recover factories only took place during the period from 2001 to 2006 and have been extensively studied by social scientists since the end of the 1990s. These studies focused on aspects such as worker movements, subordinate identities, and

[21] A search through the Official Bulletin did not reveal the actual content of the expropriation laws before 1984, but did indicate the thematic trends.

organization of the production process. The importance assigned by the legislator to this type of expropriation can be appreciated in the context of the reform introduced in the legal framework of the province which extended to the expropriation of patents, trademarks, and goods, making it possible for industry to continue operating. The laws enacted in this category of expropriation prior to 2001 attempted to develop an industrial area and/or create free trade zones. But since 2003, they began to be applied to expropriation of factories that had declared bankruptcy due to the economic crisis in order to transfer the business to cooperatives formed by their workers.

The main arguments justifying the application of eminent domain in these cases pertained to the preservation of jobs and the promotion of economic development. The aim was not to defend a particular industry or sector in order to increase its development or profitability, but rather to prevent loss of jobs related to a particular enterprise and to protect these jobs from market forces. Once again, this is a type of expropriation where one property owner is substituted by a private party—in this case a workers' cooperative—rather than by a government agency. The potential of the factory fixed and moveable assets to generate jobs and wealth justifies the reversal of ownership rights of the owner, for whom keeping jobs was not a priority. All these laws are justified by extensive arguments that allude to the crisis of 2001 as "the worst in Argentine history," and emphasize the commitment of the state to maintain full employment, in contrast to the economic model that caused the loss of jobs: "The State must help those who want to maintain a genuine source of income; those whose only goal is to continue progressing with the "dignity of a job" (Fundamentos de la Ley 13.693).

The reference to work as a bastion of individual and social dignity is a strong argument that justifies these laws against owners who, by fraud or incompetence, lead their factories to bankruptcy.

Finally, the fourth category of expropriations encompasses "other" purposes, such as court and administrative facilities, certain urban infrastructure and road projects (although this type of expropriation does not require a special law), and also police facilities.

Implications and Outcomes of Eminent Domain (1983–2006): Does Everything Continue the Same?

Eminent Domain in Real Terms

As we observed in the previous section, during the last military dictatorship in power between 1976 and 1983, eminent domain was used as a way for the government to gain access to land needed to develop its priority projects, such as highways and the ecological belt. The same did not occur during the first years of transition to democracy. With the sole exception of the failed project to move the federal capital to the south of the country, there were very few projects or public debates where eminent domain occupied center stage. However, this lack of visibility of eminent domain in public discourse does not imply that daily and routine expropriations in the province of Buenos Aires did not occur.[22] The archives we reviewed indicate that during the 1990s, and also in the first decade of the twenty-first century, expropriations were carried out mainly for road and water projects; less frequently to provide land for pre-school, elementary, secondary, and higher public education facilities, or for municipal infrastructure, among other uses.

[22] This research was based on the analysis of 738 expropriation protocols during the period from 1992 to 2008, the statistics of the Provincial Prosecutor's Office, the Registry of Deeds, and the Judicial Branch of the Province of Buenos Aires. It was done in the context of an investigation entitled: *La expropiación como herramienta de las políticas urbanas en Argentina* (Eminent Domain as a Tool for Urban Policies in Argentina) by Ángela Oyhandy (2010). We also analyzed records of the Registry of Deeds and the Provincial Prosecutor's Office.

The results of this exploratory research must be considered with caution, due to fragmentation of data available in government agencies, and the multiplicity of parties involved at different levels and branches of provincial government. However, the prevalence of road projects as the motivation for the majority of expropriations is clear. As detailed in chapter two by Oyhandy and Maldonado, the Constitution of the province of Buenos Aires makes an exception to the Federal Constitution concerning the implementation of eminent domain law for road and water projects.[23] This resulted in the simplification of the complex expropriation procedures established by the Argentine Constitution that is likely to be one of the most complicated in the region; including a series of checks and balances between branches of government sometimes requiring the agreement of all three branches in order to finalize the expropriation of private property.

The legislative branch is responsible for the initial declaration of public interest and the consequent need for expropriation (except in the case of road and water projects, as mentioned above); then the executive branch must conduct assessment and negotiation with the property owner in order to implement the provisions of the law; and finally, if the owner is not satisfied with the amount of compensation offered by the executive, he has the right to appeal to the courts.

When analyzing the deeds of the General Government Registry of the province of Buenos Aires,[24] we identified 728 deeds that were the result of expropriations carried out between 1992 and 2008. Of these, more than 90 percent were made by the Highway Department (dependent on the Ministry of Infrastructure and Public Works), in order to widen or reroute highways and roads.

[23] In these cases, public interest is defined generically in Act 5708, which regulates expropriations in the province of Buenos Aires.

[24] We analyzed 728 deeds corresponding to the period from 1992 to 2008, which comprise all deeds archived in the General Government Registry of the Province of Buenos Aires.

These sources of data make it possible for us to determine the profile of successful expropriations, meaning those that resulted favorably to the government. However, other sources consulted mention multiple expropriations attempts by officials and legislators in the province of Buenos Aires, following the restoration of democracy. A number of these are expected to be completed after long judicial processes, and others will be abandoned. One of the ways to measure eminent domain activity is by analyzing the number of expropriations in the Land Registry, many of which have annotations halting the process although a law declares the property to be of public interest. This gives us an idea of how many expropriations were attempted and how many actually resulted in the transfer of land to the provincial government. A quick review of the recordings in the Land Registry between 2004 and 2009 reveals 597 annotations related to expropriations during only this five year period.

Why do so many expropriations fail? They fail for multiple reasons. Undoubtedly, the courts play an important role in this process. While we cannot determine from data at our disposal how

TABLE 1
EXPROPRIATIONS RECORDED IN THE
LAND REGISTRY (2004–2009)

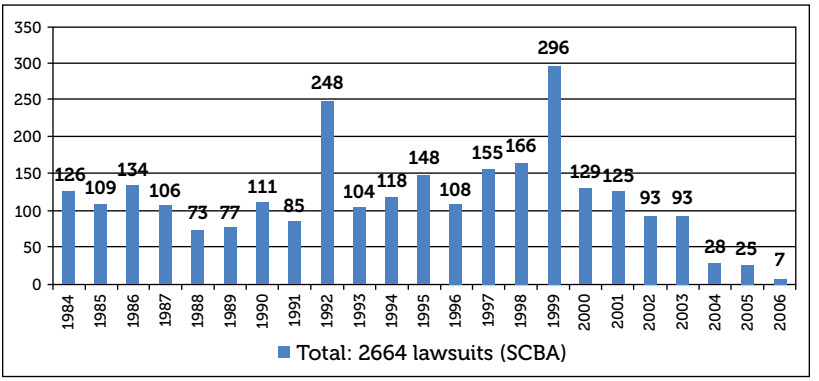
Type of Action	**2004**	**2005**	**2006**	**2007**	**2008**	**2009***
Court Ruling	51	42	18	25	28	15
Preventive Annotation	83	28	11	15	25	83
Agreement	5	31	113	43	138	67
Reversal	6	2	1	2	2	4
Total	**145**	**103**	**143**	**85**	**193**	**169**

* Through September 2009.
Source: Land Registry for the Province of Buenos Aires.

many of these cases ended up in court, if we compare the total number of expropriations archived in the General Government Registry of the Province of Buenos Aires between 1992 and 2008, with the total number of cases filed, according to the Provincial Supreme Court, between 1984 and 2006, there were 738 expropriations in the first period and 2,664 lawsuits. In order to correctly interpret this information, several factors should be considered. First, any eminent domain law may affect several property owners simultaneously, but each one of these may file suit. We also need to consider lawyer activism and incentives provided by some recent court judgments to allow the reversal of expropriations in the case of public works projects that were never executed. If these are included, the number of cases filed for expropriation in past decades increases.

Expropriations for road construction and urban infrastructure are part of the daily activity of provincial agencies. Likewise, as a result of the application of eminent domain since the mid-

GRAPH 2
EXPROPRIATION LAWSUITS FILED (1984–2006)



Source: Prepared by the authors based on data from the Department of Case Records of the State Prosecutor of the Province of Buenos Aires and the Statistics Department of the Supreme Court of the Province of Buenos Aires.

1980s, and due to the emergence of new political and social actors fostered by the democratization process, eminent domain acquired new applications and significance. For example, eminent domain has been invoked by the legislature of the province of Buenos Aires since the mid-1980s as a legitimate procedure for land tenure regularization benefitting low-income families. Between 1984 and 2006, 134 laws were enacted that declared public interest in properties, based on the right to housing, and more than 100 laws were extended in order to uphold initial declarations. These laws resulted in only a minimal percentage being enforced as actual expropriations. However, this fact does not diminish the importance of these laws. On the contrary, we need to gauge the social effects of these laws as an indicator of the way in which the provincial government supported low-income groups and their organizations.

The vast majority of these eminent domain laws dealing with land tenure regularization of informal settlements (and similarly in the case of recovered factories) had the practical effect of suspending the eviction of those occupying the properties.[25] As we saw, a large number of eminent domain laws enacted between 1984 and 2006 were sanctioned only for the purpose of extending the declaration of public interest. An analysis of these expropriations from the restricted viewpoint of public policy would consider these laws as a necessary formal step, but ineffective for achieving land tenure regularization, taking into account the outcomes. However, from the point of view of the social organizations and the political and institutional actors involved in lobbying for their enactment, these eminent domain laws were an invaluable resource that while preventing evictions also created a network of political and social relationships. The enactment of these laws is

[25] According to one of the qualified informants that participated in the group meeting to discuss the preliminary text of this version, the sanctioning of the law does not imply a legal impediment for the courts to carry out the evictions, but the fact is that the courts do not grant evictions even when there is a law enacted on the matter.

publicly celebrated as a "win," not only because they have the immediate effect of preventing imminent harm to settlers, but also because the state is legitimizing land occupation and the relationship between occupants, mediators, and government officials.

It may be impossible to understand this process without considering a case of successful land occupation that occurred in the southern part of the province of Buenos Aires, culminating in the enactment of the first eminent domain law (Act 10239) for the purpose of regularizing land tenure, and the subsequent granting of titles for a large area of land in favor of its occupants. As described by Pedro Nuñez:

> The occupation of land in this county south of the Buenos Aires Metropolitan Area initiated a process of coordination between government authorities and social organizations . . . dating back to the beginning of the eighties. The government together with the community and neighborhood organizations was responsible for identifying those needing the regularization of land tenure, for the provision of basic public services and also for providing school facilities and first aid clinics. (2010, 231)

This first successful experience may have acted as a powerful incentive for other political groups and mediators, but can also be seen as resulting from the impact of new social problems that were being addressed by the provincial government. A sociological interpretation of eminent domain reveals that over the past 25 years a number of social organizations and political mediators, generally with solid links to the government, have lobbied for eminent domain laws in order to ensure special treatment of cases involving housing issues and the maintenance of jobs.

After confronting the reality of the constant renewal of public interest declarations and the massive lack of compliance with the regularization goals of these laws, we can now appreciate the limitations to this type of solution. Although it caused the problem of access to land to come to public attention, it was not as successful in terms of achieving land regularization. When considered in the light of state reforms, it is striking to see how, given the general lack of public policy for addressing informal land tenure

and the problem of insufficient affordable housing, the legislative branch becomes the institution that attends to the particular circumstances of actors and organizations, who by means of personal contacts or collective action and organizing manage to legalize their cases.

Similarly, the recovery of factories is the second situation where the state is able to expropriate and to transfer property from one individual to another. The justification for this type of law suggests an interpretation of public interest as constituting government intervention in favor of certain populations and organizations, with the understanding that the satisfaction of a particular need results in collective benefit. This type of interpretation does not comprehend a notion of public interest as something common or potentially available to all, as would be the case of a school, a public park, a road, or a highway. However, it does convene a shared interest (both public and common) in a basic set of rights for all inhabitants. To justify an expropriation in terms of public interest in the case of the so-called recovered factories, which are transferred to worker cooperatives, is an example of government intervention based on notions of justice or social equity. In these cases, the enactment of laws has not been followed through with actual expropriations. However, these expropriations have been consistently vetoed by the executive branch of the provincial government on technical or financial grounds. Variation concerning interpretation of political priorities, when considering government intervention for expropriation purposes, should not be underestimated. There is a classic contradiction in democratic systems between political criteria and technical criteria, in the context of expropriation. A number of technical officials, with ample experience and long careers, regard these laws as a way of seeking electoral gains and forming alliances with different groups, but manifesting poor technical viability. In other words, political interventions tend to be defined by short-term goals, with no consideration for budget or technical restrictions.

Research based on several sources of data and consultation with government officials revealed novel interpretations of public interest. Due to its relevance in terms of numbers, we consider the expropriation of land in Epecuén, a city that was left under water after a flood in the 1980s, as a case where the government argued the need to demonstrate solidarity with the city residents who had lost their homes. At the same time that the provincial government rejects its supposed responsibility for the disaster, it proposes the following strategy based on solidarity:

> It is important to point out that if the urban area of Epecuén remains under water for a minimum of 10 years, as forecast by the Provincial Water Department on pgs. 7/12, it will be impossible for the residents to recover their material goods, thus they deserve the solidarity of the Provincial Government in addressing this situation, even though the causes of the flood are not related to any action on the part of the Provincial Government. (Decree 9320/86)

Several controversial configurations and circumstances of public interest are thus revealed here. As apparent in the next chapter, not many legal reforms related to eminent domain were implemented; however this does not imply that no changes occurred in terms of the power of the state to expropriate, evident in new tendencies and practices.

CONCLUSIONS

In the past 25 years, eminent domain has not been the focus of the public agenda or the media debate. In contrast to the 1940s and 1950s, when the provincial government made large land expropriations generating both extensive support and criticism, in the past 25 years eminent domain appears as an opaque and routine practice, requiring a complex research process for its examination.

As we have described, most expropriations pertain to small and medium-sized land parcels for the purpose of building or widening roads and highways, or for water supply projects. A large percentage of these cases ended up in court because owners

were not satisfied with the compensation offered by the government and thus demanded a judicial assessment.[26] Valuations made by court assessments tend to be much higher than those made by the state prosecutors' assessors.

When identifying the problems related to eminent domain process, it is important to note that, as in many other countries of Latin America, the intervention of the courts significantly increases the price of compensation that the public administration has to pay for expropriations.

We also analyzed expropriation in the light of its impact when democracy was reinstated. On this subject, we have reached two conclusions: first, there is no linear association between the return to democracy and the notion of the social function of property in Argentina. However it is evident that, from the 1980s onwards and during the transition to democracy, eminent domain is used as a legal tool for bringing together the state and collective experience of land invasion, making it possible for low- income groups to become politically allied with a state that during the previous 30 years has been unable to articulate effective responses to the problem of affordable housing.

Whereas from the beginning of the twentieth century until the bloody repression of the 1970s, the low-income population organized itself around labor claims, during the 1980s and 1990s, land related movements emerged focusing mainly on access to land. This is important for understanding the multitude of laws enacted for the purpose of regularizing land tenure, which can be interpreted sociologically as arrangements that prevent a return to unequal access to land ownership, but also reflect a tense and complex relationship between community organizations and the state.

[26] A different situation occurred with the expropriations for the highways in the federal capital during the previous dictatorship. Although we still do not have the elements to discern why court activity was limited, it is not unreasonable to conclude that the repressive system at the time discouraged lawsuits intended to contest compensation amounts.

It cannot be denied that over the past seven years, starting with the expropriation of Aerolíneas Argentinas, the ruling of the Supreme Court on the financial controls known as "corralito" and the laws to recover factories,[27] there is a perception of change in official policy, reflected in certain limitations being imposed on private property, which the media in Argentina describe as a problem of legal guarantees. Concerning this issue, it would be interesting to conduct a future investigation into Supreme Court decisions and academic and media debates on this subject.

Second, we conclude that the return to democracy has enabled certain social demands for housing and jobs in the legislature and these are now inserted in institutional space, whereas previously these were invisible.

In this chapter, we have not found any evidence to indicate the influence of globalization on the use of eminent domain. We agree with Antonio Azuela (2009) that judicial culture and the dynamics of national and local policies seem to have greater importance for understanding eminent domain than global trends. Likewise, the effects of the economic crisis in Argentina, and the subsequent shift of economic model towards internal growth following a decade of total economic openness and reduction of the role of government in the economy, make it possible for us to understand this new use of eminent domain as a means for strengthening certain social economic experiments such as cooperatives.

Closely related to this point, government reform processes in Latin America have been linked to decentralization of competencies and functions, which have been transferred from the federal government to provinces and municipalities. In Argentina, and in particular in the province of Buenos Aires, there is no significant reform of this kind. The power of eminent domain is con-

[27] This term is used to refer to the situation created during the crisis of 2001, where savers were prevented by the government from taking all their money out of the banks.

centrated in the federal and provincial levels of government, while the courts are now deciding whether municipalities should also have the power of expropriation. However, despite the lack of decentralizing reforms, our study reveals a new dimension where the municipality is viewed as a territory that concentrates the political activities of the low-income groups. Commonly, the weaving of political and social relations can be traced to municipal petitions, provincial legislators, and social organizations.

To conclude this chapter and reflect on the new open questions, we emphasize the need to conduct empirical studies, in order to understand the material and symbolic impact of eminent domain in the public policies of the Argentine state. The relationship between democracy and the social function of property is a theme in urgent need of exploration. Together with this type of historical study, we think it is also imperative to analyze the different public discourses (political, media, and legal) dealing with property rights and public interest at the present time.

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Chapter Two

Eminent Domain in Argentina: Practices and Legal Debates Germane to Public Interest

Melinda Lis Maldonado and Angela Oyhandy

INTRODUCTION

This chapter explores eminent domain in Argentina from the legal point of view, particularly in the Province of Buenos Aires and the City of Buenos Aires. It focuses on the importance of the concept of public interest for the configuration of the regulatory framework (and corresponding alterations), as well as on the legal procedures that it entails.

We start by demonstrating how the legal framework of eminent domain in Argentina is one of the most restrictive and difficult to navigate in Latin America, comprising a complex set of vetos and accords between the different branches of government that suggest the legislature has a keen interest in guarding against any advance on private property.

When analyzing the legal framework of eminent domain, we attempt to emphasize the role played by the three branches of government and their interrelationship. This interrelationship is mainly determined by the type of public interest declaration and its presentation, i.e., whether general or specific, and possibilities for its total fulfillment. It becomes apparent how these factors are crucial for the configuration of the legal framework, at both federal and provincial levels, and how the changes and continuities in

this legal framework, and its reforms, are related to the declaration of public interest.

Following this appraisal, we proceed to review debates generated by judicial rulings related to eminent domain, particularly in terms of the requirement for a public interest declaration.

This chapter is divided into three sections:

1). *The legal framework of eminent domain.* We provide an overall description of how the declaration of public interest represents the primary link between branches of government, and how this defines the complex system of eminent domain in Argentina.
2). *Eminent domain, public debate, and legal reforms.* Changes and continuities in the legal framework of eminent domain are highlighted, analyzing reforms to the system and their impact on public debate.
3). *Legal debates referring to the practice of eminent domain.* In this section, we present a series of debates emerging from a number of court rulings that reveal the high degree of tension between different branches of government and the role played by each branch, with or without great economic impact. These rulings can be classified into four topics: the concept of public interest, reverse or irregular expropriation, application of deferred expropri-ations (for example those destined to the construction of urban highways during the dictatorship), and the power of municipalities to initiate eminent domain.

LEGAL FRAMEWORK OF EMINENT DOMAIN

The legal framework of eminent domain is comprehended as the set of rules and procedures that facilitate or interfere with the application of this strategy. As pointed out by Azuela, Herrera, and Saavedra, "the tension between public and private interest inherent to eminent domain, makes it one of the most controversial legal concepts in the world. Therefore, its regulation repre-

sents an essential element in contemporary property regimes" (2009, 2).

The constitutional design of eminent domain is a focus of interest because in this context, all three branches of government together with other participants define the rules of the game for converting private goods into public benefit. These rules are developed further in statutory legislation.

In Argentina, in addition to the Federal Constitution and a Federal Expropriation Act (Act 21499), each province has its own constitution and a provincial expropriation act. Thus, each province has a different expropriation system. Our analysis focuses on some specific points of legislation at the national level and in the Province of Buenos Aires.

The Federal Constitution, together with the Constitution of the Province of Buenos Aires, which are the focus of our interest, made it obligatory to issue a law when declaring expropriated goods to be of public interest. This is one of the distinct attributes of eminent domain in Argentina. In Article 17, the Federal Constitution states that "Property is inviolable, and no citizen of this Nation can be deprived of it, except by a declaration enacted by statute. Expropriations for public interest causes must be qualified by statute and compensation must be paid beforehand." Article 31 of the Constitution of the Province of Buenos Aires provides that "Property is inviolable, and no citizen of the Province can be deprived of it, except by a declaration enacted by statute. Expropriations for public interest causes must be qualified by statute and compensation must be paid beforehand."

An analysis of eminent domain procedure in Argentina reveals that it is among the most complicated in Latin America. The constitutional limitations imposed on governments intending to remove private property for the sake of public interest are structured as a complex mechanism of checks and balances between branches of government. First, the legislative branch has to make a declaration of public interest in order to establish the need to expropriate; however the executive branch has to implement the

process by assessing the property and negotiating with the owner, in order that any provisions in the law can be applied. If the owner does not agree, the judicial branch intervenes. Thus, the comparative analysis carried out by Azuela, Herrera, and Saavedra (2009) indicates that the eminent domain procedure in Argentina requires agreement on the part of the greatest number of institutional participants with veto power so that potentially all three branches of government can become involved in expropriation proceedings.

As explained by Dromi (2006), the federal government and the provinces represent the only entities with eminent domain authority because only they are able to independently and directly declare a public interest cause. This is an exclusive constitutional attribute, as no other natural or legal entity, either public or private has jurisdiction to declare a property as public interest. The public interest qualification is applied by the legislative body, but it can be promoted by different state agencies, decentralized entities (independent agencies, municipalities, and state enterprises) and private parties, as authorized by law. When promoting expropriations, there are two categories of active participants: the originator and the subsidiary.

This means that municipalities are not obliged by constitutional jurisdiction to declare public interest, however they are obliged to implement the declaration (if legally authorized to do so). Besides, the complex interrelationships between legislative, judicial, and executive branches, is the lack of power for municipalities to take the initiative that sets in motion the process of eminent domain: the declaration of public interest.

The declaration of public interest is the key element in this complex eminent domain system, because it introduces the main actor: the provincial or federal legislative body, which will subsequently share the stage with other branches of government. But, is it possible for this principal actor to be absent? Two specific circumstances exist where a declaration of public interest is not required in order to implement an expropriation. The first refers

to water and road projects in the Province of Buenos Aires, and the second is related to restrictions on property ownership imposed by reverse expropriations, as provided for in the Federal Expropriation Act.

If we analyze the case of the Province of Buenos Aires, Provincial Act 5708 that regulates the expropriation process provides an important exception to the requirement of a special law, in Article 3: "Expropriations must be carried out by enacting a special law that explicitly determines the scope of each case and why it should qualify as a public interest or general interest cause." However, an immediate exception is made:

> Properties affected by streets, roads, canals and railways, and any ancillary projects which delimit and circumscribe their layout, are exempt from the qualification of public interest declared by this Act.

Legislative action is not required for the expropriation of properties intended for road and water projects, because the aforementioned Act generically declares public interest in these cases. The legislature exempted these types of infrastructure works from the consensus of one of the participants with veto power (the legislative branch), thereby facilitating the complex expropriation process described here. The previous chapter explains the applications of eminent domain in the Province of Buenos Aires, showing how expropriations for roads and water projects are those that most frequently succeed, resulting in the transfer of property from private ownership to the state.[1] Notably, this exception to a special law being required does not exist in the federal statute (Act 21499 of 1977 enacted by the military dictatorship that governed the country between 1976 and 1983).

Expressed concisely, in the Province of Buenos Aires eminent domain is initiated via two distinct institutional processes, depending on the intended use of the expropriated land. This dif-

[1] This information is a result of a systematic investigation performed by Ángela Oyhandy (2010).

ferentiation assigned by the law to eminent domain, depending on the "destiny" of the expropriated item facilitates interaction between the three government levels involved in this context, should the property owner disagree with the compensation amount or claim the public interest qualification is arbitrary.

It is apparent that in the Province of Buenos Aires, road and water projects have been granted a privileged definition of public interest within the provincial regulatory framework, resulting in a less cumbersome procedure.[2] Undoubtedly, this differential treatment implies a sense of priority that eliminates the legislative deliberation and facilitates the eminent domain process. Public interest for this type of project is therefore indisputable, and there is no need for legislative deliberation and consensus via a special law. In these cases, the executive branch initiates and implements expropriation, except when the owner is not satisfied and files a complaint in court.

EMINENT DOMAIN, PUBLIC DEBATE, AND LEGAL REFORMS: CHANGES AND CONTINUITIES

This section considers debates associated with reforms to the legal framework in the context of eminent domain. As indicated, the statute in effect at the federal level refers to a law from 1977 issued by the last military dictatorship (1976–1983), and since this time there have been no significant legislative changes. Likewise, in the Province of Buenos Aires, Act 5708, enacted in 1952 and currently still in effect, originally replaced the provincial expropriation Act of 1947 that had created a great deal of controversy as it was associated with proposals for large scale expropriations

[2] Around 95 percent of the protocols reviewed were for that purpose. Another indicator of the relevance of expropriations for this purpose is that the Ministry of Infrastructure (currently responsible for water and road projects) can autonomously implement expropriations, without consulting the Provincial Expropriations Council, a body created by Act 5708 that is in charge of centralizing all provincial expropriations.

TABLE 1
PUBLIC INTEREST

Public Interest	*Agreement between Parties*	*Intervening Branches of Government*	*Resolution*
Road and water projects	Administrative procedure	Executive branch	Agreement
Other	Law + Administrative procedure	Executive branch + Legislative branch	Agreement
Public Interest	*Agreement between Parties*	*Intervening Branches of Government*	*Resolution*
Road and water projects	Failed administrative procedure + Expropriation lawsuit	Executive branch + Legislative branch	Court ruling
Other	Law + Failed administrative procedure + Expropriation lawsuit	Executive branch + Judicial branch + Legislative branch	Court ruling

that were often implemented. Before analyzing the political and social effects of this controversial statute that was replaced by the current law, it is essential to indicate that this recognized multiple public interest causes were closely linked to the model of state control of economic development.

We present Article 11 in full:

> We hereby declare of public interest:
> a). Railroads under provincial jurisdiction.
> b). Telegraphs, telephones, radiotelephony, and radiotelegraphy stations, or any other communication system within the provincial territory.
> c). Land intended for cities and towns, railroads, roads, streets, playgrounds, future expansion, complementary works or extraction of soil

or other materials, construction of canals for irrigation and transportation, as well as ancillary and complementary installations to penal and correctional facilities, courts, hospitals, quarantine hospitals and cemeteries, schools, police stations, and other buildings that belong to the state or municipality; the creation of colonies and parks, bathing resorts, stadiums, sports fields and airports, housing for people in charge of the permanent preservation of main roads up to 5 hectares in each case; the creation of new population centers or expansion of existing ones, or to facilitate the creation of new neighborhoods, industries, or agricultural enterprises.

d). Roads, streets, playgrounds, and bridges as well as previously constructed irrigation and transportation canals.
e). Direct use of natural waterways or via bypass canals, as a means of producing energy for powering public buildings or promoting industry, as well as land needed for indispensable or ancillary projects to improve their operation.
f). Water in private lakes and any resident fish that the province or the municipalities are cultivating, reproducing, and studying.
g). Lakes that belong either partially or totally to private parties.
h). Utilities that generate, provide, or distribute electric power or running water, their installations or accessories that belong to private parties during and after the period of effectivity of concession contracts for lighting, power, or running water.
i). Documents or publications of historical interest.

This statute, enacted in 1947, and up to its modification in 1952, triggered numerous, contentious expropriations that were justified by the government of Juan Domingo Perón as representing essential strategies for implementing economic and social development. Although historical studies describing these expropriations in detail have not appeared, literature relating to the agrarian policy of the Peronist government highlights their fundamental importance in building political alliances and guiding public debate. This expropriation act that granted the executive branch ample powers for expropriation without the need for a special law declaring public interest for the cases mentioned above was replaced only five years later by another law that reinstated the complex procedure for eminent domain that is still in effect in Argentina today.

Notably, during the period from 1945 to 1952, an intense institutional debate was conducted in relation to property rights and the role of eminent domain for generating public benefits that had broad political and social repercussions, and this would not be repeated in these terms up to the present. Although the statute that is currently valid creates an exception to the constitutional mandate of enacting a law in order to declare a cause of public interest, in 1952 this was restrictive compared to the previous statute. Lattuada pointed out that during the year after the enactment of the statute granting ample eminent domain powers to the province, 1948 was the most active year with regard to expropriations (Lattuada 2002) and also the one that most exacerbated conflicts between the Peronist government and large rural landowners. Fundamentally these consisted of rural expropriations, including private silos and grain elevators (Lattuada 1986).

Given the few legal modifications to the eminent domain regime during the second half of the twentieth century, it is striking that during such a short period, a shift occurred going from a statute without a special law that granted the executive branch ample power to expropriate properties destined for matters as diverse as urban use, infrastructure projects, historical sites, and other functions linked to building infrastructure for different government agencies (police stations, jails, and sports fields, among other uses cited in the statute) to a more restrictive statute that was implemented five years later. This last reform was interpreted as a change in the agrarian policy of the Peronist government, expressed as a change in the discourse concerning the "social function of property," where once extensive landowners were challenged for so-called "irrational use," referring to land that was not being used.

During the years that separate these two statutes, there were laws, such as Act 5101 (1946) which expropriated 62,000 acres (25,000 hectares) where a number of strategies were employed with the intention of blocking the outcome. Without attempting to study this period in detail, we intend to emphasize that this was

a unique historical period when a majority political force, with control over the state's institutions, openly challenged the complex eminent domain process established by the Constitution.

When reviewing the underpinnings of Act 5708 that crystallized the diminished power of the state over private property, significantly one of the arguments put forward was the need to adjust eminent domain procedure in the Province of Buenos Aires to include the constitutional provision that stipulated the need for a special law to declare the public interest of each eminent domain act. A constitutional tone was assigned to the role of the executive branch when declaring public interest:

> I have the honor of submitting to Your Honor the enclosed bill in order to adapt the current expropriation regulations to constitutional precepts. At this time, the statute in effect in the province is the General Expropriation Act number 5141. This statute provides a list of public interest causes in Article 11 which do not require prior declaration by the Honorable Legislature. This means that depending on the case, the provincial or municipal administrations can proceed with an expropriation if its objective is included among those granted by this statute. The correct constitutional provision defines that the legislative branch must intervene in each expropriation case. This implies that a law is required for each case. The provincial Constitution, in accordance with Articles 5 and 38 of the Federal Constitution, states: . . . "Eminent domain for a public interest or general interest cause must be qualified by legislation and is subject to prior compensation (Article 30)." This provision is the basis for the three fundamental requirements of an expropriation: a) a cause of public or general interest; b) qualification by legislation; and c) prior compensation. The "qualification" requirement is the main item. In effect, "qualification" means that each expropriation case must be determined by the legislative branch, thus providing a greater guarantee to all our inhabitants, and ensuring a better analysis of any goods subject to expropriation.

Among the considerations of Act 5708, there are arguments in favor of new powers for the legislative branch that coexist with a new definition and concept of private property as expressed in the Federal Constitution of 1949, including an explicit reference to

the social function of property. Article 38 of that Constitution stated:

> Private property has a social function and is, therefore, subject to the obligations that the law establishes for the common good. The state has the responsibility to monitor the distribution and use of rural land or to intervene in order to develop and increase its yield in the interest of the community, procuring for each laborer or his family the opportunity to become the owner of the land he cultivates. Expropriation for public or general interest causes must be qualified by statute and prior compensation must be paid.

This Constitution was suspended by the *coup d'état* that overthrew the Perón government in 1955, reimposing (nominally) the Constitution that had been in effect, prior to the reform of 1949. It is important to note that in studying 18 countries in Latin America, Azuela, Herrera, and Saavedra discovered that the Argentine Constitution (reformed in 1994) is the only one that does not make explicit reference to the "social function of property" (Azuela, Herrera, and Saavedra 2009).[3]

The 1952 expropriation act limited the generic definition of public interest exclusively to cases of expropriation for providing infrastructure for streets, roads, and railway projects, as well as for water projects.

> Among the proposed reforms, the legislative branch must decide which expropriations are required for the normal and progressive development of government policy. This will contribute to further guaranteeing the social function of private property, as stipulated by the Constitution, indicating that it represents one of the foundations, like those of the New Argentina that tends to improve the welfare of the people. (Considerations of Act 5708 of the Province of Buenos Aires)

[3] However, as explained by Melinda Maldonado (2007), even though the Federal Constitution does not use the term "social function" in a literal sense, social function of property is a feature of the Constitution. Thus, one of the most important reforms of the 1994 Argentine Constitution is provided in Art. 75, paragraph 22, which grants "constitutional level" to certain International Treaties on Human Rights that "do not revoke any Article from the first part of this Constitution, and must be interpreted as complementary to the

Act 5708 has remained in effect from 1952 up to the present and has only been partially reformed. While during the central decades of the twentieth century, eminent domain was at the center of the political debate about the economic development model, it was not used as a legal instrument in Argentina during the 1980s and 1990s, either practically or rhetorically, as a structural axis of state policies. On the contrary, with the symbolic importance given to the concept of "legal security" (*seguridad juridica*), eminent domain vanished from prominent public debates until the crisis of 2001. One sign of this trend is the few reforms introduced to the eminent domain legal framework since the enactment of Act 21499 by the military dictatorship in 1977.

The partial reforms that were introduced incorporate a series of technical clarifications, such as the option of expropriating land parcels with street frontage that cannot be used independently (in order to conform to provisions regarding the creation of subdivisions), and a more accurate interpretation of the concept of "possession" in order to calculate the interest to be paid by the expropriating authority. For its part, Law-Decree 7297 of 1967 introduced a series of reforms, including an exemption of the court costs stipulated by the Civil Code for expropriation lawsuits. New rules were also established for the assessors' reports together with other clarifications relating to attorneys' fees.

In the Province of Buenos Aires, a conspicuous reform from 1971 consists of the creation of the Expropriation Council, a body for interdepartmental coordination that still operates and is

rights and guarantees recognized by this body." One of these treaties is the American Convention on Human Rights, also known as the Pact of San José, Costa Rica, which defines property rights in its Article 21 as follows: "Everyone has the right to the use and enjoyment of his own property. The law may subordinate this use and enjoyment to social interest." Maldonado identifies this as one of the arguments, asserting that the social function of property is a constitutional precept in Argentina. This even comprises one of the arguments used in the document "Declaración Nacional por la Reforma Urbana en Argentina (*National Declaration for Urban Reform in Argentina)*" (October 1, 2007).

responsible for centralizing the administrative process. This body is headed by the Attorney General.[4]

Finally, between 2006 and 2008, in the context of numerous laws enacted to expropriate bankrupt factories and industries to benefit workers' cooperatives, two reforms were introduced to the Expropriation Act. In 2006, Act 13504 explicitly included productive units, facilities, equipment, trademarks, and patents in the list of goods that could be expropriated. This marked the return of eminent domain to the center of the legislative debate, a reflection of the change in economic policy that took effect in Argentina starting in 2001. In 2008, Act 13828 suspended court proceedings against a production unit managed by its workers ("recovered factories") for 360 days. Their expropriation had been initiated before April 30, 2008. As in the 2006 law, its considerations include an explicit reference to the economic crisis of 2001 and the need to preserve jobs as justification for the declaration of public interest.

> Work is an indispensable means of satisfying the spiritual and material needs of an individual and the community as a whole, representing the foundation of all civilizations and the basis for general prosperity; therefore, the rights of the worker must be protected by society, affording him the dignity and importance he deserves and providing a job for those who require one.

It is important to point out that since the return of democracy until the enactment of these laws, in 2006 and 2008, associated with the "recovery of factories," there have been no reforms to the legal framework of eminent domain. These last two legal reforms that adapted the legal framework of eminent domain to the experiences of the so-called "recovered factories" were the result of a newly found prominence of the state in the economy. Towards

[4] Other relevant changes were enacted in 1982 (Decree 836/82) and 1983. This last decree modified Art. 5 of the basic law by establishing the need to make a preventive annotation of any expropriation in the records at the Land Registry, with a deadline of five years to implement the expropriation.

the end of our period of study, following decades of obscurity concerning the public debate about eminent domain, it is notable that the subject reappears politically and in the media with the expropriation of Aerolíneas Argentinas,[5] and this time unrelated to the problem of rural land tenure (as in the 1940s) or the provision of urban infrastructure (as during the dictatorship), provoking less reaction from the media compared with expropriations to regularize land tenure. In the political and institutional scene after the crisis of 2001, the expropriation of Aerolíneas Argentinas marked the transformation of the role played by the state in the economy, reversing the privatization policies that characterized the previous decade. In this case, policies of nationalization go hand in hand with the principle of "recovering our flagship company."

Together with expropriations for land tenure regularization and the recovery of factories by workers' cooperatives, as analyzed in chapter one by Duarte and Oyhandy, new applications of public interest declarations have recently begun to surface in the Province of Buenos Aires with the occupation of land by marginalized groups. In one instance, violent repression against land invasion in the province of Jujuy (July of 2011) resulted in the death of four people, generating an expropriation law regarding the occupied land. In contrast to other cases, one of the demands of the social organizations that led the land claims was to reject that compensation should be paid to the company that owned the land. Likewise, in this case the expropriation law does not identify the parcels to be expropriated. Rather than analyzing the technical or legal aspects of these important expropriations, it is interesting to observe how in the current political climate, eminent domain still represents a vital tool for political bartering in relation to social claims associated with access to land and, to a

[5] The airline companies, Aerolíneas Argentinas and Austral, were declared of public interest and subject to expropriation by Act 26466 enacted on December 7, 2008.

lesser degree, for job preservation. As analyzed in the previous chapter, these laws have had minimal effect on the ultimate success of expropriation during the past thirty years, and although they create temporary and unstable solutions for the claimants by declaring the intent to expropriate, they do not provide a solution in the medium or long term.

JUDICIAL DEBATES ON THE PRACTICE OF EMINENT DOMAIN

In this section, we intend to analyze a number of debates contained in judicial rulings that refer to specific expropriation cases. While there are numerous points of discussion, we have selected a few that either directly or indirectly relate to declarations of public interest.

First, we focus the debate on public interest. In the previous chapter, Duarte and Oyhandy explored the different categories of "public interest" defined by laws enacted by the Legislature of the Province of Buenos Aires, during the period from 1983 to 2006. In this chapter, we analyze two applications of this concept from the legal perspective, and specifically "court reviews of declarations of public interest." One of these analyzes expropriation as a strategy for urban value capture, and the other expropriation as a means of regularizing land tenure. The first case constitutes a ruling from the past (Argentine Supreme Court 1888), but nonetheless it is very important. The second case (Supreme Court of the Province of Buenos Aires 2009) is a novel court decision, however, one we feel constitutes a leading case in the matter.

Second, we analyze two interesting legal debates associated with "reverse or irregular expropriation" meaning an expropriation initiated by the affected property owner (not by the Administration) and therefore lacking a specific declaration of public interest. These debates center on the legitimacy and the statute of limitations involving reverse expropriation. The legal rulings adopted are intimately related to the economic impact of eminent domain when applied as an instrument of urban policy.

Third, we reconsider the plan for urban arteries in the City of Buenos Aires that was described in chapter one by Duarte and Oyhandy. That chapter indicated legal claims were minimal and that most expropriations were implemented by agreement. We will analyze some of these "minimal" legal claims that emerged as a result of the "deferred expropriation" strategy that was applied because the Municipality did not have enough resources to pay compensation for all these properties at the same time. This analysis will pose questions such as: is it advantageous to apply the strategy of deferred expropriation when funds for paying compensation are limited? And, what are the negative consequences resulting from this procedure? In these cases, we will return to the concept of reverse expropriation, as well as the requirement of public interest.

We close this section with a very relevant contemporary topic: the power of municipalities to initiate an expropriation with a declaration of public interest. We will analyze the role played by each of the participants in the complicated process of eminent domain in Argentina.

URBAN VALUE CAPTURE AS PUBLIC INTEREST?

Here we examine the application of eminent domain as an instrument of value capture in a legal case resolved by the Argentine Supreme Court in 1888 during the construction of the emblematic Avenida de Mayo in the City of Buenos Aires. While this ruling does not explicitly mention these terms, as evident in the following, it demonstrates the power of the state to "capture the urban value added to a property." The meaning of value capture is "the process by which all or a portion of those increments in land value attributed to community efforts are captured indirectly through their conversion into public revenues (for example taxes, fees, levies, and other fiscal means), or directly through on-site improvements that benefit the occupants or the general community" (Smolka and Furtado 2007).

We initiate with a description of this case. A law enacted on October 31, 1884 (Federal Act 1584) authorized the opening of an avenue (Art. 4) declaring that parcels affected by its construction were of public interest (Art. 5):

> Article Four. The opening of an avenue at least thirty meters wide, initiating at the Plaza de Mayo, bisecting all city blocks between Rivadavia and Victoria streets, and terminating in Entre Rios street, is hereby authorized.
>
> Article Five. For the purpose of the previous article, the buildings and parcels affected by the opening of this Avenue are hereby declared of public interest and their expropriation is authorized.

In summary, this proposal authorized the Municipal Administration to expropriate not only the land that was going to be occupied by the new Avenue, but also any parcel and houses affected by this project (point 3 of the ruling). The implicit intention was that the project (the opening of the Avenue) would increase the value of the bordering parcels, and the Municipality would then be able to resell these, thus capturing the increased land value caused by the project. What is not clear in the ruling is the allocation of the revenues obtained by the resale of the indicated real estate. According to a historical survey,[6] it seems that the Municipality of Buenos Aires was worried about not affecting the public treasury; however it is not clear whether financial gains from the resale would be exclusively employed to finance the Avenue project, or whether it could be used for other purposes (financing other public works or transferred to general funds, for example).

[6] For an overview of the facts, which cannot be surmised from the ruling, we referred to a historical survey performed in "*La Avenida de Mayo: Un proyecto inconcluso* (Avenida de Mayo: An unfinished project)." (Solsona and Hunter 1990, 11–12). A year after the enactment of this law, the Municipal Council passed the regulations in an ordinance for the official initiation of the project. This ordinance read: "The municipality shall use the expropriation granted in Article 4 of law (1583) to open the Avenue . . . 35 meters wide, starting works in those city blocks that offer least resistance in agreements made previously with the property owners, authorizing them to nominate commissions of

This legal case was initiated when one of the owners affected by the expropriations, Mrs. Isabel A. Elortondo, argued that she should only be obliged to sell the land area required to make way for the Avenue, and not her entire property, arguing that the law was unconstitutional. In the ruling "Municipal Capital v. Isabel A. Elortondo" (Rulings 33:162), the central issue to be resolved by the Supreme Court was the following: is it constitutional that the law should declare parcels located outside the trajectory of

neighbors for appraisal purposes, to consult with owners about the provisions of the law, and agreeing that the municipality should pay moderate compensation in advance. The Municipality may reduce the stipulated width in the public interest, if obstacles arise during the execution of the project that need to be reconciled, but not to less than 30 meters." The Municipal Council must take responsibility for the economic solvency of the project, foreseeing any possible conflicts due to the necessary expropriations: "For the expenses required for the execution of this ordinance, as long as the bond authorized by Congress this past October 28 (1885) has not been issued or negotiated, the the administration can request credit for up to four million pesos, which shall be paid with the resale of the expropriated properties in a public auction, announced 15 days in advance in the newspapers of the capital, subtracting the area needed to trace the new street." Solsona and Hunter explain that the plan devised by Mayor Torcuato de Alvear was to finance the Avenue without imposing a burden on the municipal budget. Any possible conflicts caused by the expropriations can be easily solved by mutual agreement between the public and private sector. The Municipality thought that the parcels would be ceded by the owners in exchange for the obvious increase in value of the properties that faced the Avenue, plus the exemption of building permit fees for the new frontage and an eventual monetary compensation in cases where the only possible solution would be an expropriation. However, despite the fact that verbal or written transfer agreements enabled a successful start to the project, a confusing interpretation of the law, plus the desire of certain affected owners to enrich themselves, caused delays and difficulties that tempered the initial optimism. Once this problem became widespread and based on Art. 5 of Act 1583, the Municipality tried to purchase all properties in the path of the new Avenue. This extreme attitude gave rise to protests by the owners and ultimately to a ruling by the Supreme Court permitting the expropriation only of those properties directly affected by the new boulevard (Solsona and Hunter 1990, 11–12).

the Avenue project to be of public interest, thus making them subject to expropriation?

There was no doubt that the opening of the Avenue fell into the category of public interest, but the Supreme Court had to decide whether it was possible to also declare parcels that bordered the Avenue, to be of public interest. The judges voted by majority against the constitutionality of the law, but the Attorney General, in his arguments, as well as Dr. Zavalía, in his minority opinion, defended this, with very interesting arguments.

The Attorney General defended two ideas.[7] First, as applied repeatedly throughout the twentieth century, he opined that the courts were not authorized to reassess the concept of public interest because this is exclusively the competence of the legislative branch. Second, he argued that an expropriation can be extended beyond the subdivisions required for the trajectory of the Avenue, principally basing his arguments on proportionality and fair share.

What were the specific arguments put forward by the Attorney General? As for the first point, he stated that the Argentine Constitution establishes that any declaration of public interest must be made by statute (Article 17). As for the second point, he reviewed a series of national and international precedents,[8] consistent with the Argentine Constitution, declaring the following principles:

[7] For that purpose, it used four sources of argumentation: 1). The current law (Art. 17 of the Federal Constitution); 2). foreign legislation (mainly European); 3). U.S. jurisprudence; and 4). an Argentine precedent of public works (railway).

[8] He first mentioned a case where two areas on each side of the Córdoba Railway track were expropriated without any constitutional objection. Subsequently, he noticed that the precedents in the domestic legislation and jurisprudence were scarce, so he analyzed the European legislation and the U.S. jurisprudence. In the case of European legislation, arguments were based on *expropriation by areas* relating to the French law that made possible the financing of the great avenues in Paris, a procedure that was then followed by Belgium and Italy. As for U.S. jurisprudence, the Attorney General reviewed the court decisions upholding the constitutionality of statutes that imposed a levy on property owners for the value added by public works projects, basing this on the argument of proportionality.

> 1. For the exercise of eminent domain, the legislative branch is invested with the power to make a declaration of public interest for all or only part of a property required for the convenience of the community; this attribution is political and exclusive; and the application of conferred power cannot be challenged in the courts of justice. 2. While exercising its authority to impose taxes and contributions, the legislative branch has the power to distribute, assign, or assess the cost of a local improvement to owners who will benefit immediately from this, by determining the area influenced by the benefit and the amount each one is obliged to contribute; this attribution is exclusive to the legislature, and cannot be disputed in court.

Subsequently he made a very interesting reflection:[9]

> We could argue furthermore that those who attempt to benefit from the interests of the community should simply be asked to abandon their property. As members of the community, they will derive the same benefits as everyone else. As owners, they receive an intangible benefit because their properties increase in value. This benefit is real, positive, and immediate; not random or fortuitous. Is it fair that those who receive this benefit should contribute the same amount as everyone else? Is it fair to tax everyone, in order to favor a few? Can it be argued that we are complying with the proportionality and fairness that the Constitution requires for the assessment of taxes, if the inhabitants of Boca and Almagro pay the same amount as those who own property along the Avenue? If the Municipality does not have its own resources to build the project as it says, it should not do so. This would condemn all progress. Property owners do not constitute those who decide whether a project will be implemented or not. If a competent authority makes that decision, the work should progress, with everybody contributing proportionally in order to benefit from this. This is true doctrine in my view: proportionality; fair share. This is what we already do when we pave the streets; and there is no reason to change the rules when we open a street or an avenue. The principle is the same: they are all local improvements. If the expropriations had been undertaken according to areas, encompassing all the blocks as far as Entre Rios street, creating two avenues by widening Victoria and Rivadavia, besides being able to sell the land between the two avenues, the Municipality would have the right to require the owners who live in Victoria facing north, and those living in Rivadavia facing south, to contribute proportionally to this great project. And if these contributions, in accordance with Italian law,

[9] Ruling of the Attorney General, Rulings 33:162.

> were limited to half the value added to their properties, no one would be able to claim that they did not receive a considerable benefit. After all, they could opt for an expropriation.

However, majority opinion did not concur with these arguments.[10] On the contrary, most people argued as follows: 1). judges can assess the public interest declaration because the attribution of Congress cannot violate constitutional provisions; and 2). the concept of public interest can only be used to expropriate the land required to make way for the avenue: a). otherwise, the right to eminent domain would be distorted, converting expropriation into a straightforward way of gaining resources by an unusual and abnormal financial process; b). because the expropriation of parcels on both sides of the avenue is not required in order to implement the project; and c). because the intention of the law in this context is to make use of the profits generated by the sale of those parcels, forcing the owner to relinquish them so the municipality can profit from their sale.

The dissenting vote of Dr. Zavalía, following the arguments of the attorney general regarding the European law and U.S. case law, was based in principle on three arguments: 1). Congress has competence over the declaration of public interest, so that this cannot be altered by the courts; 2). the aim of this expropriation is to achieve equity, justice, and public convenience; and 3). the Municipality has a legal right to capture the value added, because it generated this benefit.

In relation to the last argument, Dr. Zavalía stated with absolute clarity:

> As an immediate result of this project, the gardens of the present houses will probably increase in value two or three times because they will now

[10] By majority opinion, French law is fundamentally not applicable because this legislation was enacted by monarchic governments or because the expropriations by area were required for other causes (hygiene or because remaining property was rendered useless), and U.S. jurisprudence also supports this majority opinion.

> face the Avenue; this increase in value created by the Municipality at such a great cost does not pertain to the property owner, but rather to the Municipality; thus it is fair that the Municipality should obtain this and this is one of the purposes for expropriating the entire parcel of any houses affected by the Avenue, in order to sell any surplus area. Or is there anyone who opines that this added value pertains to the owner? The General Expropriations Act expressly denies this, and is consistent with all current laws regarding these matters, stating that "the value of the goods must be regulated by the value they would have had if the project had not been implemented or authorized." If this added value is waived in favor of the property owner, the municipality would suffer an enormous sacrifice, which is neither justified nor within its budget. (Rulings 33:162)

However, majority opinion considered that no public interest was promoted by expropriating parcels that were not required for constructing Avenida de Mayo. Thus, the Court ruled that it was unconstitutional to use expropriation to capture urban added value.

The interesting element in this case is that it discusses the concept of public interest for expropriating land adjacent to the project construction.

Marienhoff (1998) sanctions the expropriation of parcels adjacent to the area that is strictly necessary for a project should this aid in its execution, either "materially" or "financially." In this regard, the legal expert mentions two types of expropriations: 1). expropriation of the adjacent area for the purpose of extracting construction material ("soil," "sand," "gravel," etc.) for the building of a road, street, or avenue, resulting in the correct level and structure. This extra expropriated land is termed a "loan" because the project can be carried out thanks to this; and 2). expropriation of an adjacent area for the purpose of sale, with any profits being employed to "finance" the project. In this case, he opines that we cannot talk about "speculation" on the part of the state because the sale of the remaining parcels is not undertaken specifically to obtain funds for the treasury, but with the direct intention of gathering funds for the implementation of the project that originally caused the expropriation. Marienhoff explains that the

prevalent doctrine accepts the possibility that, in the two cases described above, expropriation may include areas flanking that strictly required for the project, i.e., expropriation can include an area greater than that strictly required for the intended project. As for case law, he points out that although at the beginning, the Argentine Supreme Court did not permit an expropriation to include land that was not required for the project (the "Elortondo" case just mentioned), this was subsequently rescinded, to include more extensive criteria contemplating the possibility that the expropriation may include a greater extension of land than that specifically occupied by the project.[11]

Article 7 of Federal Act 23512, 1987, which was approved as part of the proposal to transfer the Federal Capital to Patagonia mentions the same subject. Although ultimately the expropriation was not implemented because the capital was not moved, Article 7 declares properties subject to expropriation to include not only properties "necessary for establishing the new Federal Capital," but also

> any whose reasonable utilization, based on specific blueprints, plans, and projects would likewise result in either material or financial benefits, with any estimated advantages being directly employed to execute the program, thus justifying the declaration, or contributing to the comprehensive development or settlement of population in the area.

This illustrates the "material or financial" application of the formula as described by Marienhoff (1998).

The analysis of these cases is pertinent because the concept of public interest is questioned. Marienhoff distinguishes between these two alternatives, admitting that there is a possiblity of "expropriation for value capture," where the state makes an expropriation only to take advantage of the increased value of

[11] Argentine Supreme Court, "Rulings," book 85, page 303 et seq., case *Carlos Casado v. José Mario Bombal* re: expropriation, ruling of June 19, 1900; book 93, page 219 et seq., in the case *Jorge Gibbs v. Provincia de Mendoza*, ruling of December 5, 1901.

subdivisions because of their proximity to a public works project. In his opinion, this last form of expropriation is contrary to the notion of justice, and does comply with the concept of public interest, as in this case the state's only motive is financial.

Thus it is apparent that urban value capture does not easily conform to the category of "public interest." These restrictions on interpretation do not consider general principles referring to this type of strategy (such as, the legal doctrine of "enrichment without cause") or whether the imposition is reasonable in terms of analyzing the means utilized and the goals pursued (and their relationship). In this context, we reconsider the following question: is eminent domain a suitable and necessary strategy for capturing urban land value, and is this consistent with the objective? Are there no other strategies that would cause less harm to the affected property owner?

Land Tenure Regularization as Public Interest

As analyzed in chapter one by Duarte and Oyhandy, the Legislature of the Province of Buenos Aires repeatedly declared properties requiring land tenure regularization during the period from 1983 to 2006, to be of public interest. With reference to the ruling on the *O'Connor, Alberto M. et al.* case by the Supreme Court of the Province of Buenos Aires on February 18, 2009, we will explore discussions that refer to this classification, as unusually in these cases the courts assess a public interest declaration issued by the Legislature.

Alberto Marcos O'Connor and Juan Carlos Falco filed a lawsuit against the Province of Buenos Aires claiming as unconstitutional Act 11949, declaring land parcels that they owned in the county of San Isidro (Province of Buenos Aires) to be of public interest and subject to expropriation. These were to be transferred prior to compensation, to settlers who had occupied these properties for at least two years. The plaintiffs argued that this

law was unconstitutional because it made a "false declaration of public interest." This case is interesting because the state makes an expropriation in order to transfer property to third parties, in this case informal settlers, in order to regularize their land tenure.

The Government Attorney General, on responding to the complaint, alleged that the declaration of public interest made by the Legislature cannot be reviewed by the courts, and therefore their rulings were not able to overturn these criteria. Likewise, he denied the existence of a false declaration of public interest. He explained that this cause was of public interest because the law "is trying to prevent a situation of vulnerability due to lack of proper housing."

The issues brought up in this ruling, described by Dr. Soria, are twofold: 1). a judicial review of public interest as declared by the law; and 2). the constitutionality of Act 11949.

Referring to the first point, Dr. Soria states that there is no doubt that the declaration of public interest is an exclusive right of the courts, "whose criteria cannot be altered by the judges without running the risk of rupturing the division between powers and the functional independence of the branches of government (Argentine Supreme Court, Rulings 4:311; 35:303; 93:219; 191:424), thus interfering with the exercise of attributions that are indispensable for social coexistence (Argentine Supreme Court, Rulings 252:310; 272:88)." However, these rights must respect the constitutional order; and if this authority is exercised arbitrarily, or in a way that notoriously deviates from or exceeds the goal that was invoked (Supreme Court, Rulings 298:383), the legislation can be declared invalid for lack of reasonableness (Arts. 17, 28, 31, 33 et seq., Federal Constitution).

> Therefore, having denounced an absence or distortion of the constitutional principle, or more correctly, having disputed the expropriation law for not being based on public interest, it is logical for the courts to intervene. (Arts. 17, 18, 28, 31, 33 et seq., Federal Constitution; 1, 15, 31, 57, 161 paragraph 1 et seq., Provincial Constitution)

As for the second point, Dr. Soria alleges that as in this case the plaintiffs have not objected to the constitutionality of the abstract aim declared by the legislature in the statute, this conflict disputes specific public interest as established in Act 11949. However, he makes a few general clarifications:[12]

1). *Constitutionality of expropriation in favor of third parties.* The scope of public interest depends on the economic, political, and social conditions (conf. doct. case B. 43878 cit.). Therefore, an expropriation that transfers expropriated goods to third parties, to achieve industrial development goals for example (conf. Rulings 298:383) or to generate progress and welfare in the community (conf. Rulings 318:445) is not necessarily contrary to public interest.

2). *Different ways of achieving public interest.* Assumptions exist concerning the nature of objectives to be fulfilled by expropriation, so that public interest is achieved directly by increasing the public domain or state assets through attaining the expropriated good, thereby generating a tangible benefit for an indeterminate group of people (e.g., construction of roads, dams, canals, railways, schools, and homes for the elderly, to give some examples). However in other situations, the goals pursued by expropriation are achieved for more reflective and indirect purposes, not to increase state assets or by creating a public benefit for a large and indeterminate group of people. Instead beneficiaries comprise a limited and specific number of individuals, defined by social, economic, or other policy frameworks. It is possible to expropriate for this purpose and still satisfy public interest, but adequate justification is required when the majority of the community can neither directly use or enjoy these benefits (Ruling of 15-Nov-2005, case no. 44302/2002, issue *J. A. Pye [Oxford] Ltd. v. United Kingdom*).

[12] Arguments 1.c, 2a, and 2b of Dr. Soria's opinion.

There is no doubt that in the context of certain political reforms (settlement plans, affordable housing, agrarian reforms, and urban developments, etc.), transfer of property to third parties can represent a legitimate way of promoting general interest (ruling of the European Court of Human Rights, Ruling of 21-Feb-1986, *James* case, no. 40; Ruling of 21-Feb-1990, *Hakansson and Sturesson* case, no. 44, among others), particularly when it enables low-income, excluded, or marginalized people access to benefits that are essential for their dignity.

3). *Requirements to review public interest declaration when it is achieved indirectly.* In these cases, deference to legislative decision operates differently, and is less assertive, as proof of public interest demands more perceptible evidence concerning: a). the correlation between the reasons that formed the basis for the legislative outcome and alleged evidence that determined the need to apply the strategy of eminent domain (*U.S. Supreme Court Cincinnati v. Vester*, 281 U.S. 439 [1930]); and b). the connection between the decision to expropriate and a rationally assessed government policy in this context (Ruling on *Kelo v. City of New London*, 23-Jun-2005).

After these general considerations, Dr. Soria examines whether the law that declares public interest is constitutional, concluding that it is not so, mainly because

> the legislator has irrationally applied constitutional powers, gravely affecting the property rights of the plaintiffs (Arts. 10, 31, 57 et seq., Provincial Constitution), as: i) this is based either on nonexistent motives or these were applied erroroneously; ii) the legislator has resorted to expropriation without rationally considering the general interest goals it was attempting to fulfill.
>
> The ultimate conclusion here is that the public interest or general interest causes invoked here have not been justified.[13]

[13] Argument K of Dr. Soria's opinion.

With this interesting viewpoint, Dr. Soria has made clear that eminent domain for land tenure regularization is constitutional, however, this particular case did not meet the requirements necessary for affirming its constitutionality, first due to serious factual errors (there were no illegal occupants), and second because the measure was disproportionate (expropriation for this purpose) to the goals (guaranteeing the right to housing for informal sectors of the population).

Another point that we would like to emphasize is that this ruling has been interpreted in the light of the relationship between the judicial and legislative branches and cited by certain legal experts as a "move" towards more active intervention on the part of the judicial branch, when reviewing qualifications of public interest presented by legislators. Juan Carlos Cassagne (2009) interprets this change as a positive step towards greater independence on the part of the judiciary and a consolidation of the "Rule of Law." In this sense, this ruling inaugurates an auspicious judicial intervention concerning the review of the power of eminent domain.

> For some time now, the Supreme Court of the Province of Buenos Aires has been issuing a series of rulings in matters of public law that deserve attention, both in terms of their legal content as well as their constitutional basis, as they contribute to the affirmation of the Rule of Law, and in particular, to the independence of the judicial sector.

It was time for the institution of eminent domain to be assessed as this had generally fallen outside judicial control. Far from restricting itself to the issues in dispute, the provincial Supreme Court, via the learned opinion of Justice Daniel Fernando Soria, goes to the core of the matter and puts things in context, correctly separating the legislative function that defined public interest on the part of the power of the courts to declare an arbitrarily imposed provincial law, to be unconstitutional (Cassagne 2009).

Cassagne's interpretation makes clear certain assumptions on the part of judicial control when declaring public interest, evi-

dent in the intense legislative activity accompanying this type of expropriation, from 1984 to date.

DEBATES ABOUT THE LEGITIMACY OF IRREGULAR OR REVERSE EXPROPRIATION

Reverse expropriation, also termed "irregular," refers to the situation when the property owner has the right to initiate the expropriation process himself. Article 51 of the Federal Expropriation Act regulates cases when irregular expropriation is legitimate:

> Art. 51. Irregular expropriation can be applied in the following cases:
> a) When there is a *law that declares the public interest* of a property, and the state takes possession without paying the corresponding compensation.
> b) When, as a result of a *law that declares the public interest* of an item or real estate property, there is obvious difficulty or impediment to taking possession of it under normal conditions.
> c) *When the state imposes an undue restriction or limitation on the owner of a good or asset, which affects his property rights.* (Emphasis added.)

Apparently, in the first two cases, a law declaring public interest is required, whereas this is not necessary in the last case.

Although our analysis is limited to the federal level and to the Province of Buenos Aires, it is notable that provincial expropriation acts are not consistent in terms of the way they regulate irregular expropriation, in some cases requiring a declaration of public interest, and in others exempting this requirement. This is significant because it may imply that a property owner can request an expropriation even when the legislation does not corroborate the matter. The power balance is significantly altered in the absence of one of the elements apparently required by the constitution: "an expropriation for a public interest cause must be qualified by law and not be implemented without compensation" (Art. 17 of the Federal Constitution).

A number of questions have arisen in the national legal doctrine and case law concerning the requirement of a public interest

declaration to permit an irregular expropriation.[14] By "public interest declaration" we mean a formal law that specifically declares the property in question to be of public interest. Is it possible for a property owner subject to an undue restriction or limitation that damages his property rights to request that the administration grant an expropriation of his property, even though there is no law declaring it to be of public interest? The answer to this question is interesting, defining the circumstances when an owner affected by an administrative restriction (for example, limitation on the height of a building) is able to claim an expropriation.

The Argentine Supreme Court ruled on this legal problem on four occasions: in three cases this represented the main legal issue, and in the other, it represented a subsidiary issue. We believe these four rulings establish jurisprudence, and the dominant ruling was the first one: the *Ovando Sanabria* case of 1986 (Maldonado 2008).

In the *Ovando Sanabria* case, an irregular expropriation is claimed (by Art. 51, paragraph c of the Federal Expropriation Act) for a property that was subject to a setback restriction due to the route of the new Perito Moreno Highway.[15] This setback banned any construction on 99.90 m^2 of the parcel, as this had to be maintained as a green area; only the remaining land area of the parcel was permitted to have buildings, however, the surplus area consisted of only 7.25 m.[2] The Civil Federal Appeals Court, Chamber G, permitted a reverse expropriation, as it considered these property restrictions to be confiscatory; applying Art. 51c of the Federal Expropriation Act it stated that there was no need for any prior legal declaration of public interest. The Municipality filed an appeal to the Argentine Supreme Court claiming that the Appeals Court ruling was unconstitutional because it granted

[14] This legal problem is analyzed by Melinda Maldonado (2008) as "legal issue A."

[15] This artery is part of the arterial road network of the City of Buenos Aires.

an expropriation without a prior public interest ruling, as established in Art. 17 of the Federal Constitution.

The Supreme Court did not agree with the arguments given by the Attorney General, and ruled that a formal law of public interest was not required to proceed on an irregular expropriation. It stated that

> a full and systematic analysis of Act 21499 indicates that the legislator has expressly considered different instances when irregular expropriation may proceed without a prior declaration of requirement by the expropriating entity, harmoniously balancing the general interest of the community on one side and the legitimate rights of private parties on the other. In this context, cases exist where there is no declaration of public interest or direct expropriation, the law allows a private party to claim a reverse expropriation when his property, either directly or indirectly, and always due to another law that declares public interest, can obviously not be used due to difficulties presented under normal conditions (Arts. 8, 9, and 51). The restriction imposed on the property indicated in this litigation is a direct consequence of the route intended for the Perito Moreno Ave. . . . thus preventing its owner from using it freely, as the administrative burden imposed on it distorts the exercise of property rights, as expressed in the technical report issued by the defendant, stating that the "area has permission for construction from the regulatory perspective," but has been rendered useless owing to its small dimensions.

This ruling contributed valuable criteria to interpreting the viability of the application of Art. 51c "distortion of the exercise of property rights," when "property is rendered useless," and limited in terms of "accessibility to the property."

Similarly in the *Estrabiz de Sobral* (1988) and *Ruani* (1989) cases, the owners of properties affected by urban land use limitations requested an irregular expropriation. First, there were limitations that affected the property of the requesting party, involving an area where construction was not permitted because special zoning codes were imposed on the rest of the property concerning its use and the maximum height of the buildings. The property owner requested an irregular expropriation based on Art. 51b of Act 21499 that requires a law declaring the property constitutes

public interest. The ruling ratified the *Ovando Sanabria* doctrine, stating that the absence of a formal declaration of public interest makes it possible for the owner to claim an irregular expropriation when it is apparent that his property has been rendered either directly or indirectly useless, as the result of another law declaring public interest that presents difficulties for it to be used under normal conditions. It also stated that in this case, there was a declaration of public interest, but this had not definitively rendered the property useless under normal conditions, as required in paragraph b of Art. 51, because the height limitations imposed by the administrative authority had not been adequately demonstrated to affect the property rights of the requestor thus justifying an irregular expropriation; so in this case, the Court ruled that an irregular expropriation was not warranted.

In the *Ruani* case, the Supreme Court overturned a judgment that granted the expropriation of the plaintiffs' property included in listing 6.1.2 as "Streets with Specific Building Specifications." The zoning for this district required future construction to be set back five meters from the current building limit. Once again, the Supreme Court ratified the *Ovando Sanabria* doctrine, admitting that when a property cannot be accessed due to obvious limitations to its use under normal conditions, a legal declaration of public interest was not needed for an irregular expropriation to proceed. However, as in the *Estrabiz de Sobral* case, the ruling of the lower court was overruled and the pronouncement of a new ruling was ordered, as the fact that the zoning regulations prevented future construction with the same building limitation as before did not create an immediate limitation to the property rights of the plaintiffs. This expressly stated that "reverse expropriation is inadmissible if damage to the owners turns out to be hypothetical, as is the case here, because until the owners decide to demolish their building and start a new construction, their property can still be used, inspite of prohibitions relating to construction within the previous limits."

The *Faut* case concerns state responsibility for public works. Due to a public works project initiated by the state, the plaintiff's property was flooded, as a result of the rising water level of Lake Epecuén. The plaintiffs requested an irregular expropriation based on the Expropriation Act of the Province of Buenos Aires (Act 5708). In all cases this requires a legal declaration of public interest in order to proceed with an irregular expropriation. The Supreme Court does not mention the *Ovando Sanabria* doctrine here, but expressly states, in the opinion of Dr. Elena Highton de Nolasco,

> that local Act 5708 expressly requires a declaration of public interest for the property owner to initiate an expropriation action, while this is not required under Art. 51c of Act 21499; however the plaintiffs did not question the constitutionality of the provincial act.

It would appear that the Court is proposing a strategy by making this distinction: if an irregular expropriation is requested without a legal declaration of public interest, this must be made based either on the Federal Expropriation Act or on the provincial act, citing its unconstitutionality because it contradicts the Federal Act. Otherwise, the affected party could argue that the actions of the state have damaged his property rights, in other words, file a complaint for damages. Therefore, in this case, the Court has adopted a nuanced position, where the resolution of the case will depend on the legal arguments justifying irregular expropriation.

This precedent referred to by the Argentine Supreme Court is based on the Federal Expropriation Act that permits certain irregular expropriations to take place without a declaration of public interest, in contrast with the expropriation regime of the Province of Buenos Aires where a requirement is mandate for all cases (as in the *Faut* case).

It would be interesting to learn whether these contradictions also appear in other provincial expropriation regimes. As stated previously, there is no consistency concerning this subject. In certain provinces, a declaration of public interest is required for all

cases of irregular expropriation, whereas in others, this requirement is not mandatory.

The provinces in the same group consist of: Buenos Aires (Art. 41 of Act 5708 of 1986), Córdoba (Art. 32 of Act 6394 of 1980), Chubut (Art. 50 of Act 1739 of 1979), Formosa (Art. 60 of Act 490 of 1977), Tucumán (Art. 62 of Act 5006 of 1978), Santiago del Estero (Art. 40 of Act 4630 of 1978), Mendoza (Art. 46 of Law-Decree 1447/75), Chaco (Art. 61 of Act 2289 of 1978), and Santa Fe (Art. 51 of Act 7534 of 1975, modified by Act 12167). The Santa Fe case is interesting because it represents an attempt to introduce a case that did not require a declaration of public interest. This case made it possible for the property owner to file an expropriation request "when a property has been temporarily occupied and not returned at the required time or deadline as stipulated by law for this case." This article was vetoed, arguing that a lack of legal intervention in an expropriation proceeding was contrary to the provisions of the Constitution, proposing instead to cite the declaration of public interest as an express requirement in this case.

The second group consists of the Provinces of La Pampa, Misiones, Tierra del Fuego, San Juan, and San Luis. The expropriation acts of these provinces apply the formula defining the Federal Expropriation Act, which permits an irregular expropriation "when the state unduly restricts or limits the rights of an owner to a good or asset, causing damage to his property rights (paragraph c of Art. 60 of Act 908 of 1979 for La Pampa, paragraph c of Art. 52 of Act 421 of 1998 for Tierra del Fuego, and Art. 51c of Act 1105 of 1979 for Misiones). Act 5639 of 1987 for San Juan follows a similar formula: when the provincial or municipal authority perturbs or restricts the rights of the property owner, either by action or omission, be this continuous or temporary" (Paragraph d of Art. 51). The Expropriation Act of San Luis provides for a singular case, stipulating that a property owner can file for expropriation

> when the establishment of the building limitation or the construction authorization or permit have been delayed or denied without justification,

> or granted in a way that it deprives the owner of all or part of his property, or perturbs or restricts in other ways his right to use or enjoy this property. These cases do not include general regulations regarding construction, hygiene, safety, and other provincial or municipal law enforcement measures. (Paragraph d of Art. 57 of Act 5497 of 2004)

This straightforward comparison of provincial expropriation regimes is interesting because it demonstrates the different procedures for reverse expropriation and demonstrates how some provinces (in addition to the Federal Expropriation Act) grant an expropriation initiated by the property owner without the intervention of the provincial legislature. However, it is apparent that most of the provinces do not follow these criteria; there seems to be strong defense concerning the need for lawful intervention for reverse expropriation to proceed.

A question that remains unanswered is whether the outlook will tend to change and follow the criteria of the Federal Expropriation Act and the jurisprudence established by the Argentine Supreme Court.

The debate surrounding the issue of reverse expropriation concerns not only the concept of property (one interpretation is that the protection of property is so strong that a declaration of public interest is not even required), but also referring to the balance between the three branches of government (from the traditional triad to a straightforward duet between the executive and the judicial branches, in the case that a declaration of public interest is not required).

STATUTE OF LIMITATIONS FOR AN IRREGULAR OR REVERSE EXPROPRIATION

Another very serious problem for the public treasury mentioned in the interviews, closely linked to the previous subject, is the statute of limitations for reverse expropriation. During our study period, several changes were made with regard to this issue. In 1994, the Supreme Court of the Province of Buenos Aires, in the

ruling of the *Pefaure* case[16] accepted the statute of limitations for reverse expropriation. What was the implication? To simplify, in those cases where the state had affected the right to private property but had not yet taken possession (compensation had not been paid, nor the deed signed), the court granted a timespan of five years during which the owner could legally request an expropriation and receive corresponding compensation. This is a point that has been conflictive throughout history, with many comings and goings over the years.

After the statute of limitations had been accepted ("a triumph" for the officials who defend the interest of the state treasury) in 2004, the Supreme Court of the Province of Buenos Aires, in the *Aguilar* case,[17] rejected any statute of limitations on violations of property rights, by a majority of votes. This ruling has been gradually consolidated, gaining progressively greater acceptance on the part of the judges, to the point that recent rulings have been passed unanimously and have become the jurisprudence of the Argentine Supreme Court.

What does this imply in practical terms? This has allowed reverse expropriation filings to proceed for public works carried out up to 100 years ago, but which were never formalized with a property title and for which compensation was never paid.

As indicated before, the legal doctrine of the Argentine Supreme Court is pacific. In several instances the Supreme Court has been obliged to respond to the following legal problem: is it constitutional to impose a statute of limitations indicating that the deadline for requesting irregular expropriation must be calculated with reference to the date when actions or state policy was implemented? These provisions are, in fact, stated in Article 56 of the Federal Expropriation Act with similar statutes formulated at the provincial level.

[16] *Pablo Marcelo Pefaure et al. v. Treasury of the Province of Buenos Aires* re: reverse expropriation. SCBA, Act 52386 S 26-7-1994.

[17] *María Lucía Aguilar v. Treasury of the Province of Buenos Aires* re: reverse expropriation. SCBA, Ac 85060 S 1-4-2004.

Jurisprudence[18] concerning this issue has now been settled, and the Argentine Supreme Court has ruled that the statute of limitations for an irregular expropriation must not commence until the requirements of Article 17 of the Federal Constitution are met, i.e. until prior compensation has been paid. Another of the arguments made by the Court is that property rights are irreversable. Employing these arguments in the *Aranda Camacho* case, the Court stated:[19]

> Consequently, the court has affirmed that as compensation is a condition for expropriation (Art. 17 of the Federal Constitution), this acts as a counterpart for the property right acquired by the state in the same legal action. The right to be paid the value of the expropriated property has to be defined as a cash credit for the property owner, who in the case that mutual agreement is lacking, can only take recourse in a judicial ruling. It is thus unenforceable, until its value has been converted into a certain amount of cash. The fact that it cannot be enforced implies that the right cannot be reversed by a statute of limitations, as this does not commence until such time as the cash credit becomes a reality. (Rulings 287:387; 296:55)
>
> A similar legal doctrine has been reiterated in rulings, in the sense that only after the prior compensation has been calculated can the statute of limitations begin to be counted as in the Ruling 304:862 and in the Ruling 12/12/85 for the case: *Héctor A. Bianchi et al. v. Provincial Highway Department*. This latter case objected to a law that was similar to the one being considered here (Art. 36 of Act 6394 from the Province of Córdoba). Your Honor stated that the application of this Article 36, which establishes a five year statute of limitations to file a request for irregular

[18] *Helina A. Recabarren de Pérez Caillet et al. v. Province of San Juan*, 06/15/1982 (Rulings: 304:862 - La Ley, 1983-A, 134); *Héctor A. Bianchi et al. v. Provincial Highway Directorate* re: reverse expropriation, 12/12/1985; *Carlos Aranda Camacho v. Federal Highway Directorate* re: irregular expropriation, 04/07/1992 (Rulings 315:606); *Garden Jacobo Aarón et al. v. Municipality of the City of Buenos Aires* re. reverse expropriation, 07/01/1997 (Rulings 320:1263); *Staudt Juan Pedro Guillermo v. Treasury of the Province of Buenos Aires*, 05/27/2004 (Rulings 327:1706).

[19] Argument V of *Carlos Aranda Camacho v. Federal Highway Directorate* re: irregular expropiation, 04/07/1992, T. 315 P. 596.

> expropriation, is in effect justifying the transfer of properties to the provincial state without applying the corresponding ruling on compensation as stipulated in Art. 17 of the Federal Constitution. This, therefore, violates the right granted by this rule and justifies the invalidation of the provision that is being considered here.

This legal doctrine has a very relevant consequence: until an agreement is reached or a judicial ruling determines the price or compensation relating to an expropriation, the statute of limitations for an irregular expropriation cannot begin. Therefore, any facts or actions taken by the state in the past that may have violated property rights make it possible for the owner to request that his property be expropriated.

"REVERSAL" OF THE PUBLIC INTEREST DECLARATION

Another interesting type of conflict that introduces variations in the definition of public interest is what may be called "reversal" of public interest. In legal terms, this is known as "deallocation (or *desafectación*) of a property from the declaration of public interest." We will analyze this subject, referring to a series of legal cases that arose from "deferred expropriations" for infrastructure road projects in the City of Buenos Aires.[20]

We begin with the description of the case presented by Uslengui (1998:515–516). As part of a large arterial road plan initiated in 1977 by the Municipality of the City of Buenos Aires, many properties were declared of public interest and subject to expropriation, with the intention of transferring these to the public domain in order to build future arterial roads. When the properties could not be acquired by mutual agreement, the Municipality initiated legal proceedings for expropriation. As there were several arterial roads in the plan, the expropriations of several of the properties were deferred, employing a new legal category inserted in the Federal Expropriation Act 21499, by specific request on

[20] See chapter one by Duarte and Oyhandy about the construction of highways in Buenos Aires.

the part of Federal Capital officials. With this legal recourse, the Municipality hoped to execute its plan to progressively develop the arterial roads, expropriating the properties at different moments, in accordance with a schedule that was established by the same ordinances that traced the route of the arterial roads, thus expropriating properties belonging to the affected owners on varying future dates. In practice, a large number of property owners affected by future expropriation filed immediately for an irregular expropriation, seeking judgments that ordered the Municipality to take their properties prior to payment of the compensation amount established by the court. This greatly frustrated the gradual schedule of expropriations established by the Municipality, forcing it to immediately pay an amount that had not been budgeted, for a large number of expropriations. Similarly, at the time poor economic circumstances in the country were affecting the municipal budget. In later years this ambitious plan for arterial roads had to be abandoned, reversing declarations of public interest by ordinance and cancelling the original routes for fast transit arteries. Due to these circumstances, many properties were first subject to expropriation due to a public interest cause for the construction of arteries and were subsequently canceled, even when the owners had already reached an agreement with the Municipality, or once they had filed and proceeded with requests for irregular expropriation, including in some cases arriving at firm rulings that lacked only the payment of compensation and possession of the properties by the Municipality. In many cases, owners affected by these changes in ordinance and who were directly affected by urban development plans that were not implemented, demanded damages from the Municipality.

Some aspects require a more detailed analysis. One of these is that the building of urban arteries in the City of Buenos Aires, as Duarte and Oyhandy explained in the previous chapter, was one of the most important policy initiatives of the last dictatorship, both in terms of territorial transformation and because it required

the application of eminent domain on a massive scale. The second aspect concerns the application of deferred expropriation. As explained by Cassagne (2002:488), the main innovation of the Expropriation Act currently in force, as compared to previous laws, was the regulation of the so called *reserve of properties for deferred projects or plans*, as provided in Art. 34.[21] This legal classification constitutes an exception to the abandonment of an expropriation.[22] A deferred expropriation, therefore, would seem to represent an "ideal" alternative for a large-scale artery construction plan, as it permits the declaration of public interest for certain

[21] Article 34. The provisions contained in the first paragraph of the previous Article do not apply to the purpose of reserving properties for projects or plans with deferred execution that have been qualified by a formal law. The following stipulations shall apply in this case: a). the expropriating agency, after declaring a deferred expropriation, must assess the affected property by consulting with the Federal Assessment Court, and then notify the owner of the results; b). if the owner accepts the assessment value, any of the parties can request confirmation on the part of the court, and once issued it shall become binding for both parties, and this amount can only be adjusted by the procedure described in paragraph d of the present Article; c). If the owner does not accept the assessment value, the expropriating agency must request a court assessment of the property, pursuant to Articles 10 and 11; d). the compensation amount shall be adjusted as stipulated in Article 10; e). if during the proceedings, and prior to the final court judgment, the expropriating agency needs to take immediate possession of the property, the provisions of Articles 22, 23, and 24 shall apply; and f). the affected properties may be freely transferred to third parties, with the condition that the purchaser must be made aware of the status of the property and consents to the compensation amount, if this has been determined. For that purpose, once the compensation amount is firm, it shall be communicated by the expropriating agency or by the intervening court to the corresponding land registry. The certificates issued by the registries related to the affected property shall include this compensation amount. The notaries that certify the deeds drawn for the transfer of titles of the properties included in this article shall expressly record the acknowledgment by the purchaser of the status of the property or the owner's consent to the compensation amount.

[22] Abandonment means that if the expropriation agency does not initiate the legal case within a certain time (two, five, or ten years) after the authoriz-

properties without worrying about executing the actual expropriation within the statute of limitations. However, as Cassagne makes clear, when the Expropriation Act was sanctioned, even though not expressly stipulated in this law, the affected owner has the option of requesting an irregular expropriation, as provided in Art. 51 of the Federal Act (Cassagne 2002:489), should the state fail to follow through. This is precisely what occurred. It is notable that the Municipality initiated an expropriation under this legal term, only when it could not reach an agreement with the owner, as explained by Duarte and Oyhandy, whereas in reality, agreement was reached in 97 percent of cases.[23]

These facts cause us to reflect on policy implementations, particularly as a consequence of this type of pharaonic plan. First, we would like to analyze the convenience of applying deferred expropriation when this involves many cases that can be altered to irregular expropriation, which the state may not be able to finance, as it becomes liable for such a large number of compensations. These irregular expropriations, therefore, represent an undesired side effect of urban regulations, involving the process of deferred expropriation.

At the time when the Municipality named properties that would be affected by the arterial road plan and were destined for deferred expropriation, it did not foresee that this would create an avalanche of expropriation requests from affected owners. In fact, the decision to name all properties destined for deferred expropriation created an obstacle for desired land policies. The state even had to contend with complaints for damages filed by owners whose properties were named for expropriation and then reversed when the plan could not be implemented.

ing law is enacted, the expropriation is understood to have been abandoned. (Art. 33, Act 21499).

[23] Oscar Oszlak (1991, chapter V) explains the causes of the "effectiveness" of the expropriations and the high percentage of agreements reached with the property owners.

This is the legal problem described here that the courts had to tackle in the case of the arterial road plan. *Is the state responsible for the damages caused by the declaration of public interest of a property and its subsequent reversal?*[24]

What is at stake in this case is the prudence and foresight that the state must have when deciding to expropriate, because if it makes this decision, but is subsequently unable to implement these plans for any reason, the declaration of public interest will have to be reversed, and thus, it must respond to the damage that it caused by affecting the property rights of the owner during that time.

The Argentine Supreme Court responded to the legal problem relating to the Buenos Aires arterial road plan in five cases: *Begher* (1986), *Klyck S.A.* (1986), *Costoya* (1987), *Galanti* (1988), and *López Dardo* (1989).

These rulings followed a consistent line in jurisprudence, starting with the *Begher* case. The striking thing about this group of rulings is that it repeats the same arguments made by *Begher* in the later cases, but without revealing that these cases are based completely on *Begher*. The structure of the argument was based on the first case and is composed of three main points:

1). *Authority of the expropriating party to desist from action.* "With reference to Art. 29 of Act 21499, the power of the expropriating party to desist from its actions is indisputable, as long as this has not been totally formalized, when unexpected circumstances or previously unknown acts demonstrate, to the satisfaction of the branches of government, that the public interest once declared, no longer exists or has disappeared." This legal doctrine was not created by the Justices in the *Begher* case, but is derived from *Gabriel C. Cerda et al v. Federal Government* (Ministry of Education) on irregular expropriation," ruling on October 19, 1982

[24] This issue is addressed in general and more specifically, from the legal point of view in Maldonado (2008).

(Rulings 304:1484), which did not concern someone desisting from an expropriation, but rather the abandonment of the expropriation action, and was not related to the arterial road cases; therefore, it does not comply with this category of jurisprudence.

2). *Right of the affected party to claim compensation for damages caused by the reversal of the expropriation.* "It is indisputable that if, as a consequence of the withdrawal of the expropriating party, the owner suffers damages, he has the right to initiate corresponding legal actions in order to obtain adequate compensation." The rulings that are based on the arguments formulated by *Begher* apply this reasoning, which in the *Begher* case is cited as being derived from the ruling made in the *Nation v. Las Palmas del Chaco Austral* case of 1975 (Rulings: 291:507). However, in fact this legal doctrine belongs to two rulings from 1946 (Rulings 206:195, 197).

3). *Prudent approach by judges in relation to compensation.* In the *Begher* case, the judges establish a very important legal doctrine. This is the only argument that originates from this case that was not established in previous disputes:

> The judges must act with extreme prudence when determining compensation for these damages, verifying ahead of time whether damages have in fact been suffered, and if so, confirming that they were really the direct and immediate consequence of the annulment of the expropriation, taking care not to demand a compensation amount that will generate manifestly irrational solutions.

Thus, in all cases, the Supreme Court ruled that the state must provide compensation for damages caused by expropriation followed by subsequent reversal, but only if these damages have really been caused. However, the Supreme Court did not accept any of the complaints for damages, mainly because they lacked two essential requirements that would establish responsibility on the part of the state (both for lawful and unlawful activities): 1). the existence of damage; and 2). the causal relation between the acts of the state and the alleged damage.

The existence of damage is a fundamental requirement and includes several aspects: 1). that damage exists; 2). that the damage has been verified; and 3). that the damage can be compensated.

In a number of rulings, the Court noted the fact that the owner maintained possession of his property, without any problems caused by acts on the part of the administration, thus indicating no damage was inflicted. In its ruling on the *Klick S.A. and Costoya* case, the Court stated that the plaintiffs maintained possession of their property during the lawsuit filed against the Municipality of Buenos Aires—this was dismissed when the expropriation was reversed—as no further possessory acts appear to have prevented the plaintiffs from benefitting from the value of their property. Also, in *Begher*, the Supreme Court noted that a declaration of public interest was not the same as dispossession: "The mere existence of a law that indicates a property as public interest cause cannot be translated into a material dispossession that deprives the owner of the use and enjoyment of his property."

The fact that damage has not been proven invalidates the claim indicating state liability. Damage is a necessary requisite for proving both state liability as well as civil liability. In the *Costoya* case, the Court stated that the compensation granted due to the impossibility of marketing a property subject to expropriation was not appropriate because during the trial neither evidence of a lease or intention of a lease and its subsequent cancellation as a result of the alleged case was produced nor did the Court find any evidence indicating subdivision expenses incurred by the plaintiffs in order to sell the property due to its depreciation.

Besides having been proven to exist, any damage must be indemnifiable. In the context of state liability, the Court has always maintained that unrealized gains cannot be subject to compensation and neither can hypothetical nor conjectural benefits and damages.

In the *Galanti* case, the ruling was that the claim of the plaintiffs could not proceed

> insofar as it was based on the change of appearance of the neighborhood, as this fact does not constitute a damage which can be repaired by compensation, as it does not essentially alter domain. This circumstance would at most deprive the owner of a benefit he enjoyed, but this would not grant him the right to compensation. (Art, 2620, Civil Code)

In *Costoya*, the Federal Appeals Court had permitted compensation for unrealized gains, due to the fact that the property was not available between the time possession was transferred to the Municipality and the moment when the judgment was made that rejected the demand for a deed because the expropriation of the property had been reversed. The Supreme Court partially overturned this judgment, discarding the compensation for unrealized gains. In *Klick S.A.*, the High Court rejected compensation for damage it considered hypothetical, as it stated that the fact no improvement could be made to the property after the ordinance declaring public interest was not subject to compensation (Art. 11, act 21.499), as this does not configure *per se* a certain damage that must be repaired: it is at least necessary to demonstrate that this declaration frustrated projects that were being either implemented or completed on the affected property.

As for the second requirement, referring to the causal relation between acts of the state and alleged damages, the Court declared in the *Galanti* case:

> [T]he action for damages against the Municipality based on the existence of vacant lots whose buildings were demolished to make space for an arterial road, which are now used as dumping grounds for garbage and a refuge for homeless people, is not appropriate because besides being circumstantial, these damages are not a direct and immediate consequence of the declaration of public interest or its reversal, or related to building the arterial road.

The High Court also referred to this indispensable requirement in *López Dardo*: "The case for damages should be dismissed in cases where a plaintiff's property has been declared of public interest for expropriation, but subsequently reversed. This is because there is no causal relation between the initial declaration and later reversal and the deterioration suffered by the property,

as this alleged damage was not caused by the Municipality, but by the conduct of the plaintiff who decided to abandon the property once it was declared of public interest and, thus, neglected to perform the actions necessary for maintaining and conserving it."

While the Supreme Court has upheld the power of the administration to desist from an expropriation, it has also indicated that if this reversal causes damage, the affected owners have a right to compensation. This means that property must be protected against the acts of the state, meaning it will be liable provided all requirements of the case are fulfilled.

COMPETENCE OF THE MUNICIPALITY TO EXPROPRIATE

Finally, another controversial subject relates to the power of eminent domain held by the different levels of government following the constitutional reform of 1994. As we indicated at the beginning of this chapter, only the federal government and the provinces have eminent domain capacity, as they can directly and autonomously declare a property to be of public interest.

It is not clear whether the constitutional reform of 1994 modified the relationship between the different levels of government. Some authors, such as Ábalos (2001) argue that this has further decentralized and dispersed power over land regulation by incorporating municipalities and declaring the City of Buenos Aires as an autonomous entity. Others, including Antonio M. Hernández (1994), opine that the constitutional reform of 1994 has resulted in four levels of government in the Argentine Federation: the federal government, the provincial governments, the autonomous government of the City of Buenos Aires, and the autonomous municipal governments. He adds that

> the constitutional autonomy of the City of Buenos Aires and the municipalities totally confirms the federal nature of the country, due to the close relationship between these institutions. Likewise, an aspect of this strengthening of federalism is the possibility of economic and social development at a regional level, not directed by a political government pertaining to a group of provinces, as prescribed in Art.124 of the Constitution.

Bidart Campos (1994) also indicates that the duality of power comprising the federal government and provincial governments, after the constitutional reform of 1994, now adds a third actor within each province with municipal power, which can also act autonomously (Ábalos 2001).

Despite the explicit recognition of municipal autonomy in the constitutional reform of 1994, municipalities cannot exercise the power of eminent domain and, therefore, the balance of power has not been altered in favor of the municipalities. In spite of this constitutional limitation, officials and experts we interviewed have described expropriations initiated by municipalities. One interesting ruling on this matter was issued by the Supreme Court in the case of the *Municipality of Avellaneda v. Pavillón S.A.* (re: expropriation, case 70361), where the limitations and potential for municipalities to exercise eminent domain are discussed.

SOME CONCLUSIONS

To conclude this chapter, we would like to emphasize the stability that has characterized the constitutional regime of eminent domain in Argentina. The complex expropriation procedure, at times involving the three branches of government has not been modified, barring exceptions when special laws have been applied declaring the public interest of a property, as in the case we described for road and water projects in the Province of Buenos Aires. Unlike other countries in the region, the decentralization of eminent domain competence has not advanced in Argentina to include the municipalities.

It is also important to note that the complexity of the constitutional framework of eminent domain has created conflicts and tensions between the different branches of government. Beyond the dichotomy between public and private interests that characterizes eminent domain, we can observe important tensions in terms of the power to define public interest on the part of different levels of government, and even among the different agencies

involved in the process. The interlocking veto power of the three branches of government makes the eminent domain process one of the most complicated in Latin America, and reveals different views concerning public interest and private property. The expropriation process is complex and plagued with obstacles. Expropriations are less the product of deliberate central planning than the result of limited and fragmented initiatives, at times defensive, as in the case of expropriations for land tenure regularization that result in deferring highly damaging situations (in this case evictions), but are incapable of resolving these issues in the long term.

This stability of the eminent domain process does not imply an absence of innovations, conflicts, and disputes during the period of study, where courts have played a central role. For example, the Federal Expropriation Act (21499) was sanctioned in 1977, in the midst of a military dictatorship, and included some of the policies promoted by the *de facto* government to build highways. One of the legislative innovations of this statute was the creation of deferred expropriation permitting for expropriations to be implemented at different times, thus enabling the municipality to obtain adequate financing for a project of such importance. However, actions taken by the property owners to progress with the expropriations immediately was backed by the courts, partly frustrating the initial plans. This decision on the part of judges in favor of the affected owners, together with other factors we previously examined in detail, has created obstacles to government policies.

We have also reviewed other topics related to time limits for filing claims for expropriations performed several decades ago, and the prevailing jurisprudence that rejects the statute of limitations in cases of reverse expropriation where no declaration of public interest has been made, demonstrating a lack of sensitivity to the historical, political, and institutional context where these expropriations were implemented (particularly in cases where road and/or water projects have increased the value of proper-

ties). It is apparent that the paramount interest of the courts is to defend property rights, and they show little consideration for the collective needs and problems that must be addressed by the government.

Likewise, an innovation identified by the analysis of the legal debates is the legitimacy of expropriations intended to transfer properties to third parties (i.e., to other private owners), as long as these are destined for "industrial development or the welfare of the community." In this sense, the jurisprudence established by the *O'Connor* case of 2009 legitimized the massive legislative approval for new applications of public interest to regularize land tenure and transfer factories to workers' cooperatives. Although the legal interpretation stating that the power to declare public interest resides in the Legislature and cannot be altered by the courts has been reinforced, there are still a significant number of instances when public interest has been legally applied, during the past thirty years.

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Chapter Three

Judicial Valuation and Delayed Payment of Compensation: The Case of Eminent Domain in the State of São Paulo, Brazil

Emílio Haddad and Cacilda Lopes dos Santos

INTRODUCTION

This chapter intends to further investigate the role of eminent domain as a strategy in social and urban transformations, as well as the function of the Judiciary to ensure the prior payment at a fair price in judicial proceedings related to eminent domain in Brazil.

First, it is notable that Brazil, with a population estimated at some 192 million inhabitants in 2011, consists of a vast territory of 3.28 million square miles representing 47 percent of South America. It has a large capitol built on public land, a factor that distinguishes it from other countries. The ownership and management of these public assets are distributed among three levels of government (federal, state, and municipal), as well as state-owned companies. We should remember that Brazil is a federal republic consisting of 26 states and one federal district, and is quite heterogeneous in many respects. Likewise, each state is divided into municipalities, reaching a total of 5,565.

Here, we focus on the case of São Paulo state and its municipalities. The reasons for our choice are made evident in the following; however they reflect both the difficulty of addressing this issue in

greater detail at the national level, owing to the limits imposed on this chapter, but also the fact that this is the case that offers best quality information.

In the state of São Paulo, or more specifically in the city of São Paulo and its surrounding area, society finds itself in a paradoxical situation. On the one hand, a huge number of expropriations have been reported, often related to transportation and social housing programs, for which many of the owners receive a down payment, even though they are not satisfied with the appraisals. Similarly, in a separate system based on the law and the Constitution itself, an enormous amount of debts, known as *precatórios*, have still to be paid, in relation to past expropriations.

The system of *precatórios* is an instrument specifically designed to pay any judicial debts that the Brazilian government has with individuals. It represents the final stage of a judicial process against the government, in which the latter was ordered to pay a certain amount to an individual. No rule prevents the public authorities from making further expropriations, even though they have not paid their outstanding debts. Notably, the system of *precatórios* exists only in Brazil; it is a unique instrument in the world, which although extremely relevant, has received little attention in the literature dealing with the subject of eminent domain in the country.[1]

In relation to the *precatórios* there is much dissenting information regarding values. In Brazil, the legislature of each federal entity (states and municipalities) also has the power to audit the accounts of the executive branch. According to data gathered by the legislature in the state of São Paulo in May, 2011, this state alone has almost 400,000 unpaid *precatórios*, equivalent to approximately US$13 billion. Of this amount, an estimated 40 percent relate to *precatórios* due to expropriation.

[1] Analysis of *precatórios* was practically absent in the articles comprising the book published by Fernandes and Alfonsin (2009). This is considered a milestone among recent efforts to review this issue in the light of updated urban law concepts.

Importantly, these data do not include the debts incurred by municipalities that make up the state of São Paulo, as many of these have not yet informed the Court of Justice of São Paulo of the updated total relating to their respective *precatórios*.

In order to improve understanding of changes that occurred in relation to expropriation procedure in the case of São Paulo and its disappointing attempts to comply with unpaid *precatórios*, this chapter is divided into two sections.

The first part consists of a brief introduction to the analysis of the issue of eminent domain in Brazil with the intention of exploring relevant aspects that are specific to the Brazilian case: the payment phase of amounts prescribed in judicial expropriation processes, known as the issuance of *precatórios*. We present a rough idea of the *precatório* instrument, while taking the opportunity to provide a broader picture of the social, political, and legal foundations of eminent domain and its complexities.

The second part attempts to provide context to the analysis, using the example of what occurs in the city of São Paulo in relation to existing *precatórios* and new expropriations. We focus on the initiative adopted in the early nineties by lower court judges, members of the Judiciary of the municipality of São Paulo, whose intention was to prevent a delay in payment of compensation to owners in new expropriations.

Eminent Domain in Brazil

Characteristics of the Eminent Domain Instrument

In Brazil, the eminent domain instrument is regulated by long-standing legislation: Decree-Law No. 3365 dated June 21, 1941, and Law No. 4132 dated September 10, 1962, both prior to the 1988 Constitution and with very few amendments since their respective publication (Santos 2010).

After the Federal Constitution of 1988 and the new urban order established by Law No. 10257, dated July 10, 2001 (The City Statute or *Estatuto da Cidade*), many intervention instru-

ments were backed by law, deeply altering the urban property rights by determining that land management of urban space should be the responsibility of the municipality, through approval of a master plan mainly based on the social function of urban property and citizen participation.

Despite the profound change concerning the management of urban real estate property introduced by the City Statute, the new legal order maintained the same, more than six-decades-old approach to expropriation, consistent with the autocratic vision characteristic of the military regime.

Fernandes (1998) recapitulated on this issue in his work *Direito Urbanístico*, where he set forth:

> Up until now urban sociology has manifested poor understanding of the nature and implications of the actions of the state on the urbanization process, both in terms of the adoption of legislation and the formulation of court orders. Nor is there a broader understanding of the role played by the Law in determining new social practices, particularly those contrary to the prevailing legal order, but which have led to various types of "informal justice" in urban areas. Similarly, as we describe here, the study of the urbanization process has also been neglected by jurists, who with few exceptions have refused to understand that after six decades of intensive urban growth, the prevailing legal order no longer expresses the real urban-spatial order.

Although Brazil has great, large public land assets, at the country's present stage of development, lack of a growth plan prompted government of various levels to promote expropriations, in order to offset the housing and infrastructure shortfall and demand driven by major events such as the World Cup and the Olympic Games, to be held shortly in the country.

The Federal Constitution of 1988 instituted mandatory planning on the part of the public authority,[2] a novel approach in

[2] Article 174 of the Federal Constitution: "As normative and regulatory agent of economic activity, by law the State shall exercise the functions of oversight, incentive, and planning, the latter being binding in the case of the public sector and indicative in the case of the private sector."

public administration, although it will not be possible to assess the results for many years. In order to design a land management policy, the Brazilian state must have a good knowledge and understanding of the situation of land tenure in the country. Public property should be used to direct land management and refocus the national development model.

In accordance with administrative law, actions such as expropriations have to be justified and declared to be in the public interest.[3] In Brazil, the expropriation procedure initiates with a decree of public utility or social interest prepared by a government representative, public entity or public utility concessionary—usually empowered by a valid contract, who is interested in the area to be expropriated at the three federal levels, either the Union, members states, or the municipalities.

Although Brazilian public administrations abide by these requirements, it is apparent that decisions to expropriate land, in order to fulfill a certain public utility or social interest have been taken in isolation, i.e., without any planning. In addition to this lack of forecast concerning expropriations required for municipal urban planning, notably *the law does not encourage contractual agreements in the expropriation process, resulting in countless proceedings pending before the Judiciary*. While it is true that some governments have taken a conciliatory stance in conducting expropriation, given the large number of these processes pending or awaiting settlement, we can affirm that there is an excessively *judicial approach to* expropriation issues in Brazil.

It is necessary for public officials to rectify their stance. A legal provision, establishing the obligation to initiate procedure with a proposed agreement would reinforce the importance of the agreement in cases of expropriation, and contribute to changing the Brazilian practice of resorting to the Judiciary to resolve issues that could be settled administratively, as occurs in many countries.

[3] With reference to essential requirements of administrative acts; see the works by Hely Lopes Meirelles (2001); Celso Antônio Bandeira de Mello (2003); and Maria Sylvia Zanella Di Pietro (2003).

In fact, besides the serious problems concerning valuation and compensation for expropriations, lack of planning and administration prevent agreements with owners of land that are of interest to the public administration and are factors that contribute to the crisis concerning this instrument in the Brazilian context (LAB-HAB 2002).

As to the role played by the Judiciary in Brazilian expropriations, it encompases arbitrating or defining compensation in the judicial expropriation process. In other systems, the Judiciary has a role of control. For example, the Code of Expropriations in Portugal, which includes Law No. 168/99 (Article 38 and following articles) exempts the Judiciary from the task of deciding how much compensation is due. If no agreement is reached, a specialized Court (the *Tribunal de Relación*) appoints a commission, consisting of three arbitrators and subsequently adopts a resolution. A remedy can be filed within the ordinary courts, so that as a general rule, judicial proceedings do not follow. This is also the case of the Spanish Expropriation Law[4] of 1954 which refers this task to a jury composed of five members (Articles 31 and 32).

Disarticulation Between Government Levels

Within the federation established in the Federal Constitution of 1988, the Brazilian state is divided into the following political entities: the Union, member states, municipalities, and the Federal District. As a result of this federative division, in the field of eminent domain, the courts are available in two contexts. A lawsuit is settled at the federal level when one of the parties promoting expropriation is the Union. Expropriation is dealt with

[4] In Spain, a Provincial Expropriation Jury sets the compensation amount. This decision-making body must justify its resolutions against which an administrative appeal may be filed (articles 31 to 35 of the Forced Expropriation Law dated December 16, 1954). In Italy, the administrative judge has exclusive competence to intervene in the dispute concerning the acts, procedures, agreements, and behavior of the public administration and similar entities, while the ordinary judge is responsible for setting the compensation amount.

by the state juditiary and its courts when the interested parties comprise municipalities, states, or the Federal District. This division has caused some difficulties, especially when the state and the federal government have an interest in the same area, resulting in two lawsuits focussed on the same land, particularly in the case of areas intended for environmental protection.

National land use policy instruments include national, regional, and local land use plans outlined in Articles 21.IX and 30.VIII, respectively, of the Federal Constitution of 1988, which must be prepared by the various government entities, within their jurisdiction. In the specific case of local plans, the municipalities are responsible for promoting proper urban land use, as per Article 30.VIII.

Given the difficulties that public administrations face in the Brazilian federal system, also reflected in the issue of eminent domain, the resolution of disputes requires greater cooperation among the entities of the federation, whose institutional relationship is defined in the recent Law of Associations of Federative Entities,[5] indicating the need for more planned action on the part of the federal government and the states with respect to the creation of conservation areas, parks, environmental reserves, and ecological stations—cooperation that may extend to cases that result in lawsuits.

Notably, the Brazilian Constitution did not provide for the integration of the land planning activity of its different federative entities, resulting in a lack of coordination among these entities

[5] Federal Law No. 11.107/2005: "Article 1. This law establishes general rules for the Union, the states, the Federal District, and the municipalities to contract associations of federative entities in ordr to achieve common interest goals, among other provisions.

First Paragraph. The association of federative entities shall constitute a public association or a private legal entity.

Second Paragraph. The Union shall only participate in those associations of federative entities that include the all states where the associated municipalities are located."

in terms of their expropriation decisions. Thus, the compentencies that are exclusive to the federal government include the development and implementation of national and regional land use and economic and social development plans (Article 21.IX, CF/88). Although this falls within the scope of material competence that does not require capacity to legislate, progress in developing a legal framework that would allow for the integration of the various norms regulating different types of urban land use, occupancy, and protection are necessary, as currently there is no relation between the different legal mandates and regulatory norms.

The use of expropriation-as-sanction, characterized by compensation paid with government bonds, as established in the City Statute, depends on having the areas where this kind of expropriation is being contemplated as part of the master plan. However, this practice has not been assimilated into the municipal master plans, a situation that is exacerbated when the expropriations are carried out by the states or the Union, as there is no plan for the expropriations at these federative entities, nor any arrangement that ensures expropriations performed by member states and the federal government are compatible with those planned by the municipalities.

Because the development of national and regional land use plans is the responsibility of the federal executive branch, it is essential to have norms that regulate this administrative activity. Thus, it becomes necessary to enact a new law instituting what some studies refer to as a national land use plan. However, as these plans are actually instruments of far-reaching land use policies, this law would define the outline of a national policy, permitting a much broader scope of action for the federal executive branch.

Some academic studies[6] propose the enactment of a law defining national land use policy that would contain a land management system for the coordination of expropriation plans composed

[6] Aldomar A. Rückert (2007).

directly and indirectly by agencies and entities within the Union, the states, and the municipalities. It should also define the scope of the national, regional, and local plans, which may either coincide with the political boundaries of member states or refer to other management units, for example eco-regions, watersheds, political boundaries of the municipal territory, etc.

The City Statute as a Promoter of Alternative Mechanisms

Eminent domain is undoubtedly an important instrument for urban development. Within the framework of the state's chronic fiscal crisis, there is need to seek financing alternatives, including the recuperation of part of the incremental land value generated by the public sector intervention. An increase in the application of these instruments is inhibited by the lack of political and administrative structures and actions to facilitate this practice.

For example, the City Statute outlines alternative instruments to eminent domain, such as right of first refusal: the public authority defines the areas of interest for future projects and, if the owner wants to sell the areas, it is mandatory for him to give preference to the municipal public authority. The same principle should be applied to areas to be expropriated for public utility or social interest, so that acquisitions are compatible with municipal planning.

In this regard, it is important to remember that there is another possible approach to the issue of land value capture associated with urban projects, not often applied in Brazil: the so-called expropriation by zones, established in Article 4 of Decree Law No. 3365 dated July 21, 1941:

> Expropriation can affect the area that is contiguous to that required for development of public works and those areas that derive exceptional appreciation in value, as a result of these works. In any case, the declaration of public utility should specify which areas are indispensable for construction and which are intended for re-sale.

In such cases, the area of expropriation goes beyond the space needed for the project for one of two possible reasons: the project considers a future expansion or there is an anticipated rise in value of adjacent properties. Any expansion of the project and the land to be used for such an expansion has to be part of the proposed project plans. If those lands are not used for the purposes stated in the plan, they may be returned to the original owners or sold. The lack of an express provision concerning the timespan during which the property must be used for the purpose it was expropriated, does not imply that the public authority can decide whether or not to use the property or choose freely when to make use of it, or decide how much land area to expropriate, without any limit (Dallari 1981).

In cases where the area is reserved for future growth of adjacent properties, the maintenance of this area will be based on the value added generated by the public works carried out. The resale of the expropriated areas which then acquire additional value is authorized by law, based on a way of valuing the public works that generated this value. Usually, the cost of the works is covered by everyone's taxes; nevertheless, the government is authorized to expropriate areas exceeding that required for the work in question in order to cover the investment costs with the subsequent resale of the land.

However, the doctrine is divided regarding this type of expropriation, as public works should be paid for with taxes and not through expropriations. In this context Dallari (1981, 93) asserts:

> As the betterment contribution only represents an alternative strategy to expropriation by zones, it is true that the existence of the former does not imply the unconstitutionality of the latter. Moreover, it is perfectly legitimate for the public authority to absorb any added value, when this is derived from the execution of public works, based on the principle that prohibits unjustified enrichment with no cause and the ancient principle of equity (*suum cuique tribuere*).

Another instrument that is gaining notoriety in Brazil, especially in São Paulo, is the "urban concession," which consists of autho-

rization on the part of the public authority for individuals to carry out public works that enable the development or revitalization of urbanized areas. This instrument has been used in municipal laws, based on the general law on expropriations and concessions for the provision of public services.[7]

Silva (2006, 324) develops the possibility of granting an urban concession for individuals in the following terms:

> Urban concession consists in a form of concession for public works not designed for subsequent exploitation of services that are compensated for by charging fees. Thus, it is a pure concession for public works, not a dual concession (for works and service provision), a concept that is barely surfacing in the legal doctrine. As mentioned previously, Francisco Lliset Borrell (1969) provides us with the essence of its concept when he presents it in the following terms: "the unmitigated concession of a public work implies the transfer of powers which are the prerogative of the Administration to a private party, so that it can execute works for public use and buildings to house services provided by a state, a province, or a municipality. The costs incurred by the concessionary will be paid through tariffs for service provision or by donation of assets for public use. Instead, the cost will be recovered from the added value or by-products derived from the project itself." This applies, for example, when the municipal government prepares a redevelopment or urban renewal plan for a certain area; if that area is private property, it will be expropriated in order to implement the plan. The implementation may be undertaken directly by the municipal authorities or by one of their public state-owned companies, such as the EMURB (*Empresa Municipal de Urbanização de São Paulo*), or be carried out through a concession, in which the concessionary will bear the costs of implementing the plan, but have the right to sell the land or new buildings of the redeveloped area.

Significantly, urban concession should not be understood as a straightforward provision of services to carry out a specific public works or simply as a concession of public services, as this would

[7] In the city of São Paulo, Municipal Law No. 14918 of May 7, 2009, authorizes the urban concession of Nova Luz, a severely degraded area of the city, known as *Cracolândia*, where the company that is awarded the bid may expropriate private areas, with a view to urban reclassification. The areas that may be expropriated have not yet been defined and the residents and traders in the area are mobilizing against the urban concession because they believe that the municipal project only favors the real estate market.

place the concession within the law that defines public-private partnerships.[8] The concession is offered to a private party only in terms of executing the project, as ownership or control will still pertain to the public authority. The concession must be object of oversight by the public authority and be established according to its guidelines, master plan, and municipal laws.

Thus, executing an expropriation is not exclusively the power of political entities and, consequently, the expropriated property does not always fall within the domain of the authority that declared the property's public utility. However, although individuals may benefit from expropriated property to implement urban projects, the subsequent expropriation requires a formal declaration.

It is thus apparent that the Federal Constitution does not mandate that expropriated property must compulsorily become public property. The purpose of the eminent domain instrument is to fulfill public interest and the fact that the public administration's principal role is to fulfill public interest does not mean that this is the only way of achieving this goal. What is unacceptable as grounds for expropriation is private interest. The same applies to the resale of previously expropriated properties where the main objective is to fulfill public interest.

Currently, there is great interest in applying urban concession in the city of São Paulo; this being the first attempt to use this instrument in Brazil. There is expectation regarding the next activities by the municipality of São Paulo in evaluating urban concession in terms of its impact on the city and on the people who live and work in the area subject to the intervention. At the same time, the Court of Justice of the state of São Paulo is processing a claim of unconstitutionality at the state level.[9] The first ruling on this

[8] Federal Law No. 11.079/2004. Public-private partnerships are contracts between the public entities and private parties to enable the implementation of activities of general interest.

[9] In Brazil there are two models for direct action against unconstitutionality: at the federal level, in the context of the Federal Constitution, and at the state level, heard by the state courts of justice to protect state constitutions.

process on April 27, 2011 prevented the expropriations promoted by the Nova Luz project in São Paulo. However, Judge Souza Lima, of the Court of Justice of São Paulo (TJ-SP), reversed the provisional measure, which he himself had dictated, to suspend the progress of activities of the municipality in the area known as *Cracolândia*. The judge had complied with a direct demand filed by the Union of Electricity Companies Workers, claiming this was unconstitutional. As a result, the works were halted.

The main reason for the merchants' objection is that the municipal administration would be delegating the power to expropriate properties in the area to private parties, whereas this should be the exclusive power of public authorities. In his last resolution, Judge Souza Lima concludes that "expropriation on the part of concessionaries for public services, public facilities or those who carry out functions delegated by the public authority" is legal. Thus, a private party is able to promote an expropriation and the contested regulations will permit private entities to promote any expropriations required to implement a program that will revitalize one of the most degraded areas of the city, as sustained by the judge in his decision.

However, the expropriations mentioned here that were delegated to private entities have been constantly subject to other legal procedures. The last one was a class action brought by a merchant who works in the town. On January 26, 2012, in process No. 0043538-86.2011.8.26.0053, the Eighth Court dealing with public finance granted the provisional suspension of the effects caused by Municipal Law No. 14.918/2009, referring to the application of urban concession in the Nova Luz project area. He also suspended administrative process No. 2009.0.209.264-9, which is being processed at the Municipal Urban Development Secretariat and deals with the development of the urbanization in the area and its economic feasibility.

The action was brought by André Carlos Livovschi, who sustained, among other things, that the mayor of São Paulo had not held any public hearing in the context of the executive branch to

show the project to the population, especially to those citizens affected by the intervention.

According to Judge Adriano Marcos Laroca's decision in Federal Law No. 10.257/2011, the City Statute, which establishes general guidelines for the public administration of urban policy provides for democratic management through the participation of citizens and associations representing various community groups. The judge declared that the political decision to apply urban concession to the Nova Luz project disregarded the participation of citizens, especially those pertaining to the heterogeneous community (low-income residents, small merchants of electronic appliances, businessmen, etc.), who were affected by the intervention.

The judge also noted that the predominant reason for applying urban concession in the Nova Luz project was that it would facilitate, with private sector investment, the execution of public works and services without major investment by the municipal government. However, studies carried out by Fundación Getúlio Vargas (FGV) noted that the project would only be implemented if a government investment of about 600 million reais was made, over and above the tax incentives already granted.

Evidently the main justification for the application of urban concession to the Nova Luz project areas proved to be false. In other words, the specific law (*Ley de Efeitos Concretos*) that was the focus of social action regarding the administrative act in its material form was invalidated due to false reasoning (lack of need for major government investment), which as the judge argued lead to its enactment.

This decision is subject to appeal. We understand that the fact that the public administration has not joined the debate or recognized the right of the landowners of the area that will be expropriated to express their opinion concerning the intervention, indicates that there will be many more legal suits related to this intervention proposed by the municipality of São Paulo.

THE QUESTION OF VALUE

Besides fiscal problems and delays and unpredictability concerning payments related to the *precatórios* system, there are other features of the expropriation process that may potentially make it abnormal, in particular the assessment of compensation amounts.

In a comparative study of various countries, Azuela and Herrera (2009) considered that the assessment of the compensation amount, together with its rationale, comprise the principal difficulties faced during the expropriation process. There are reasons for this.

In Brazilian legislation one of the problems is the lack of explicit procedures for the valuation of real estate. In their absence, valuations are drawn up according to the rules of expert reports, which may share similarities, but also specific differences.

The expert report in an expropriation process is ruled by the Civil Procedure Code, in articles that relate to the expert, 145 to 147, and to the expert report, 420 to 439. Notably, along with the Civil Procedure Code, we should also analyze Decree Law No. 3365 dated July 21, 1941, dealing with the possibility of expropriation for public utility, especially provisions 14, 23, and 27.

As a point of departure, we should consider articles referring to expert reports as they appear in the Expropriation Law, in order to fully understand their scope. Article 14 states:

> When the judge issues the initial request, he must freely appoint an expert of his choice (a technical expert, if possible) to proceed with the appraisal of the property. Single Paragraph: The plaintiff and defendant may appoint a technical assistant to the expert.

This article makes clear that immediately upon issuing the initial request, the judge must select an expert; in this case, the provision does not require that the person selected should have technical knowledge, should it prove impossible to select a technical expert. On this subject, Salles (2006, 307) asserts:

> Whenever possible, the expert selected should be a technician (Article 14 of Decree Law No. 3365 dated July 21, 1941). However, when this is

> not possible, the judge may appoint a layman to proceed with the expert report for the expropriation act.

Similarly, this provision allows the parties to the lawsuit to appoint assistants to the expert. This legal authorization is granted because often the parties find themselves in the same position as the judge, because they do not understand the technical specificities of the case, and are thus able to resort to an expert who will explain what is necessary. The duty of the technical assistant is to assist the parties that appointed him, in the same way the expert assists the judge.

In this regard, Salles (2006, 318) states that the assistant's duty goes further, as he is also empowered to criticize the expert report, pointing out any flaws and inconsistencies.

Based on the analysis of the renowned Brazilian author, the absence of appraisal criteria for defining fair compensation is already consolidated in the Brazilian system. Salles even states that the technical assistant's role is to enlighten the judge concerning the point of view of the party who appointed him and that the judge should take into account the assistant's personal and technical qualifications.

Note that while qualifications are important, the existence of objective appraisal parameters would to a large extent eliminate the subjectivity of compensation value assessment. Indeed, the fact that the technical assistants exclusively defend the interested parties may lead to having three report expressing very divergent points of view in the same process, thus causing delay in judicial decisions concerning fair compensation.

The need for an expert in legal procedure is due to the fact that the judge has no specific knowledge of the specificities relating to the very diverse topics addressed by the judiciary. The judge should be a connoisseur of the law, rather than the specifics of each case.

It is paramount that the expert report should contain truthful information. Salles (2006, 310) emphasizes:

> Note also that the expert must provide truthful information. Therefore anyone who provides untruthful information by fraud or negligence shall be liable for the damages caused to the other party, be disqualified from

> participating in other reports for two years and shall be subject to the penalty established by criminal law (Article 147 of the Civil Procedure Code, and Article 342 of the Criminal Code).

Article 420 of the Civil Procedure Code defines the duty of the expert as an examination, a physical inspection, or an appraisal. In the case of expropriation acts, the duty of the expert consists of appraising the property object of expropriation.

In relation to the contents of the valuation reports, we note that Brazilian law grants ample powers to the expert, but does not mention the basic rules that must be observed in the expert report, a fact that has led to very subjective reports with very divergent values being presented, compared to other reports prepared for areas having similar characteristics.

However, Decree Law No. 3365 dated June 21, 1941 establishes very simple criteria to be observed by the judge when fixing the amount of compensation; but these criteria do not take into account the type of land or make reference to urban regulations:

> Article 27. The judge must refer to the basic facts that justified the decision he expressed in his ruling, and must pay particular attention to estimating the value of the property for tax purposes; the purchase price and the interest accruing to the owner of such property; its location, state of maintenance and security; the fiscal value of similar property over the last five years; and the appreciation or depreciation of any surplus property, belonging to the defendant.

Based on the values fixed by the experts—which generally go unchallenged by the courts—default interest, compensatory interest, or monetary correction are applied and all of these elements, are taken together in order to define the final compensation amount. Thus, while questions arise concerning the effect of the interest rates on the value assessed in the appraisal, the main problem is to understand the methods used by the experts to arrive at the property value, which may generate even larger distortions with the application of interest rates and monetary correction.

Despite these procedural provisions addressed in Brazilian law, we should not ignore that a particular source of difficulty for the

expert appraiser lies in the very nature of the expropriated property, which for various reasons may be considered as a special case of valuation. For example, areas to be expropriated for public works can be very extensive, making it impossible to obtain appropriate comparators; their boundaries are not necessarily those of the expropriated property; property for reserves or subject to classification for its historical or artistic value represents a situation that is not market-related; likewise there are cases of land that has been invaded and other instances that will require an alteration in land use.

These cases may deviate from the paradigmatic model, which assumes the existence of a perfect competitive market for which valuation methods were formulated and whose uncritical application can have, and has had, disproportionate results. However, several examples of overvaluation have emerged in the state of São Paulo requiring the intervention of the state Attorney General's Office.[10]

The perception that problems relating to valuations have hampered urban policies prompted research and seminars to analyze and discuss the issue. Among them are Land Expropriation Price: Limits on Public Policies in areas of Housing, Environment, and Public Roads in São Paulo, by the *Laboratório de Habitação* of the School of Architecture and Urbanism of the University of São Paulo (LAB-HAB-FAU-USP 2000), and the Workshop on Appraisals and Land Management Processes, held in Bogotá in 2004, both sponsored by the Lincoln Institute of Land Policy.

Court actions tend to reflect the power structure of the class of society to which they pertain. In Brazil, as in other capitalist countries, access to representation depends on the financial capacity of a person, defining whether or not prestigious law firms can be hired.

[10] The Attorney General's Office of the State of São Paulo is responsible for defending the state of São Paulo in a lawsuit. In the case of millionaire expropriations, some attorney generals were pioneers in requesting a "review" of the judgement to avoid the treasury from being affected. When questioned, the judiciary believed that state defense represented an "excess" making it difficult for the property owner to receive his compensation.

This occurs when there is no collusion between the state, the expropriated party, and the judge in order to render judgments resulting in increased compensation values. This should be suspected in cases in which the judge authorizes possession of the property on the condition of a symbolic deposit of 1.00 real which, in principle, contributes toward the minimum value prescribed by the expropriation law, and which led to a considerable number of *precatórios*, as some owners agreed[11] that the public authority should enter their property without a down payment, as occurred in the Parque Guapituba, in the city of Mauá, that was expropriated in 2000, where the owners permitted the municipality to enter the property without having made the prior deposit.

Another aspect relates to the ideological position taken by the law regarding the uncompromising defense of the party subject to expropriation. Research by Maldonado (2009), considering Argentine judges, found that in Argentina judges tend to protect ownership rights. It seems that this is no different in Brazil. In this context, it is difficult for the appraiser to become independent from the judge who appoints him; and as a result they serve the mentality and ideology that protects patrimony.

To this end, the so-called "single-value school" has greatly contributed to the appraisal value being independent from its purpose: whether the expropriation constitutes a case where the public authority uses its prerogative to avail itself of the property citing collective interest, a valuation to secure a loan, or the adjustment of a company's equity value.

Fortunately, this school concept was superceded by the ruling adopted at the meeting of the Pan-American Union of Valuation Associations (UPAV) held on the occasion of its 2006 congress in

[11] In the recent past, the fact that an owner might consent to early entry to the expropriated area without receiving a prior deposit was to their advantage, as in those cases, the judiciary fixed an increase in the compensation of twelve percent per annum, based on assessed value. At present, this percentage has been reduced by case law and may be fixed at a maximum of six percent of the compensation value.

the city of Fortaleza, which changed the existing paradigm, when stating in its Declaration that "the value of a property depends on the purpose and definition that apply to the specific case being analyzed at the time of valuation."

This approach creates the opportunity for a valuation that puts the expropriation into context, thus giving rise to a new paradigm that respects traditional methods for analysis, takes into account more broadly the impact of different factors involved in expropriation, thus obtaining results that are less controversial (Haddad and Santos 2009).

Likewise an effort has been made to perfect the regulation of Brazilian property valuation, NBR 14653 (*Associação Brasileira de Normas Técnicas,* n.d.). The new version of Article 2, "Urban Real Estate," in effect since March 2011 has already been approved. Moreover, considering the approach to more specific cases, two new and major articles were included: Article 6, "Natural and Environmental Resources," whose updated release is dated July 2008, and Article 7, "Historical and Artistic Heritage Property," in effect since March 2009; these have already incorporated to their text the above-mentioned Fortaleza Declaration.

It should be noted that in Brazil, appeals filed with higher courts to challenge court decisions in expropriation processes have been based on procedural matters, as there is no higher authority which can effectively serve as a technical safeguard in the case of valuations with questionable results.

Origin of *Precatórios*

In this section, we reflect on an issue of great relevance for judicial expropriation processes: the payment phase for the amounts set by the Judiciary. In Brazil, this procedural phase is called issuance of *precatórios*, i.e., a court order addressed to the public authority that promoted the expropriation is issued after the final court decision, ordering payment to the owner of the expropriated property.

According to the country's vast doctrine, the *precatórios* system is based on the precedence of public interest, meaning that finan-

cial compensation for an individual should not be paid from public funds, which would thus interfere with the interests of the majority in the community. Thus, public administration is permitted to pay these debts by applying the *precatórios* system, in order to schedule payments, in accordance with the public budget.

The big problem is that public entities throughout the country rarely have surplus funds in their budgets, resulting in the accumulation of a huge amount of *precatórios* awaiting payment, representing a significant share of the public debt. Considering that *precatórios* are distributed throughout the different levels of government, no one knows exactly how much they total, although in 2006 the federal section of the Brazilian Bar Association estimated they amounted to 58 billion U.S. dollars.[12]

However, evidently delayed payment involves additional expenses in the form of default interest, compensatory interest, and a monetary correction for inflation; all to be included in the compensation value.

In short, the system of *precatórios* is a specific instrument for the public authority to pay judicial debts to individuals. It represents the final stage of the judicial process against the government, when the government is ordered to pay a certain amount to an individual.

It is important to remember that in Brazil, the public authority is subject to the same legal procedures as individuals in terms of lawsuits, except during the phase when the final judgment is executed. If an individual does not pay voluntarily when a judgment is made against him, he must make the payment within a 24-hour period under penalty of seizure and with subsequent auction of assets in order to sufficiently cover the debt.

If the judgment is made against the public authority, it must comply with the payment following the *precatório* system, pre-

[12] Federal section of the Brazilian Bar Association: an entity that represents and controls the activities of lawyers licensed to practice in Brazil at the federal level.

scribed in Article 100 of the Brazilian Federal Constitution, a provision that undermines the principle of equality among the parties involved in a lawsuit.

From the time of its origin, this provision was the cause of the system's downfall. When first enacted, the Federal Constitution of 1988, in Article 78 concerning temporary constitutional provisions, provided for the possibility of an eight-year payment for overdue debts, from that date. This extension of the term for payment of overdue debts was followed by others, resulting from two constitutional amendments, the most recent consisting of the controversial constitutional amendment No. 62 in 2009, which will subsequently be discussed further.

Notably, the system for payment of *precatórios* does not bear any resemblance to instruments found in other developed countries. Countries such as Italy, England, Germany, and the United States simply abide by court decisions. The public authorities monitor their judicial processes and manage to preempt payments that are due, as the result of those acquisitions.

Bruno Espiñeira (2004), referring to García de Enterría (1997, 921) tells us that ordinary judges in Spain hold direct execution powers against the Treasury and in no way can these be weakened by alleging lack of, or insufficient budgetary resources. The Spanish academic refers to a Spanish Constitutional Court ruling of July 1998 (STC No. 166/98 dated July 15, 1998), which declared the unconstitutionality of Article 154 of Local Finance Regulations generically prohibiting the seizure of public property, whether or not these pertain to available patrimony.[13]

France has a different system. An administrative court exists that is specialized in resolving expropriation issues (*Juridiction Départementale de L'expropriation*) so that no judicial rulings are required to enforce this matter. It is up to the expropriation judge (*juge de l'expropriation*) to arbitrate the amount of compensation,

[13] Espiñera Lemos, Bruno (2004, 37).

while an appeals court assesses any amounts indicated by expropriation judges from neighboring departments.[14]

In Brazil, the origin of the payment procedure through the *precatório* system dates back to the days of Imperial Brazil, in the Instruction given on April 10, 1851. During the republican era, the first constitution to include this was that of 1934, which specified that federal debts could be paid by means of a *precatório*.

> Prior to 1934 a sad reality was hidden behind the scenes, where privilege and patronage even managed to undermine the independence of the Judiciary. The so-called *caudas orçamentárias** became widespread, with the nominal appointment by the Legislative of those creditors who would be paid in the following fiscal year.[15]

The Legistative, reach the absurdity of discussing the sense and the righteousness (or otherwise) of judgments generating credits. If the grounds for these judgements were not of their liking courts did not approve the grounds for these judgments, then they denied the requested credit. This implied that the *res judicata* underwent an *a posteriori* political revision.

The Constitution of 1937 continued with the same format, and that of 1946 extended the system to states and municipalities. The Constitution of 1967, as amended in 1969 during the military regime, aligned the *precatorios* with stipulations defined in the current Constitution, for example an issuance for a *precatório* up until July 1 should be paid by the following year's fiscal budget, referring to the order number it received at the court of origin. At the time, this provision was designed to forestall the many abuses by public authority intending to pay only those who were politically aligned with them.

[14] See *Institutions juridictionnelles* on the page *www.evadoc.com/doc/23544/institutions-juridictionnelles-(cour-de-droit-l1)*.

[15] J. V. Viana (1998a).

* *Caudas orçamentárias* is the ancient name given to provisions not related to the budget, but often included in the budget bills with modifications to facilitate their approval.(TN)

Currently, those who are owed money by the public authority face serious difficulties being paid. In a study conducted in the municipality of Mauá, within the metropolitan area of São Paulo, in November 2010, Ana Paula Ribeiro, the Secretary of Legal Affairs revealed that when the current mayor took over the municipal government in 2008, there was no file recording the status of the judicial processes about to become resolutions that would give rise to *precatórios*. In order to estimate the magnitude of the municipal debt, it was necessary to hire a consulting firm to audit the processes and overdue debts.

Unfortunately, the example of Mauá is common in the country. Recently, a surprise judgement was made in the city of São Paulo itself, stating that the state governor must appoint an interim mayor to replace the mayor elect and thus re-establish the payment of legal debts.

This is the resolution dated August 11, 2010, which reads as follows:

> Summary: Constitutional — State Intervention in the municipality of São Paulo — Failure to pay a precatório relating to an act of expropriation. Creditor legitimization to date — Precedents of this court. Inapplicability of constitutional amendment 62/09, given the unconstitutionality of its retroactive nature as shown here — Transgression of an immutable constitutional principle (Article 5, item XXXVI, and Article 60, fourth paragraph, item 4). Failure to observe the term in paragraph 1 of Article 100 of the Federal Constitution — Inconsistent justification on the part of the defendant — Administrator's obligation to balance public accounts — Incidence of Article 35, item IV, of the Federal Constitution, and Article 149, item IV, of the Constitution of the State of São Paulo — Intervention granted.
>
> Having seen, reported and discussed these intervention proceedings In Municipality No. 994.09.002451-6, in the city of São Paulo, where the plaintiff is LUIZ GUILHERME DA SILVEIRA RIBEIRO and the defendant is the MAYOR OF SÃO PAULO.
>
> IT WAS AGREED, at the Special Court of Justice of São Paulo, to issue the following resolution: "BY A MAJORITY VOTE, THEY SUSTAINED THE REQUEST FOR INTERVENTION," in accordance with the vote of the reporter who forms part of the collegiate resolution.

In the case of the preceding lawsuit, the resolution will not be complied with. Certainly, the new governor elect will not appoint an interim mayor to replace the acting mayor, who is a political ally.

The intervention of a federative entity in dealings with another entity represents an exceptional feature in Brazilian federalism. The Constitution authorizes the federal government to intervene in the states and the states in the municipalities should the executive branch fail to comply with court resolutions.

The procedure consists of two phases. During the first phase, the prosecution or interested party makes a request to the Judiciary for a declaration of contempt of a court. During the second phase, a political decision is made by the President of the Republic in the case of intervention of the federal government in the states or by the governor in the case of intervention of the state in its municipalities, to appoint an interim official by decree, who will take over the state or municipality to restore court payments. These provisions are set out in Articles 34 to 36 of the Federal Constitution; however, despite court resolutions authorizing this, these interventions have never been implemented.

Procedure of the *Precatório*

According to current constitutional order, and in a normal situation,[16] i.e., in those cases where the public administration is up to date with payments for *precatórios*, the projected payment of any new public finance debts derived from a final court resolution is established in Article 100 of the Federal Constitution.

This system insists on full compliance with the chronological order assigned to the *precatórios* and, except for alimony credits that are to be paid immediately, *precatórios* are paid by including them in the debts to be paid from the public budget. These debts are communicated to the public administration by an official letter from the court where the debt originated.

[16] Please note that in cases of overdue debts, as in most of the country's public entities, the payment will be made through a special regime established by constitutional amendment No. 62/2009.

However, the inclusion of these debts in the budget takes place with reference to the public administration's resources, a very questionable prerogative generating legal uncertainty, especially in the case of creditors for *precatórios* derived from judicial expropriation processes.

In fact, under the first paragraph of Article 100 of the Federal Constitution, the value of a *precatório* not submitted by July 1 must be reported in the following fiscal year's budget, for the updated payment to be made by the end of that fiscal year, in strict compliance with the chronological order of submission.

However, most of the country's public treasuries, whether federal, state, or municipal, do not meet this constitutional requirement. Article 100 of the Constitution also outlines two hypotheses to force the public administration to pay the *precatórios*: one is that the affected party requests the judicial seizure of public revenues, when the public authority makes the payment without following the chronological order; the other is that the affected party or the Attorney General requests intervention in the public sector entity that has violated court resolutions, in the event of a breach of the *precatório*.

Even though intervention is regularly authorized by the Judiciary, it is never implemented by the Union against a federal state or by a federal state against a municipality. As discussed in the previously-transcribed resolution for intervention to proceed in the municipality of São Paulo, what Brazilian society contemplates in awe is the establishment of a large moratorium, created since the promulgation of the Federal Constitution of 1988.

Similarly, regarding the issue of intervention, the Federal Supreme Court (STF) has been consolidating the view that the decree is not applicable in the light of proven budgetary limitations known as the "doctrine that you can only do what is possible" (*teoría de reserva do posivel*).[17]

[17] In an article published by magistrate Gilmar Mendes (2000) from the Federal Supreme Court states: "Please note that, although these decisions are legally bound, in reality their application is subject, to what is financially pos-

Given the non-payment of debts by public finances and the impasse faced by creditors, the Federal Constitution has recently been amended to make it possible to pay overdue *precatórios*, known by many as the third moratorium.

The Special Regime of Constitutional Amendment No. 62/2009

Constitutional amendment No. 62, enacted on December 9, 2009 establishes a complex procedure for the Union,[18] the federated states, the Federal District, and the municipalities to pay any overdue judicial *precatórios*. This innovation on the part of the constitutional lawmaker requires a legal deposit to be made by the treasury, electronic auctions, classification in order of lower value, besides giving preference to people over 60 years old or suffering from a serious illness.

This amendment, together with the previous ones, resulted from a huge demonstration organized by mayors and governors outside National Congress, owing to the elevated scale of public-sector debt.

However, many social groups do not accept the terms of the amendment, considering it to be unconstitutional. Several direct claims indicating that amendment No. 62/2009 is unconstitutional have been made, mainly arguing that "discount auctions" fail to comply with the resolutions of the Juditiary.

Note that the procedure for paying *precatórios* does not bear any similarity to any instrument in any other country legal system.

The direct demand claiming unconstitutionality filed by the National Confederation of Industries (ADI 4425 dated June 6, 2010, reported by the magistrate Carlos Ayres Britto) states in its

sible, among other factors (Vorbehalt des finanziell Möglichen). In this regard, the German Constitutional Court recognized, in its renowned resolution concerning the numerus clausus number of places in universities (numerus-clausus Entscheidung), that claims intended to create factual assumptions, necessary for implementing certain rights are subject to "what is actually possible" (Vorbehalt des Möglichen).

[18] The Federal Government has no overdue debts for *precatórios*.

arguments that in some countries such as Italy, Spain, Portugal, and Argentina, an agreement was made to provide greater protection to creditors by limiting immunity from seizure of public assets, thus promoting the seizure of property owned by the State and public revenue, if it is not being employed for the development of essential activities.

In Portugal, assets pertaining to administrative bodies, property of their private domain, can be seized as long as these are not allocated to public use. In Spain in 1998, the Constitutional Court declared the unconstitutionality of the Local Tax Office, generally prohibiting the seizure of public property, whether or not they formed part of available assets. In Argentina, if the state becomes delinquent, public assets used for private purposes may be seized.

In Italian law, neither public money nor credit, as recorded in the balance sheet, is liable to seizure, except for that relating to public legal disputes, meaning those resulting from such acts performed in the exercise of administration, or public loans of private origin, where no public allocation has been established previously.[19]

The idea of constitutional amendment No. 62 was to find a solution to the extensive judicial liability relating to public administrations that resulted from the irregular, partial payments that had been permitted previously by the Constitution. In 1988, when the Federal Constitution was enacted, it is important to remember that eight years were granted in order to settle outstanding *precatórios*. Twelve years later, in 2000, constitutional amendment No. 30, authorized that payments in installments could exceed 10 years, for cases filed up until December 31, 1999.

In fact, amendment No. 62 established the third moratorium since the Federal Constitution of 1988 was enacted, known as the "special regime for payment of *precatórios*."

[19] See Ricardo Perlingeiro Mendes da Silva (1999, 49) and following pages; Leonardo Greco (2000, 536) and following pages.

As long as the supplementary law that may ultimately establish the special regime of *precatórios* has not been published, the public administrations that adopt the special regime established by constitutional amendment No. 62 are subject to the rules from Article 97 of the act of temporary constitutional provisions. During that adjustment period, Article 100 of the Constitution becomes unenforceable, except regarding the right of *preference* of the elderly and those suffering from serious illnesses, compensation paid from the active debt, *precatórios* from the payment of auctioned real estate, and corrective measures exclusively related to savings account, among others.

The new procedure prescribes that public administrations should make deposits to a special bank account, to be managed by the Judiciary, apportioning amounts sufficient to settle *precatórios* as follows: 1). 50 percent as defined in the traditional chronological order;[20] and 2). the remaining 50 percent through "discount" auctions, or in order of the lowest value of *precatório*, or according to negotiations carried out with the creditors.

In the fourth paragraph of Article 97 of the Act of Temporary Constitutional Provisions (ADCT), it states that the special deposit account will be managed by the local court, even though it is the courts that issue the *precatórios* in labour disputes.

States and municipalities that adopted the special payment regime in March 2010 by a decree on the part of the governor or mayor, elected one of two possibilities in order to settle court liability: monthly payment consisting of a portion of public revenues or installments for up to 15 years.[21] Over 15 years will elapse for administrations to settle their overdue debts, consider-

[20] Arguments against this amendment are that the legislature, by ordering a delay in the term and "discount" auctions as prescribed in constitutional amendment No. 62/2009, ends up altering and disobeying the court resolution which has already set the compensation amount payable by the public authority.

[21] In a recent resolution (No. 115/2010) the National Council of Justice, a constitutional body composed of judges from across the country whose pur-

ing that during the two prior moratoria terms, public entities failed to settle their debts.

In practice, at least in the state of São Paulo, the court has not yet succeeded in establishing a system that satisfactorily controls public administration debts in cases where the special payment regime was adopted. The established system depends on the municipalities' declaring the amount of their debts and many municipalities have no control over these debts.

Simultaneously, the Federal Supreme Court has received several claims that challenge the constitutionality of amendment No. 62, as this enables the alteration of final court resolutions and prevents creditors from knowing when their credits will be paid.

In view of this crisis, and in order to avoid payments being suspended, we believe that public administrations interested in paying off a portion of their debts, especially those related to environmental expropriation could be based on the constitutional amendment in order to reach agreements with owners, applying alternative measures, as discussed below.

EMINENT DOMAIN: THE CASE OF THE CITY OF SÃO PAULO

Generally speaking, according to the procedure set forth in Decree Law No. 3365 dated June 21, 1941 ruling, that expropriation should be undertaken on the basis of a decree issued by the head of the federal, state, or municipal government, and that when proposing the expropriation, the public authority can request urgent possession[22] of the property, even before expropriation has been ordered, in which case the amount offered

pose is to administratively control legal organizations throughout the country, established that whatever the public entity opts for, in terms of special regime, i.e. monthly or annual payment, the maximum term for settling *precatórios* will be 15 years.

[22] *Imissão de posse*: Instrument that makes it possible to enter the property being expropriated, when the court process begins.

must be equal to the value of the property as recorded in the municipal cadastre which is used to set the territorial, urban and rural property tax, provided that this amount has been adjusted during the preceding fiscal year.

Once the prior deposit had been made, making it possible to take possession of the property, the expropriated party was permitted to withdraw 80 percent of the sum deposited, even though this differed from the amount offered, provided ownership and settlement of tax debts were proven, and legal notices for third parties were published.

In case of a non-urgent land expropriation, the process should follow the regular course, with the judge appointing a judicial expert to prepare a technical report and once all legal formalities had been completed, the judge should issue a ruling.

However, over the years it has been observed that the prior deposit based on the value recorded in the municipal cadastre was almost always very different from the market value of the expropriated property and could not be adjusted except during the judicial process, and this payment would be made many years later by means of *precatórios*.

As the result of the public administration's delay in paying compensation for the judicial expropriation process, and to prevent owners affected by new expropriations from waiting for too many years to receive their compensation, in the early 1990s, at the initiative of 59 lower judges who served in the Judiciary of the state of São Paulo, a new interpretation of the expropriation law and the Federal Constitution was issued, aimed at ensuring prior and effective payment to owners of land expropriated by the state of São Paulo and the municipality. However, this measure did not eliminate the problem of the judicial process involved in property appraisal.

The formula devised by the judges serving in São Paulo is based on a review of the law that established the judicial expropriation process for public utility in Decree-Law No. 3365 dated June 21, 1941. The same law permits judges to define the amount

of down payment, when it can be proved that the tax valuation is outdated with respect to the actual value of the property. However, judges often failed to apply this concession, due to the fact that technical support for defining amounts was not available in the area of public service provided by the Judiciary.

Under these circumstances, a new entity was created—the Support Center for Judges attending cases at the treasury (*Centro de Apoio dos Juízes da Fazenda–Cajufa*)—a study group whose conclusions refer to the values of land and valuation criteria adopted by the Treasury of the City of São Paulo in expropriation processes submitted by the State of São Paulo or its companies, for land located in the city of São Paulo, or by the municipality of São Paulo or its companies (Haddad and Santos 2009).

The creation of Cajufa was a response to endless court inquiries into valuations made in judicial processes, for expropriations that resulted in a large number of *precátorios* that are still awaiting payment. In addition to reviewing the law process, one of its basic aims was to implement the constitutional principle of fair and prior monetary compensation, defined in item XXIV, Article 5 of the Constitution of 1988, so as not to work exclusively with the notion of market value, without considering the benefits provided by other assets, such as environmental services.

In fact, since the creation of Cajufa, the judge has ceased to take into account the value presented by the public authority *at the beginning of the court process*, as this is usually based on an outdated tax valuations; instead he appoints an expert to prepare the preliminary report, to be paid for by the expropriating public authority. The preliminary report is made in accordance with the standards and guidelines established by Cajufa, because the law does not define valuation parameters.

Thus, once the judicial expropriation process has been initiated and urgent possession is requested, the public authority offers a certain amount, based on the valuation undertaken by its own appraisers. Subsequently, the judge summons the expropri-

ated parties and at this stage he appoints a judicial appraiser to prepare a provisional expert report, in accordance with the rules and parameters established by Cajufa.

This provisional expert report will determine the amount to be deposited by the public authority in the event of urgent possession. The change of procedure introduced by the São Paulo judges ordered that once the initial ruling prepared in accordance with the rules of Cajufa has been submitted, the judge will direct the expropriating party to deposit the amount calculated by the judicial assessor, on the basis of his technical analysis. Once the prior deposit has been made, the judge will notify the expropriated party that he can claim 80 percent of the amount deposited, provided he agrees to the provisional possession.

It is apparent that if the judges of São Paulo had not provided a new interpretation to the expropriation law, expropriated individuals would receive an unfair amount in terms of assessments made at the beginning of the process, as valuations on the basis of tax assessments that form part of the generic table of values used by municipalities are very outdated and have resulted in thousands of unpaid *precatórios*.

The process can then proceed normally, with the judge requiring the judicial assessor to draw up a definitive expert report which is then analyzed by the technical assistants appointed by the parties. After the hearing, the judge rules on the amount of compensation and on any other relevant legal matters pertinent to the case.

Another important aspect related to this procedure is the fact that a prior deposit based on more objective parameters would avoid the accrual of interest—mainly compensatory interest—that greatly increases public debt. This would prevent some government authorities from transferring the responsibility for paying these compensations to their successors, in addition to representing savings for the treasury, as delayed payment greatly increases the compensation amount.

Over the years, this procedure has gained importance, especially in expropriation cases where compensation became excessively burdensome and payment of *precatórios* was delayed. The truth is that this procedure established by the judges of São Paulo has been definitively consolidated and has spread to other municipalities in the state, according to recent rulings on appeals in the Court of Justice of the State of São Paulo.[23]

However, this has not prevented the judicial process from continuing, as many owners of new expropriated areas disagreed with the property appraisal, even if it was carried out based on the parameters studied by Cajufa. Thus, although the purpose of the São Paulo judges who created this center was to accelerate the process for paying prior and fair compensation to expropriated parties, the question of the parameters used is still the subject of much legal controversy, generating dissatisfaction in the expropriated parties and lengthy processes and delays in payments—i.e., the problem of *precatórios* has not been resolved.

Therefore, there is probably a need for broader debate among judges, professional associations with the possible involvement of universities to assess CAJUFA's studies and settle differences in the rulings noted in the proceedings, thus enabling the effective implementation of payment of the prior deposit and fair compensation for expropriation.

In brief, the procedure adopted by the judges of São Paulo was intended to overcome the problem of unrealistic property

[23] Recent decisions in the Court of Justice of São Paulo State, concerning appeals, confirmed the legality of applying standards set by Cajufa. The resolution on the appeal against interlocutory judgment No. 990.10.199.301-5 of 2010, and the resolution on appeal No. 0377590-68.2009.8.26.0000, issued in October 2011: Expropriation – Valuation – Recommended valuation criterion according to standards set by Cajufa with appropriate paradigms – Supported by objective data, rationale, and balance – Prevalence of official opinion over the critical opinion of the appellant's technical assistant – Expropriating party's proposal to reduce the compensation amount not accepted – Compensatory interest, default interest, and attorneys' fees, must remain as stated in the judgment – Appeal dismissed.

values recorded in the cadaster, which historically have always been below the market value, as well as discouraging opportunistic expropriations for payment by future administrations, while arranging for prompt payment to expropriated parties. This would offer a quick way to solve the difficulties caused by expropriation, offering largely successful parameters set by the Cajufa in terms of depth and discussion and for valuation, preventing divergent rulings and the delay in judicial processes and the subsequent payment of compensation by means of *precatórios*.

Expropriations Expected in São Paulo

Although São Paulo has a very high debt in terms of expropriation *precatórios* awaiting payment, the fact is that both the state of São Paulo and its municipalities continue to make considerable use of the eminent domain instrument at the present time. In these circumstances, the position of judges in São Paulo has been to establish the issuance of a preliminary decision early in the process, following the predefined rules of Cajufa in order to avoid generating a long list of *precatórios* with new expropriations. However, this requires broader analysis and reflection concerning rules set by the Cajufa, so as to avoid long disputes focussed on valuations, where there is discrepancy in values expressed in preliminary and final reports.

Even in the absence of planning, the city of São Paulo and the surrounding municipalities promote and continue to promote, large expropriations. According to press reports from July 2011, it is estimated that over 12,000 properties will be expropriated by the end of 2012.[24] A large number of these are intended for infrastructure and transportation works, ordered by the state of São Paulo, through its public entities and by the municipality. These large public works have two important motivations: rationalizing chaotic vehicular traffic in the city of São Paulo, and related to

[24] *O Estado de São Paulo* (2012). *www.estadao.com.br/noticias/impresso,sp-tera-um-bairro-do-bras-desapropriado-ate-o-fim-de-2012,746287,0.htm.*

the fact that Brazil will host the next Soccer World Cup in 2014 and the Olympic Games in 2016.

Another group of expropriations include those intended for the construction of affordable housing and land tenure regularization, largely funded by the federal government through two major programs: the Growth Acceleration Program (*Programa de Aceleração do Crescimento*, PAC) and the "My House, My Life" Program (*Minha Casa Minha Vida*, PMCMV), which resulted in transformations in Brazilian cities deserving of a separate study.

The use of the eminent domain instrument in the city of São Paulo, now and in coming years will significantly transform the city's urban structure. Without exaggerating, this may be one of the moments in the city's history when there have been more expropriations for the purpose of executing public works, building housing, and regularizing land tenure, due to certain political decisions regarding public investment that have been taken in recent years, many of these by the federal government.

Among forthcoming expropriations in the city of São Paulo in the short-term that will have implications for land tenure, we can mention some that are referred to in the bibliography as "large scale urban projects:"

- Subway extension projects (lines 17-Gold, 5-Lilac, and 6-Orange);
- *Rodoanel* project (peripheral ring);
- Affordable housing and land tenure regularization projects.

Expropriation for Subway Line 17-Gold

In this context, for the subway Line 17-Gold of São Paulo, which will connect the São Paulo airport to the Morumbi neighborhood, the state-owned company published legal notices of the property valuation in mid-2010 "to permit macro knowledge of its market value,"[25] necessary for the declaration of public utility. A street inspection will be conducted, but each property will have an individual record with corresponding data to calculate its value.

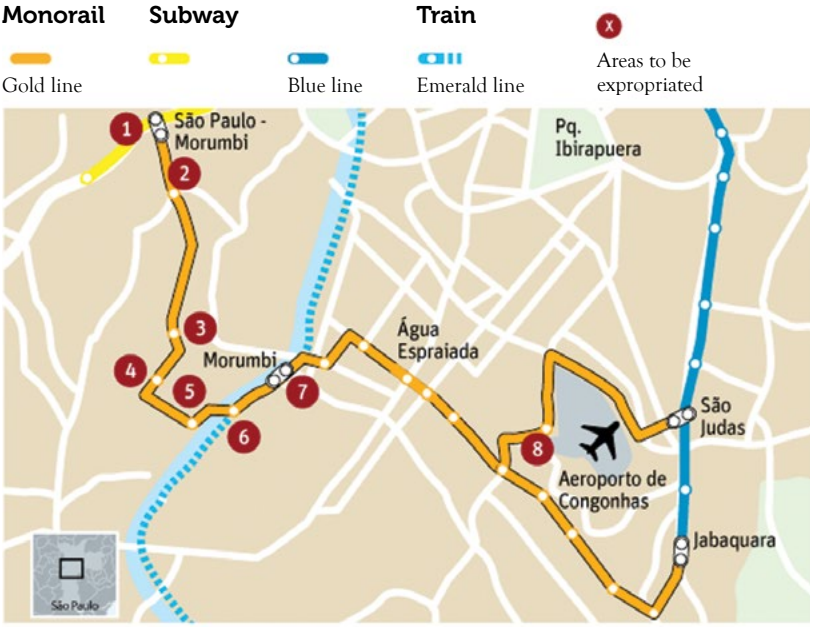
The legal notice for the appraisal of the real estate to be expropriated was based on Cajufa rules and, by decision made by the judges of São Paulo, several committees of experts were formed to study the values of the different areas of the city once again attempting to avoid the endless judicial debate over valuations which will be recorded in the preliminary ruling of each property.

According to *Empresa Brasileira de Estudos do Patrimônio* (Embraesp), in the marginal region of Pinheiros, where two areas are listed, the land value ranges from US$2,500 to 3,500 per square meter. The regions around the Congonhas airport and the Morumbi stadium are also appraised.

The *Companhia do Metropolitano de São Paulo* (Metrô) forsees spending US$110 million to expropriate 132,000 square meters—an area equivalent to 18 soccer fields, or an average of US$900 per square meter. According to the study commissioned by Metrô, 19.5 percent of expropriations affect luxury residential properties, 7.6 percent, mid-level residential properties, and 42.2 percent undeveloped land or vacant lots. Metrô notes that only after the basic project is completed will the subway line and the properties to be expropriated be accurately defined.

[25] *Folha de São Paulo*, 09/14/2010.

FIGURE 3
MAP OF THE REGION OF THE CITY OF SÃO PAULO



Details of linha 17-gold

ROUTE: Will connect the stations of São Judas and SP-Morumbi, passing through the Congonhas airport

EXTENSION: 13 miles

COST: Metrô expects to spend 2 billion reais on works only

COMPLETION: Promised by the government of Sao Paulo for 2013

PASSENGERS: About 200,000 daily users

Subway Line 17-Gold will run and join Line 4-Yellow and Line 1-Blue. Expenditure is estimated in US$ 110 million on expropriations and US$ 1 billion, 200 million on works.

Estimated expenditure in expropriations is
185 million reais

Area of 132,000 square meters, equivalents to
18 soccer fields

Expropriation for Line 5-Lilac

Another group of expropriations, this time for subway Line 5-Lilac has required the state government to expropriate 114 properties located in high-income neighborhoods in the south and west of São Paulo, equivalent to almost ten official soccer fields, in order to extend the city's subway Line 5-Lilac.[26]

These properties are located in Campo Belo, Itaim Bibi, and Santo Amaro. The land area consists of 68,800 square meters, which will be vacated for the new section of the subway between the Largo Treze and Chácara Klabin stations.

The governor's decree declaring that the new region is of "public interest" and must be expropriated either "amicably or judicially" was published on February 21, 2010 in the Official Gazette (*Diario Oficial*). Metrô claims that "most" of the properties involved are commercial properties, but did not provide any details or costs. The only available information indicated that the number of affected properties was 114.

The first expropriations for the works were defined in April 2010 affecting an initial area of 32,000 square meters and 147 properties, primarily for the construction of the future Adolfo Pinheiro station.

At that time, the media stressed that although many rumors had surfaced, the news of the expropriation was a surprise to traders and residents. The ruling sparked protests among traders who would be evicted from the Borba Gato passage, who thus managed to reverse part of the plans. Antonio Cunha, president of the Residents of Campo Belo Movement (Movibelo), said he was "perplexed" by the fact that the residential streets would form part of the project, because the neighborhood would be "destroyed."

[26] *Folha de São Paulo*, 03/03/2010.

Figure 4
Map showing the area of the city of São Paulo
where Line 5-Lilac will run

Subway Extensions

Santo Amaro, Itaim and Campo Belo will have expropriations

Expropriations

» The area to be expropriated for the expansion of the subway will be equivalent to ten soccer fields

LINE 5

» Line 5-lilac, which currently connects Capão Redondo station with Largo Treze station, will go as far as Chácara Klabin station, on line 2-green

114 residential and commercial properties will be expropriated

68,800 square meters is the total area considered to be of public interest

Projected Expropriation for Line 6-Orange

Another subway line, the 6-Orange, will connect São Joaquim station (Line 1-Blue), in the southern zone, to the Brasilândia neighborhood, in the northern zone. This line will extend for 9 miles and include 14 stations. Overall, Metrô intends to expropriate up to 350 commercial and residential properties, and more than a dozen large tracts of land. According to the first indications provided by the company, there will be over 50 expropriations in high-income areas such as Consolação, Higienópolis, and Perdizes. This number may be somewhat reduced depending on negotiations. Properties along the route that will potentially be expropriated include residential buildings, the headquarters of the Vai-Vai samba school, parking lots, and a supermarket on Avenida Angélica.[27]

The line will begin at São Joaquim station and will pass through the stations of 13 de Maio/14 Bis, Higienópolis/Mackenzie, Angélica, Cardoso de Almeida, Perdizes, Pompéia, Água Branca, Santa Marina, Freguesia do Ó, João Paulo I, Itaberaba, Cardoso, and Brasilândia. According to projections of demand by Metrô, the line will have a daily movement of 598,426 users. The biggest station to be built will be Santa Marina, near the Marginal do Tietê expressway, where the projected flow is of 73,157 users per day.

All data related to Line 6-Orange appeared in the legal notice that defines the macro plan contract for expropriations, published in late May 2010. When analyzing the material, evidently trouble has been taken to avoid the expropriation of residential properties in central neighborhoods with higher values, while this is not so in the periphery. Also notable is the fact that the high-income Pacaembu neighborhood will remain without stations,

[27] *O Estado de São Paulo*, 06/10/2010. The line mentioned here passes through a traditional São Paulo neighborhood, Higienópolis, whose residents promoted demonstrations against the construction of a subway station on Avenida Angélica throughout April 2011, claiming that the station would attract the homeless. The Companhia do Metrô de São Paulo intends to review the construction of this station.

whereas the area of the Antártica Park will have access to another line near Barra Funda station.

According to the company, the names of the stations—but not their location—will be subject to modification, and historians will help name the new stops. Metrô advisors also say that the basic design is still "in process and until it is completed, it is not possible to say how many and which properties will need to be expropriated for the construction." The executive project of Line 6-Orange will not be completed until the second half of 2011 and will produce the first stations between 2013 and 2014.

Although the location of the stations is not yet defined, Metrô says "it is not possible to construct a subway in São Paulo without expropriations," although it will attempt to minimize these.

Figure 5
Expropriated region for the northern section of the Rodoanel, a road that will encircle the city of São Paulo

Expropriation for the Rodoanel (Peripheral Beltway)

Another important expropriation pertains to the beltway or Rodoanel that will circumvent São Paulo, with the northern section currently in process.

Anticipating that works initiated later this year using funds from the state government, the federal government, and the Inter-American Development Bank (IADB), the northern section of the Rodoanel will transverse the Serra da Cantareira by means of six tunnels and will cost about US$3.4 billion, out of which US$2.5 billion will be allocated to engineering works.

The remaining resources will be allocated to the payment of environmental compensation, expropriation and resettlement, and the construction of 1,300 homes due to the track layout. This section of the project will pass through six municipalities in the metropolitan region: Ribeirão Pires, Mauá, Suzano, Poá, Itaquaquecetuba, and Arujá, requiring the expropriation of 16.7 million square meters.[28]

Expropriation for Affordable Housing and Land Tenure Regularization

It is not possible to calculate the land area undergoing expropriation for the purpose of land tenure regularization and construction of affordable housing. Evidently many municipalities will receive funding from the federal government through the PAC to promote the expropriation aimed at regularizing land tenure in informal settlements. The federal government has created programs for the regularization of land tenure in informal settlements, making it possible for municipalities to begin promotion of proper urban development in their territories. As there is a very high level of informality in most Brazilian cities, investments

[28] *O Estado de São Paulo*, 03/07/2011.

through these programs need to be sustained for a few years in order to obtain results.

Two state-owned companies were consulted for the construction of new housing units: the Companhia de Desenvolvimento Habitacional e Urbano do Estado de São Paulo (CDHU) and the Companhia de Habitação do Município de São Paulo (COHAB). Our consultation with the CDHU's department for land tenure regularization revealed that the company owns property, all of which is in process of expropriation where, instead of forging agreements, it prefers to conduct judicial processes in order to avoid problems of fraud and corruption caused by public officials.

Contrastingly, the Companhia Metropolitana de Habitação of the city of São Paulo (COHAB-SP) reported through its chairman, Ricardo Pereira Leite, that it has sufficient land for the construction of approximately 20,000 homes and that 90 percent of expropriations in these areas have been conducted amicably, i.e., without filing a judicial process.

In a separate case, the Municipal Housing Secretariat plans to expropriate 80 vacant properties in the central region of São Paulo, selected from a survey conducted by the School of Architecture and Urbanism, in order to alocate these for housing around 4,300 people in homes approximately 60 m.[29]

Social Effects of Expropriations

On first appraisal, three aspects drew our attention in relation to these examples:

1). New expropriations are carried out without addressing the issue of outstanding debts relating to unpaid *precatórios*.
2). Expropriations are not related to urban planning or more specifically, to the master plans of the cities involved.

[29] *Folha de São Paulo*, *www1.folha.uol.com.br/folha/cotidiano/ult95u593894.shtml*, consulted on 02/20/2012.

3). When the decision to expropriate is taken, no attempts have been made to establish a more profound dialogue with the affected population, leading to opposition from inhabitants in some neighborhoods, though this resistance is ineffective in the light of the extent of the public works and the dynamics of the city, which are not conducive to the convening the parties involved.

The fact that these three aspects are interrelated, but lack connectivity in terms of policies applied, we attribute largely to the dominance of the central power over the lower levels of the administration and to the virtual lack of citizen participation in the decision-making process, in the context of major urban projects. These are vestiges of an autocratic model, in need of review by means of a long-awaited political reform. Here we address each of these aspects.

Articulation Between the State and Municipal Government Levels

An aspect deserving special attention in the cases being studied is the supremacy that the state of São Paulo exerts over the municipality, which is ill-founded as the municipality shares the status of a federative entity and has express autonomy in the Brazilian Constitution. As a result of this, works are carried out by state-owned companies without any reference to municipal planning. More thorough research would indicate the degree of interference caused by expropriations implemented by the state of São Paulo for the city's master plan.

Nevertheless, the Attorney General of the state of São Paulo has intervened more in relation to works being carried out by the municipality, and for political reasons has avoided lawsuits against companies in the state of São Paulo, such as Metrô and *Desenvolvimento Rodoviário* (Dersa), the department dealing with arterial roads that also pertains to the state of São Paulo, the same federative entity of the state Attorney General.

Citizen Participation

Another interesting aspect relating to the cases studied is citizen participation. Two factions comprising residents from the Vila Mariana and Jardim Novo Mundo neighborhoods, in the Moema area have imminent plans to file civil suits before the Attorney General, in order to protest the expropriated areas. Residents claim that some of these are reserves, such as certain areas of the Chácara Klabin neighborhood, but this information is not included in the environmental reports relating to construction of Line 5-Lila. According to Metrô, all owners have already been notified. In periods ranging from six to eight months they will have to vacate the properties. The company says there will be no alterations in the project. According to the owners of these properties, the problem is that the state-owned company offers low compensation. "A total fraud," says 34-year-old Eduardo Miamoto, who will have to vacate his pharmacy.

When notified of the expropriation, the property owner can either amicably accept the compensation offered by Metrô or if in disagreement can immediately receive 80 percent of the value offered.

The debate concerning a possible increase in value, referring to the remaining 20 percent is conducted in court. However, according to Companhia do Metrô itself, based on experience relating to the construction of other subway lines, 90 percent of expropriated parties are dissatisfied and file a legal suit for compensation, a process that can take years.

Notably, protest movements on the part of residents who oppose expropriation are localized. The cases described previously relating to the Vila Mariana and Moema are neighborhoods of notably higher value. Residents do not usually demonstrate when expropriations take place in lower value neighborhoods.

In the cities of Guarulhos and Arujá, in the metropolitan area of São Paulo, records indicate that some neighborhoods have mobilized in protest against the planned large scale expropriation

for the Rodoanel, to prevent entire neighborhoods from losing their identity.

In conclusion, we believe that all this change in the structure of several neighborhoods in the city of São Paulo, even affecting cities located in the metropolitan area, is similar to what happens in other democracies, requiring a more democratic stance on the part of government bodies in the context of expropriation, in order to ensure compliance with the City Statutes and thus ensuring citizen participation in projects that have major impact on society.

Although Brazil has ways of achieving this, in practice government bodies and public entities face many difficulties in terms of directing debate concerning impact generated by the development projects on private property. This has occurred in relation to the government-owned companies Metrô and Dersa, which promote public hearings to discuss projects, but in effect expropriations are little publicized and at times do not provide for effective citizen participation.

As in a judicial process, it is only possible to challenge the appraisal of the property being expropriated, not the decision of the public authority to expropriate. The affected owners are subject to the expropriating authorities' decision, as well as facing problems in relation to organizing and demanding their more effective participation.

Finally, it is apparent that the experience of São Paulo is representative of expropriations throughout the country. In particular, we can mention the city of Rio de Janeiro, chosen to host the 2016 Olympic Games, for which a huge construction plan was devised requiring a significant number of expropriations that became the focus of opposition by organized movements.[30]

[30] Many of these residential property expropriations and evictions of *favela* occupants have caused protests by the affected residents and by human rights advocacy groups, such as Amnesty International. Local movements, reacting to expropriations have been coordinated nationally, with a website at *http://megaeventos.tk*. The National Congress formed a committee to follow up these interventions. An interview in the British newspaper *The Guardian*

In the expropriations cited previously here, despite the attempt of the judges of São Paulo to establish a market value for the properties through a preliminary report based on Cajufa's assessments, there will be a tendency for the expropriated parties to receive their compensation through *precatórios*: evidently there are countless processes pending payment caused by the discrepancy between the appraised values indicated in the preliminary reportas defined in the Cajufa rules and reflected in the down-payments, and those presented in the final report, favoring the expropriated parties; however, only this difference in value will be received through *precatórios*.[31]

In fact, although São Paulo has a very high debt in terms of *precatórios*, in the case of the current expropriations, the judiciary of São Paulo now requires the down payment of the compensation, as mentioned in the introduction to this section, when we referred to the creation of the Support Center for Finance Court Judges (CAJUFA) of São Paulo.

Current Status of Judicial *Precatórios* in the State of São Paulo

At this point, we can almost declare that a person from whom an asset was expropriated in São Paulo in the recent past but who still awaits the compensation payment runs the risk of never receiving it during his lifetime,[32] as the judiciary did not require

(2011) gives an idea of the international impact of these events (*www.guardian.co.uk/world/2011/apr/26/favela-ghost-town-rio-world-cup*).

[31] In the case of an expropriation by the Companhia do Metrô, at the end of the process, following the issue of a final decision, i.e. when no further appeals are received in court, payment is made applying a quicker procedure, because the legal regime of the Companhia do Metrô is private and the *precatórios* system is restricted to a public law regime, only dealing with judicial debts incurred by the public authority, but not those of their companies.

[32] There are thousands of pending *precatório* payments, whose resolution could still take years. Thus, some expropriated parties do not know whether they will receive their compensation during their lifetime.

the down payment[33] as a condition for the public authorities to take possession of the property. Although the law required this to have happened, neither the judiciary nor the expropriating public administrations complied adequately. Thus, an expropriation in São Paulo and in other Brazilian states may often be equivalent to a confiscation, explicitely prohibited in the current Federal Constitution.

The Court of Justice of the State of São Paulo is attempting to build a system with the capacity to control a new method to pay debts relating to overdue *precatórios*. The system has already been established and depends how much the indebted entities themselves have contributed in terms of the debts they have with their creditors.

The judge[34] responsible for controlling the *precatórios* at the Court of Justice of the State of São Paulo published a regulation obliging public entities to promptly report the amount they owe, with the threat that they will be forced to respond for lack of administrative integrity.[35]

> Single paragraph: If the indebted public entity is not registered or submits incorrect data to the Payment Control System of *Precatórios* of the court of justice of the State of São Paulo – Enforcement Department of *Precatórios* (DEPRE), it will impede the materialization of the credit identified by author/creditor or process, making them liable for any penalties described in Law No. 8429/92, Article 11, item II. (Administrative Order No. 03/2010, 21.8)

[33] We should stress that the down payment in São Paulo, although made according to the parameters of the CAJUFA, will not result in fair compensation, because the final report has proved that the amount offered previously was also unfair.

[34] Magistrate Venício Salles. Please note that this judge, who acted in the original case, has a profile that is reasonably oriented towards urban issues and is one of the few who understood urban causes with an approach that promoted the principle of the social function of the city.

[35] Law No. 8429/92 establishes the conduct that indicates a lack of administrative integrity making public authorities liable to fines, redress, or loss of public office, as well as being prohibited from competing for new elected offices during an eight-year period.

The state of São Paulo has 645 municipalities, of which 328 have already notified the court of their options in terms of paying overdue *precatórios,* but have not yet reported the amount of these debts. For example, in the municipality of Mauá, located in the metropolitan area of São Paulo, the local administration is still undergoing an audit to assemble the processes for which a final decision has already been issued, together with the respective values for *precatórios* that already have been generated.

In October 2010, the Court of Justice of São Paulo released the first batch of *precatórios*. The two lists released on the court's website will benefit 37 individuals. The first one follows the chronological order of the *precatórios*, and the second one, the order of priority. However, the initiative is still modest if we consider the number of *precatórios* that exist in the state of São Paulo. The state currently has an excess of 222,000 processes on the point of being implemented for payment to 380,000 creditors.[36]

However, it is important to indicate the interpretation given to constitutional amendment No. 62/2009 by the Court of Justice of the state of São Paulo, as it represents one of the forms of constitutional control exercised in Brazil: the so-called "diffused control" (*control difuso*), referring to a specific case that is only effective between the involved parties, in contrast to the control exercised by the Federal Supreme Court, which issues resolutions applicable to all.

The majority position of the Special Department of the Court of Justice of São Paulo that declared incidental unconstitutionality between parties only when referring to the case in progress, states that the regime that they are attempting to establish by means of the constitutional amendment No. 62/09 is in fact unconstitutional because it affects unpaid *precatórios* made by a court resolution prior to that rule.

[36] Consultor Jurídico (2010). *www.conjur.com.br/2010-nov-22/emenda-precatorios-afronta-independencia-entre-poderes-tj-sp.*

Most members of the decision-making body, referring to the article concerning the *precatórios* prior to the publication of constitutional amendment No. 62/2009, held that this rule is liable to be declared unconstitutional because it fails to obey the principle of *res judicata* and would thus undermine basic constitutional guarantees.

The case in progress referred to the request for state intervention filed by Tarcísio Ribeiro de Oliveira, holder of an alimony credit recognized by the labor court and owed to him by the city of Osasco. The debt should have been paid in the 2008 fiscal year.

The argument sustained by the mayor of Osasco in order to justify the failure to execute the court decision and pay the debt was that it was the administrator's obligation to balance the public accounts. For the majority of the decision-making body, the default shows contempt for the court resolution that ordered settlement of the debt. The resolution, which ordered state intervention in the municipality of Osasco, was approved by a majority vote.

Amendment No. 62 also provides for the implementation of a new payment schedule for *precatórios* already due, as of the publication date. In this regard, the Special Department understood that the retroactive nature violates item 36 of Article 5 of the Federal Constitution.

According to the Federal Constitution, "the law must not adversely affect the vested right, the perfect legal act and the *res judicata*." The decision-making body of the Court of Justice of the state of São Paulo also professed that amendment No. 62 violates constitutional principles including those of proportionality and reasonableness. The resolution cited above translates into greater recognition of the dignity of citizens, incorporating the principles of a democratic constitutional state.

Notably, as occurred previously after the first and second moratoriums, the Federal Supreme Court has not yet ruled on the intention to introduce these direct actions of unconstitutionality.

PRECATÓRIOS: SYMPTOMS OF A STATE IN CRISIS

Problems in Applying the Eminent Domain Instrument

Thus, if we could classify the problems facing the implementation of the instrument of eminent domain in Brazil, we would certainly place on the same level the assessment and appraisal of expropriated property that has resulted in deviations as the stubborn practice of public authorities who promote expropriation by failing to comply with judicial payment resolutions, despite the existence of cases based on fraudulent appraisals.

Likewise, the public authority's unwillingness to promote expropriations through administrative procedures or by agreement results in an excessive number of judicial expropriation processes.

The procedural system for the execution of treasury debts known as *precatórios* that are usually created after recording the final decision presents a clear example of the state crisis, which we describe in the following. In an attempt to separate these, we first address aspects more related to the law, and then those more related to the political and administrative crisis.

Aspects of the Crisis from the Legal Viewpoint

This situation has led to dissatisfaction throughout society, even including those who are not owed money by the state. Society believes that the state treats property with disdain and distrusts the judiciary which fails to fulfill its resolutions. In turn, throughout the country, the judiciary discusses the compliance of *precatórios* without providing a satisfactory response to society.

This chapter dealing with the concept of the Brazilian practice of *precatórios* brings us to the growing debate concerning the limitation of certain institutional and law models, in view of the needs of today's society. This discussion, which has its origins in the state's own image crisis, is manifested in the performance of the state in its public administration fuction.

The current model forged in the eighteenth and nineteenth centuries, no longer satisfies current needs. At that time, representation theory legitimized the establishment of a liberal bourgeois society and the institutionalization of a formal democracy in the West. Today, the landscape of representation is inserted into the context of globalized society, marked by profound sociopolitical and economic transformations in the early twenty-first century.

Indeed, the crisis of representation is accompanied by an even greater crisis of politics itself, expressed by the loss of efficiency and reliability in political parties, state administration, the legislature, and the judiciary.[37]

This crisis is reflected in the *precatório* payment system to cover debts arising from judicial processes where a final decision has been reached, especially given the new regime established by constitutional amendment No. 62/2009.

The public administration misuses its prerogative to ensure improved performance of the legislative function resulting in the entire state loosing credibility with citizens, especially concerning payment of compensation due to expropriations.

Political and Administrative Aspects of the Crisis

As stated, payment through judicial *precatórios* should be considered an administrative anomaly and an exceptional case within the law governing expropriations in Brazil, requiring a down payment for a property to be expropriated. The Federal Constitution of 1998 permits payment in government bonds only in cases of breach of the social function of property as determined by the master plan of the jurisdiction, even if the application of instru-

[37] Wolkmer, Antônio Carlos (2001). Professor of history of legal institutions in undergraduate and graduate law courses at the Federal University of Santa Catarina and member of the Institute of Brazilian Attorneys, Rio de Janeiro, Brazil.

ments such as the Progressive Urban Property Tax (IPTU) or mandatory building is unsuccessful. The *precatórios* system goes further as it fails to define a rule for payment time.

Thus *precatórios* become a pretext that makes it possible for the public entity to expropriate without securing the necessary resources, investing in urgent public works and paying only when these resources are available. It is apparent that as it is extremely easy for the executive branch to declare public utility for expropriation purposes, various idiosyncrasies have been accomodated, for example mayors who carry out expropriations that generate *precatórios,* but whose payment will be borne by their successors.

Abuse of the *precatórios* system in Brazil has led to corrupt practices. One of these, known as the "*precatórios* scandal" had repercussions in the political sphere, to the point that in 1997 the National Congress formed a parliamentary committee to investigate and clarify the facts.

At that time, the government had authorized municipalities to issue bonds to raise funds for the payment of overdue *precatórios*. The scheme was to simulate judicial debts in order to issue government bonds, and to allocate the proceeds to pay other bills, not derived from court decisions. Furthermore, the processes were carried out without any bids and through financial institutions, which then acquired the bonds at a discount, i.e. well below the market value.

Another example of how others took advantage of opportunities generated by the administrative disorder caused by the large volume of *precatórios* concerns financial speculation. *Precatórios* are sold and purchased online. Certain investment funds began to acquire, with large discounts, *precatórios* apparently about to expire, but which in fact were guarantee payment, using information to which only they had access that included the list of persons whose payments would soon be honored.

In an aspect more directly related to urban planning and payment for expropriated property by means of *precatórios*, we find examples where slowness and delay caused the owner to lose in-

terest in the property, resulting in it being invaded, thus creating more areas of irregular occupation and *favelas*.[38]

As *precatórios* are an exceptional system and with harmful consequences for the administration and public finance organization, the generation of new *precatórios* should be minimized as much as possible and alternative methods should be sought, promoting the settlement of those in existence.

Importantly, expropriation is still widely used, even though a large number of *precatórios* remain unresolved, particularly in the state of São Paulo; the focus of the first part of this chapter.

In new cases of expropriation, the difference[39] refers to lack of government credibility owing to the extensive list of *precatórios*. Concern with this issue led the judiciary to set a down payment value, leaving the difference to be paid by means of *precatórios*. This makes a significant difference, as the criteria applied for expropriations are always disputed.

Concerning overdue *precatórios*, the judiciary and certain organizations, such as the Bar Association of Brazil are currently concentrating their efforts so that the courts of each state in the country can implement a system to effectively monitor public budgets, for the prompt payment of overdue *precatórios*. However, if rulings from constitutional amendment No. 62 are implemented, it will take many years for public administrations to settle these debts, at least in the state of São Paulo being studied in this chapter.

Possible Alternatives: Addressing the *Precatórios* in Expropriation Processes

As explained above, the implementation of *precatórios* and problems it generates can be analyzed from the broader perspective of

[38] This is the case of the San Remo *favela*, which occupies part of University City, in São Paulo (Tanaka 1993).

[39] It is not a big change, since the down payment presents the problem of the lack of criteria for the appraisal, resulting in procedural delays and late payment of fair compensation.

the Brazilian state crisis, requiring modification of existing democratic representation schemes. To make the decision-making process more democratic in the context of planning and management of public property implies the strengthening of the public administration's competence, an increase in transparency, and disclosure of information about urban plans and projects, among other aspects.

Creating a new paradigm will require actions such as those presented here.

Reform of the Urban Planning Process

The urban planning process in Brazil needs to be reformed as does the often cited political process. However, this has made little progress as it threatens the current power structure. Ensuring necessary resources for expropriation will significantly help toward eliminating *precatórios*. Urban plans and projects that include acts of expropriation must demonstrate their financial viability. To achieve this, they should be corroborated by complete project designs. If a debt is entailed, there should be indication as to how these debts will be paid, to be approved (usually by voting) not only by the municipal assemblies, but also the beneficiaries committed to apportioning costs, in a way similar to that occuring in the United States.[40]

Establishment of Administrative Structures for Public Real Estate Management

In Brazil, the public authority does not traditionally regard its real estate as an asset, whose economic value can be assessed in terms of the market. This lack of appreciation for the property

[40] See, for example, in the case of the state of California, educational material referring to approval for public expenditure by vote, *www.californiacityfinance.com*, site available thanks to the Institute for Local Government, an education and research institution affiliated with the California State Association of Counties and the League of California Cities.

value of municipal patrimony must be the reason for dubious decisions such as the construction of affordable housing in high-value areas of the city.

No structure exists to manage these assets, as in northern European cities, such as Helsinki and Amsterdam, whose administration has a real estate agency responsible for the purchase and sale of properties, similar to the private sector. These agencies are responsible for studying possible public-private partnerships and for example are able to negotiate the exchange of properties, an interesting alternative to expropriations, especially when these are to be paid through dubious *precatórios*.

Application of Alternative Mechanisms to Litigation, Such As Mediation or Arbitration

These are processes that bring together the expropriating party and the expropriated party, seek a form of payment acceptable to both. In judicial processes, parties are usually represented by their respective attorneys and await decision of the judge, who on occasions does not even visit the property on which he will give a ruling.

Use of Instruments Considered in the City Statute: The Transfer of the Right to Build and Right of Preference for Example

A good example of an instrument to negotiate with creditors of *precatórios* would be to transfer the right to build under the City Statute, Article 4, item V, paragraph "o" in order to compensate the owner of urban, public or private real estate that the public authority considers necessary for:

- Installation of urban and community equipment;
- Preservation, when the property is considered of historic, environmental, landscape, social, or of cultural interest;
- Land regularization programs, zoning of areas occupied by low-income citizens, and affordable housing (Article 35).

Instead of the public authority paying to expropriate the property, the owner is empowered to exercise his right to build elsewhere or to proceed with the sale to third parties, if that negotiation is accepted.

Thus, unlike granting a building concession for the right to build which as indicated is the instrument by which the municipal public authority grants the owner the right to exercise his right to build above the basic land use ratio upon payment of a charge, the transfer of the right to build makes it possible for the owner to exercise his right to build elsewhere up to the maximum land use ratio or even transfer this right to build to a third party by public deed, in order to compensate for the administrative limitations imposed.

In other words, if, under the master plan or a law, the owner of urban real estate has the right to build over the basic land use ratio, when that property is deemed necessary for purposes defined in items I to III of Article 35, the owner may exercise this right elsewhere or transfer it to a third party either for free, or for payment. The same right may be granted to the owner who donates his property, or a part thereof, to a public authority, for the same purposes.

Although the right to build in relation to any particular property is terminated for the reasons specified in the City Statute, items I to III of Article 35, it may be exercised elsewhere or transferred to a third party.

Notably, the transfer of the right to build is irrespective of whether an urban operation is being carried out by an association of federative entities (states or municipalities), as it is restricted specifically to the property considered necessary for those purposes stated in the City Statute.

As municipal authorities are responsible for defining local land use rules, the City Statute left it to the municipalities to regulate the right to build (second paragraph of Article 35), with a specific law that adheres to the general guidelines set out in the City Statute (Article 2). This municipal law must specify clearly

how this right is exercised, establishing the conditions for its application.

This therefore represents an instrument that can bring about great changes in the real estate market, as it separates the right to build from the ownership right, rendering it an autonomous right that can be negotiated freely and that is already exercised in expropriations for the public interest. Owners of areas affected by expropriation are authorized to either exercise their right to build in other areas, or transfer the right, as occurred with the construction of the Perimetral arterial road III, in Porto Alegre (Furtado 2006).

Another possibility, if municipalities implement a good master plan is to define a right of preference (known as right of first refusal) for the municipal public authority for acquiring urban real estate subject to a sale's trasaction between private individuals. However, this option represents an alternative to applying the eminent domain instrument and depends on the municipal ordinance based on the master plan, as this will delimit the areas where the right of preference may be exercised, setting a time limit for its validity of not more than five years, renewable after one year, counting the effective time from that point.

Article 26 of the City Statute establishes the circumstances where the municipal public authority may exercise the right of preference. The municipal ordinance in the first paragraph of Article 25 defines each of the areas where the right of preference may be exercised for one or more of the purposes listed in Article 26: land regularization; implementation of housing and social projects; land reserves; management and growth in urban areas; installation of urban and community equipment; creation of public and recreational spaces and green areas; creation of conservation projects or protection of areas of environmental concern; and protection of areas of historical, cultural, or landscape interest.

Article 27 sets a thirty-day time limit for the municipality to express its intention to buy a property, when the owner informs of his intention to transfer the property. The third paragraph of

this article states that once this period has elapsed, the owner may transfer the property to third parties, following the terms outlined in the proposal. The fifth paragraph provides that any transfer made under conditions other than those outlined in the proposal will be null and void, and the sixth paragraph indicates that in this scenario, the municipality may acquire the property for the value based on the property tax assessment (IPTU) or the value indicated in the proposal, if this is lower than the former.

Note that in the cases referred to here, preference constitutes an important instrument to avoid applying the eminent domain instrument, assuming more effective planning on the part of the municipality. This instrument induces the acquisition of areas by administrative means, however it does not avoid the the issue of valuation.

FINAL REMARKS

This chapter is part of a larger project intending to present a preliminary comparative overview of urban land expropriation in different Latin American countries. Although they share the same tradition of Iberian origin, each of these countries has its own characteristics and social and legal institutions, and lack of communication has hampered the benefits derived from improved mutual understanding. However, one of the purposes of this volume is to illuminate this theme by identifying the similarities and differences.

In this chapter, we deal with the case of Brazil, a country of vast size and accentuated regional differences, where this factor together with the editor of this book instructed us to limit analysis to certain aspects, in order to provide information that would most contribute to the goal of integrating a vision of Latin American diversity, as regards the issue of expropriation.

Thus, in this work we opted to focus on legal and procedural aspects of expropriations in Brazil, addressing the issue of *precatórios*, a specific instrument for the payment of judicial debts that the Brazilian public authority has with private individuals.

As this does not bear resemblance to the instruments applied in any other country, the *precatório* leads us to interesting reflections and learning experiences.

We provided the example of the state of São Paulo, where public finance judges promoted an initiative aimed at avoiding the problem caused by delayed payment of *precatórios,* by seeking prior agreements.

Given the magnitude of the subject, inevitably, many aspects were omitted from this chapter. Notably these two:

1). The expropriation of irregular settlements, especially *favelas* and other types of poor housing, implying a need for social programs;
2). An ascending number of popular demonstrations related to expropriations that have escalated in recent months in various cities throughout the country, particularly in the city of Rio de Janeiro, host to the 2016 Olympic Games.

These are two aspects that we suggest deserve future study in eminent domain analysis. The practice of eminent domain will remain intense in Latin American cities, thus entailing constant reflection on the subject and comprehension of lessons from other countries, where public land ownership is employed as an instrument for urban land use planning (Strong 1979).

GLOSSARY

Class action (*Ação popular*)**:** type of action defined in the Brazilian legal framework, which can be used by any citizen to challenge deeds executed by a public entity that contravene the law, with possible adverse affects on public administration, as well as requiring redress.

Adin: acronym for "direct action for unconstitutionality."

Appeal against an interlocutory judgment: type of appeal considered in the Brazilian Procedural Code for court resolutions that do not terminate the process. This can be used to challenge acts made by the judge during the process.

Classification (*Tombamento*): administrative act that prohibits altering property of historical, architectural, or landscape interest.

Cracolândia: zone in the city of São Paulo frequented by drug users.

Final ruling (*Transito em julgado*): **e**ffect of a court resolution, collegiate decision, or judgment after which further appeals are not permitted

Favela: set of precarious housing in informal settlements where low-income residents live.

Compensatory interest: percentage fixed as extraordinary compensation if the property has been taken possession of without a down payment related to property value. Ten years ago, jurisprudence fixed 12 percent per annum, based on the compensation value. Current jurisprudence established a maximum rate of six percent annually.

Public Finance Court of the State of São Paulo (*Vara da Fazenda Pública da Comarca de São Paulo*): court where every lower court judge is competent to rule. By law, the judge is warranted to hear cases in which the state of São Paulo or the municipality of São Paulo is an interested party.

Metrô: *Companhia do Metropolitano de São Paulo*, state-owned company in São Paulo responsible for the subway transportation service.

Collegiate resolution: (*Acordão*) decision taken by a collegiate body in Brazilian courts.

Fiscal value: value of property for tax purposes.

Precatório: instrument whereby the judiciary orders the public treasury to make the payment to which it has been sentenced in a judicial process. Overall, it is the document in which the chief justice, at the request of the trial judge, ensures the payment of a debt incurred by the Union, the state, the municipality, or the Federal District, by including the debt value in the public budget.

Take possession (*Imissão de posse*): name given to the legal concept permitting the public authority to enter the property to be expropriated at the beginning of the judicial expropriation process, by providing a down payment equivalent to the value of the property.

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Chapter Four

Strengths and Weaknesses in the Use of Urban Eminent Domain in Colombia: Review Based on the Experience of Bogota

María Mercedes Maldonado

Eminent domain appears to be a strong institution in Colombia, as it is widely applied by municipal governments and federal agencies to implement infrastructure projects, and also by states (*departamentos*), metropolitan areas, and regional autonomous corporations, which act as environmental authorities. For the urban transformation of cities such as Medellin and Bogota, eminent domain appears to be an important strategy widely recognized in Latin America. However, we say "appears to be," because perhaps what is actually predominant refers to public acquisition of land, a broader concept than eminent domain, comprehending the possibility of prior arrangements by negotiation or alternative forms of purchase.

In any case, and even taking into account these subtleties, public authorities have neither experienced any difficulties or impediments when applying these strategies, as commonly occurs in other countries, nor are there conflicts between branches of government, particularly the executive branch and the courts, or evidence of large scale social resistance, except for isolated cases referring to affected property owners—both high and low income: the first using injunctions and other subterfuge in the courts, and, the second instigating the media to stir up social sensibilities,

neither of these significantly impacting the practice of eminent domain.

Therefore, we can state that Colombia is a good example of the application of eminent domain in terms of asserting the power of the state and public interest. In this context, this chapter tackles two points of discussion that are viewed as weaknesses in the Colombian system; the first concerns the criteria and problems in determining compensation; the second is about the limits of eminent domain, when not motivated by public utility, but rather to promote real estate development, particularly when the people affected have low income.

This chapter discusses these points, starting with a review of the legal framework for eminent domain in the context of urban use, as defined in the urban reform laws (Act 9 of 1989) and the master planning laws (Act 388 of 1997). The chapter is organized as follows: a review of the scope of agencies with eminent domain authority for public utility or social interest causes, the premise for the principle of general interest, and compensation procedures and their ambiguities.

Scope of Agencies with the Power to Use Eminent Domain for Public Utility and Social Interest Causes

Act 388 grants public agencies very broad criteria for applying eminent domain:

> In addition to other laws that are in force, the federal government, the states (territorial entities), metropolitan areas, and municipal associations may purchase real estate by voluntary agreement or eminent domain decree, in order to implement the activities stipulated in Article 10, Act 9 of 1989. Public agencies, public industrial and commercial companies, and companies of varying economic type assimilated to public companies, at the federal, state, and municipal level, whose charter expressly includes one or more of the activities stipulated in the article defining public utility and social interest causes, may also purchase or obtain real estate by eminent domain in order to implement these activities.

As if this were not sufficient, it is also permissible to expropriate in favor of third parties, regulated as follows: properties acquired by any of the aforementioned entities can be developed directly by the acquiring agency or by a third party, as long as the agency has signed a contract or agreement that guarantees the use of the property for the goal originally intended. We return to this option when describing public utility as a justification for eminent domain.

Finally, conforming with the importance given to urban planning in Colombia, any purchase or expropriation of real estate for urban use must comply with the goals and land use programs established in the municipal master plans (*planes de ordenamiento territorial*). Purchases realized by agencies at the federal, state, or metropolitan level must comply with the goals, programs, and projects defined in their respective development plans. This condition does not apply when an expropriation is necessary for remedying an unplanned emergency, which must always be defined in a similar manner to an emergency declaration for eminent domain defined by administrative decree.

These broad powers granted to the agencies of the executive branch for initiating eminent domain procedures are checked by two conditions: the law broadly defines public utility and social interest causes that justify the use of eminent domain, as well as the rules that determine compensation, and likewise eminent domain procedures are generally initiated through the courts. The legal representative of the expropriating agency files a civil case before a judge, who then defines the conditions under which the property will be transferred and the amount of compensation, complying with certain general rules.

Contrastingly, the eminent domain process by administrative decree, adopted in the 1991 Constitution can only be applied by a competent entity or authority (as defined in Act 388), indicated by the pertinent municipal council. This authority will be in charge of defining the emergency conditions that justify expropriation by administrative decree, and consequently who is in

charge of the process, as well as establishing the compensation amount. The option of urban expropriations by administrative decree is restricted to particular instances defined by the municipal council. Even so, reasons given for expropriation by administrative decree are fairly comprehensive and include emergency declarations.

If the list of entities that can initiate eminent domain proceedings is far reaching, greater still are the public utility or social interest causes contemplated in Act 388 that can be used to initiate expropriation, either via the courts or by administrative decree. Below are the possible reasons for expropriation by administrative decree:

1). Implementation of social infrastructure construction projects in the areas of health, education, recreation, supply centers, and citizen safety;
2). Development of affordable housing projects, including the legalization of land titles in de facto or illegal settlements, different from those contemplated in Article 53 of Act 9 from 1989, together with rehabilitation of tenements and relocation of settlements that are located in high risk areas;
3). Implementation of urban renewal programs and projects, and creation of urban public spaces;
4). Implementation of projects for the construction, upgrade, supply, and distribution of residential public services;
5). Implementation of programs and projects for road infrastructure and mass transport systems;
6). Implementation of ornamental, tourism, and sports facility projects;
7). Public agency offices, except those involved in state industrial and commercial enterprise and societies with mixed economy, provided their location and public utility rationale are clearly determined in the master plans or strategies applied for their development;

8). Preservation of cultural and natural heritage of national, regional, and local interest, including features relating to landscape and environment, history, and architecture;
9). Creation of reserve areas for future city expansion;
10). Creation of reserve areas for environmental and water resource protection;
11). Implementation of urban and construction projects, prioritized by the master plans that relate to this Act;
12). Implementation of urbanization, redevelopment, and urban renewal projects, applying action units (*unidades de actuación*), instruments of land readjustment, real estate integration, cooperation or other systems, as contemplated in this Act;
13). Population transfer due to imminent physical risks.

Later in this chapter, we reconsider some of these justifications.

LEGAL REGULATIONS FOR EMINENT DOMAIN PROCEDURES

In terms of eminent domain procedures, the most relevant aspects consist of an initial stage where agreement or negotiation can prevent the need for a formal expropriation process; administrative activities, judicial actions, as well as the justification for applying eminent domain by administrative decree.

Eminent domain, whether imposed via the courts or by administrative decree, is preceded by negotiations between parties. The process starts with an offer from the administration to the property owner of a base price, known as the *offer to purchase*. This stage of negotiation between parties is known as the *voluntary sale* phase in the case of legal expropiration and *direct negotiation* in the case of expropriation by administrative decree.

This requirement exists in several countries with the aim of limiting the costs and delays of the court process, an intention reasonable enough in itself, but there is an additional justification: to try to reach an agreement, even if the compensation offer

is relatively high, with the aim of preventing even higher amounts being decreed by the civil courts. It is difficult to obtain enough statistical information to prove that payments made in the negotiation phase exceed reasonable amounts,[1] or likewise to prove that as a general rule, compensation defined by judges is very high or even scandalous, or if infact this only occurs exceptionally. In any event, subsequently we present an analysis of public land purchases made by Metrovivienda, a municipal public entity in Bogota, which is organized as a state industrial and commercial enterprise, and operates as a land bank, i.e. it purchases land for affordable housing, develops the land and then sells it, or auctions it off in city block units to developers, who then build affordable housing. The combination of all these situations provides a good basis for analyzing this subject.

In terms of administrative procedure and the role played by the judge, these are as follows: should voluntary negotiation fail or if legal issues arise affecting the transfer of the property that require a court process; where judicial expropriation proceeds, the agency issues a resolution of eminent domain and subsequently, its legal representative files an expropriation petition through a lawyer, in which early transfer of the property can be requested, provided that a deposit of 50 percent is made to the court, based on the valuation established during the voluntary sale phase.

Once the respondent has been notified, should they fail to respond to the petition within the period, the judge will proceed to issue a ruling. During the proceedings, the judge, in compliance with the Code for Civil Procedure must request a federal agency, the Agustin Codazzi Geographic Institute, and also existing municipal cadastres or private assessors, to determine the value of the property with any damages that apply quoted separately.

[1] Understood as being, at most, similar to what a private party would be willing to pay.

In the second case, where an administrative decree is applied once negotiation has failed, the agency authorized by the municipal council has to issue an administrative ruling (or *acto administrativo*), in order to proceed with the expropriation; this must establish the compensation price and terms of payment, among other things. The affected parties can file an administrative appeal against the ruling, requesting an injunction to nullify the procedure and to restore the rights of the affected party, challenging any arguments presented by the agency that claim public or social interest, and disputing the amount of compensation or terms of payment. Once the ruling has been confirmed, the property is transferred and compensation is paid.

Finally, we need to consider circumstances where eminent domain proceedings by administrative decree are permitted. The opinion of the Constitutional Court, usually shared by attorneys specializing in expropriations[2] is that eminent domain by administrative decree should only be used in exceptional circumstances; however, the diversity of public interest causes to which this can be applied (almost all), and the scope and vagueness of the emergency conditions that justify it, indicate to us that this practice may become more the rule than the exception.

There are few substantive requirements. The situation must constitute an emergency as established by law, and the public utility cause invoked must be contemplated for this type of expropriation and procedure. Likewise, the municipal or district council, or the metropolitan board must agree when identifying the agency with the competence to declare an emergency, and the agency must comply.

According to Act 388, the following constitute possible reasons to declare an emergency:

[2] The exception is Medellin, where public agencies and their lawyers take an opposite stance.

1). To prevent an excessive increase in property prices; applying the guidelines and parameters established by the federal government for this purpose.
2). The problem to be resolved through eminent domain action cannot be postponed any longer.
3). An excessive delay in the plan, program, project, or construction implemented via administrative decree would cause damage to the community.
4). The plans and programs projected by the respective regional or metropolitan agency have given priority to the activities addressed by expropriation.

In the city of Bogota, where several entities use the eminent domain process continuously and even massively,[3] the agencies in charge of purchasing subdivisions were initially cautious, even reluctant to use eminent domain by administrative decree, based on their intention to guarantee property rights. As is common in the public sector, they presented a series of not entirely consistent arguments, attempting to justify this position, particularly citing that the federal government still had to regulate the implementation of the Act, although Act 388 imposed this requirement in only one of the emergency circumstances that aimed at preventing an excessive increase in property prices. However, in the midst of this debate, it became apparent that, in contrast, the city of Medellin practiced this type of expropriation habitually, without major problems. This factor reduced reluctance and misgivings concerning these aspects, and these agencies began to contemplate

[3] Such as, for example, the Urban Development Corporation (*Empresa de Desarrollo Urbano*), in charge of road work and public spaces, financed by betterment contributions, or the Aqueduct and Sewer Corporation (*Empresa de Acueducto y Alcantarillado*), a municipal public agency with a decentralized structure, similar to a private corporation, comprising one of the most powerful agencies, but also the Department of the Environment (*Secretaría de Medio Ambiente*) or the District Recreation and Sports Institute (*Instituto Distrital de Recreación y Deportes*) or the Urban Renewal Corporation (*Empresa de Renovación Urbana*).

applying eminent domain by administrative decree more frequently. In any event, this option has only been applied recently, and there are no outstanding administrative law judgments related to public interest causes, or instances where the amount of compensation has been disputed, which might indicate whether this mechanism will gain traction or instead encounter difficulties and be subject to eventual changes.

Clarity or Ambiguity Concerning Rules for Compensation

According to the Constitution, compensation should be paid prior to the property being removed and has to meet both the interests of the affected owner and those of the community. Despite this constitutional clause and the fact that eminent domain is an instrument of public law unrelated to the notion of price, as indicated in another chapter, Act 388 only discusses "commercial value," as is common in many statutes. Act 9 from 1989 made reference to a special administrative assessment, as opposed to cadastral assessment. But in the process of writing Act 388, a combination of negotiations between stakeholders, lobbying by interested parties and disinformation or lack of clarity that commonly present themselves in the process of writing a law, resulted in equating price to commercial value. This was justified by the need to guarantee restitution to property owners and reduce resistance to eminent domain, in many cases leading to speculation or anticipation on the part of real estate agents concerning which land areas would next be appropriated by public agencies, thus fueling the vicious cycle of increasing property prices. Concerning built-up areas, no major difficulties presented themselves, however challenges have emerged concerning land expropriation in terms of one of its fundamental qualities, particularly in cities: location. The second reason is more pragmatic: when land prices are relatively high, conflicts and delays can be avoided. This is a common approach on the part of the entities that build roads

and public service infrastructure, which generally do not require wide strips of land, are financially sound, and feature importantly in the political agenda of mayors. As sometimes they also have international financing, pressure to complete projects in a short period of time is high. The not-so-positive consequence is a government that is efficient and guarantees property rights, but is forced to pay high compensations, making the implementation of public works more difficult. It also promotes differential compensation that is excessive in some cases, but insufficient in others, particularly where low income population is affected by public works, as described here.

Adding to the confusion of what is meant by commercial price, the Act stipulates a set of conditions or, more precisely, limitations, for determining commercial value, not all of which are understood or accepted by assessors and representatives of public companies that initiate expropriations, and even less so by property owners and the general public.

First, the federal regulatory decree for assessment practices (No. 1420 of 1998) adopts the definition of commercial value commonly used by international assessors' organizations: commercial value refers to the "price that would most probably be paid for a property in a market where the buyer and seller act freely, and have knowledge of the physical and legal conditions affecting the property." The immediate consequence of this definition, at least in the Colombian case, is that it is not possible to include price expectations, an essential tool used by professional assessors for determining the price of real estate.

Federal regulations include two important conditions that either diminish or significantly alter the concept of commercial price or value.

1). Commercial value must be determined in accordance with the urban municipal or district regulations in effect at the time the property is purchased, particularly taking into account its economic purpose or use.

2). Any value added or generated by the announcement of the project or public works that justified the expropriations must be subtracted from the commercial value referred to in this article, except in a case where the owner has paid his share of the added value or a contribution towards improvement, depending on circumstances.

Referring to this, the regulatory decree described previously adds some other factors. In the case of subdivisions, where most difficulty for defining prices is encountered and in order to guard against unreal expectations, physical characteristics should be taken into account, such as area, location, topography and form; up to date urban regulations, the type of construction in the area; and, above all, the availability and accessibility of primary and secondary residential public services, as well as road infrastructure and transportation service. In other words, the price is determined not only by the parameters stipulated in the Act (which can be interpreted as the value assigned by the authorities who enacted the urban regulations), but also by the actual condition of the property, particularly its use, surrounding environment and accessible infrastructure.

For rural parcels, in addition to the features mentioned above, the agricultural condition of the land, water, existing crops, and land productivity associated with the local climate must also be taken into account.

These clauses have triggered a major alteration concerning property assessment in the country. Land that is classified as apt for urban expansion[4] is thus no longer assessed in terms of its possible urbanization, but for its agricultural potential. This is

[4] Act 388 of 1997 adopted the categories of land classification from Spanish law. There are three main classes of land: urban, rural, and urban expansion. Suburban land is classified as rural land, and protected land can be included in any of the other classes. This classification is the basis for establishing the urban regulatory framework setting the rights and obligations of property ownership.

not very logical, as this type of land is legally defined as land for urban use within the terms of the master plan with the future growth of the city in mind, thus generating plans for road infrastructure, transportation, residential utilities, open areas, and parks, as well as facilities for public or social purposes. In other words, from the legal point of view, the conversion of this land into urban use is merely a possibility, subject to a set of conditions. However, assessing it in terms of agricultural potential has been the source of strong debates.

The other possibility has even stronger impact, because it mandates the deduction from the commercial value of eventual increments or prospects that will result from public works or projects used to justify the expropriation. This had an even stronger precedent in Act 9 of 1989, when the idea of commercial value as a convenient reference began to prevail.

The adoption of this mechanism in Act 9 was triggered by the desire to prevent expropriations from becoming a source of unfair profit or enrichment for the owner who, even though damaged by decisions suppressing his property rights made by the public authorities, should have his compensation balanced against community interests.

Article 18 of Act 9 of 1989 stipulates:

> In order to prevent unjustified profits, the Agustin Codazzi Geographic Institute, or the agency fulfilling the equivalent function[5] should not take into account actions, intentions or recent manifestations by the state with potential for producing an obvious increase in the value of property, when performing the special administrative assessments stipulated in the present act, such as:
>
> 1. Prior purchase on the part of the purchasing agency of another property in the same area of influence during the previous five (5) years.
> 2. Projects announced, to be in progress, or already implemented during the previous five (5) years by the purchasing agencies or by any other public entity in the same area, except in cases in which the

[5] This is the government agency responsible for land cadastre in Colombia (TN).

owner has paid or is in the process of paying the pertinent betterment contribution.

3. The mere announcement on the part of the project purchasing agency for the acquisition of properties in a certain area during the previous five (5) years.
4. Changes in use, density, and height approved by the Integrated Development Plan (*Plan Integral de Desarrollo*), if this exists, within the three (3) years prior to the purchase order, provided the property owner was the same person during this period, or having sold it, reacquired the property prior to the date of the special administrative assessment.

This clause tries to prevent a property price increase due to actions taken by the state, and an increase in the cost of public urban projects due to anticipated capture of value added to property that will occur once the project is totally complete. This clause was updated by Act 388 of 1997 with the text in paragraph 1 of article 61, as mentioned.

The Supreme Court studied the constitutionality of article 18 of Act 9 of 1989, prior to the enactment of the 1991 Constitution, which although defending the social function of property as sacrosanct, did not present a formula that determined compensation in terms of the interests of the affected property owner and the community, nor did it refer to the right of the public to benefit from the value added to the property as a result of urban development. In an opinion published on September 14, 1989 (Acting Magistrate: Jaime Sanín Greiffestein) the Supreme Court clarified the object and purpose of the mechanism we have been analyzing, declaring its constitutionality based on the following arguments:

> The plaintiff argues that this law is unconstitutional because it orders the Agustin Codazzi Geographic Institute, or an equivalent agency, to disregard the actions or intentions of the state mentioned previously, when assessing properties subject to eminent domain, as this would violate article 30 of the Constitution.
>
> The contested clause gave the example that any actions or intentional and recent manifestations of the state that had potential for increasing the value of the property should not be taken into account in an assessment, concurring with the reason given for this prohibition: to prevent unjusti-

> fied profit. "*Contrario sensu*" this implies that if the increase in value is justified, it should be included in the respective assessment. . . .
>
> Also excluded are "intentional and recent manifestations on the part of the state," for example announcing a project (number 2) or simply announcing the intention of acquiring land in a given area (number 3), not constituting a legitimate reason for increase in value because this would promote skillful manipulation of announcements with the intention of incrementing the value of specific properties, with consequent detriment to public wealth. Private property protected by Article 30 of the Constitution is legitimately acquired and additional value caused by manipulation or fraud is certainly neither legitimate nor fair. . . .
>
> . . . To allege that damages have been incurred for not taking into account value added to a property, resulting from a particular government project or by the simple announcement of its execution would convert eminent domain into an unfair source of profit, not complying with provisions of article 30 of the National Constitution.

The Court determines that neither the announcement of a project or public works nor its implementation represent a legitimate source of profit for landowners. Evidently, the Court derived its opinion more from the civilian principle of undue profit than from constitutional principles, clarifying that the constitutionally protected property is all that can be legitimately acquired, and not additional value caused by action on the part of the state, except when resulting from private investment or effort. The reason here is that recognizing these increments in value resulting from action on the part of the state implies a reduction in the wealth of the state itself.

This subject leads to a recurrent problem in the field of urban law: when do acquired rights feature in urban matters? In other words, when is the owner of a property entitled to the incremented value caused by location, use, and zoning regulations or available infrastructure, i.e., by actions external to the owner?

This mechanism established by the legislature as a condition that must be observed by those involved in an eminent domain proceeding has been converted into a type of independent instrument used in various cities, informally known as the "project announcement." Once a decree or resolution announcing a work

or project is issued, the land area requiring appropriation is identified, and an assessment is made of areas that are geo-economically similar, to then be reviewed, discussed, and either accepted or rejected by the expropriating agency, and later published. These assessments serve several purposes:

1). To create a mechanism for publicizing the condition or legally imposed discounts where value has been added to land prices. Likewise, this creates a price regulator based on information, which can also benefit private parties. It also serves as a control for payment of compensation from public resources; as these are some times even higher than commercial prices.
2). To create a reference price, so that any subsequent increases benefit the community.

As already mentioned, the job of the assessor, and that of the public official who is charged with reviewing, accepting, or objecting the valuations is not straight forward, particularly in the case of buildings constructed on urban land. He must determine the current value of the asset to the owner, separating this from expectations created by government projects.

This framework, although apparently sound, becomes difficult to implement in cases where eminent domain is applied for general interest rather than public interest causes.[6] Is it valid to negate expectations generated for the owner when his property is involved in urban development, even those initiated by the government, in order to consolidate areas of the city? Here, general rules come into question.

[6] Public interest reasons are used to acquire land for public use, such as roads, parks, and other open, green, or recreational areas. Social interest motives are used to acquire land for other purposes, generally implying that the land will be transferred to the state or will be used for urban development and construction, as in the case of purchases and expropriations to develop affordable housing, create land reservations for urban growth, or for other reasons that are more problematic due to their social implications, such as urban renewal.

Certain exceptions exist (in cases of eminent domain for social interest causes), including projects for urban renewal and land readjustment or related management activities. In these instances, property owners have the right to participate as partners in these projects, and can therefore benefit from a proportional share in relation to any price increases, once charges and other project costs related to legal regulations and policies of each master plan have been deducted.

Strengths, Tensions, and Difficulties in Applying Eminent Domain

As indicated at the beginning of this chapter, eminent domain in Colombia is evidently practiced and accepted without significant resistance or difficulty. The urban transformation of its capital Bogota, well known internationally, applied eminent domain extensively to construct roads, among them the mass transit system known as "Transmilenio" and the street grid, which aimed to generate urbanized land for affordable housing programs and a number of community facilities.

If we return to the classification proposed by Azuela et al. (2009) discussing the relationship between the strength of the state and the use of eminent domain, the case of Colombia, and particularly the case of Bogota does not seem to concur with any of the previous hypotheses, especially and as stated previously by this author, the government is not particularly strong, having confronted a prolonged armed conflict with multiple opponents and generalized violence among the population. However, despite this, eminent domain has been extensively applied in the city in recent years. The application of eminent domain is related to the fiscal strengthening of the city government and the consequent expansion of public works, the emergence of mayors related to ad-hoc political movements and non-traditional parties comprising a combination of technocrats and innovators, and above all, respect for public participation, making possible the successful implementation of large municipal public works.

Evidently, this process was not free from tensions. There are several questions to be answered: who should benefit from price controls in the context of compensation and value added to land? Does the right to housing, as a private space located in an urban environment, modify or alter the balance of collective and individual interests or redefine the principles we mentioned at the beginning of the chapter? We respond to these and other questions that emerged previously by providing an analysis of expropriations performed by the land bank of the city of Bogota, known as Metrovivienda, and by identifying what seems to be a breaking point: the use of eminent domain for urban renewal in favor of third parties. Metrovivienda is a land bank in Bogota founded in 1998 and organized as an industrial and commercial enterprise in the District of Bogota, with its own legal representation, assets, and administrative autonomy. Its initial equity was provided by the Energy Company, and thereafter by the district budget.

Its goal was to promote a massive supply of urban land in order to facilitate integrated affordable housing projects, to function as a land bank or real estate bank for urban projects that promoted affordable housing as a priority, and to promote a community organization of low income families to facilitate access to land for priority affordable housing.

Metrovivienda was also made responsible for designing subdivisions in preplanned urban neighborhoods (*actuación urbanística*), undertaking land readjustment programs (*reajuste de tierras*) with the power to purchase real estate, contract infrastructure projects in order to develop affordable housing, invest resources from the Subsidy for Family Housing (*Subsidio Familiar de Vivienda* or SFV) participate in partnerships or associations, enter into agreements to sell subdivisions intended for housing families below an income level equal to 3 current minimum monthly salaries (*Salario Mínimo Mensual Legal Vigente* or SMLVM),[7] and enforce compliance with urban regulations, among others.

[7] The monthly legal minimum salary in effect (SMLVM) in 2007 was $433,700 (US$205).

From the time of its creation and up until 2007, it performed its functions in two ways: direct project execution, which consisted of purchasing land, adding infrastructure, and selling subdivisions consisting of at least 2.5 acres (1 hectare) to private developers or community housing organizations for the construction of housing units priced at less than 70 legal minimum monthly salaries (SMLVM) (Citadel El Recreo and Citadel El Porvenir); and projects in partnership with owners who contributed the land, while Metrovivienda provided the resources needed for urban development. However, Metrovivienda makes an initial payment of close to 30 percent of the total land valuation as its initial share of the trust. The business was structured so that Metrovivienda paid a predetermined price, without regard for project development. Recently, Metrovivienda initiated a third type of project, where it became more actively involved. Metrovivienda promotes partial development plans, where the project is executed in stages, directly controlling the prices of land from the beginning of the operation, applying the strategy described when the project was announced and levying a previously approved tax called value capture (*participación en plusvalía*), together with equitable distribution techniques in relation to charges and benefits. Metrovivienda invites land owners to join the project voluntarily, obtaining a price that is related proportionally to this equitable distribution; thus only if the property owner is opposed to the proposal is eminent domain process initiated, preferably by administrative decree (table 1).

The first two projects were used as a reference for making a detailed analysis of the balance between voluntary sales or sales by prior agreement, and the use of eminent domain at the court level or by administrative decree, and to obtain data about variations in terms of compensation.

The following table 2 shows average data for land purchases for three of the projects, as Campoverde has faced multiple dif-

TABLE 1
PROJECTS EXECUTED AS OF 2012

Project name and management type	*Number of acres and subdivisions*	*Location*
Ciudadela El Recreo, direct project implementation, purchase of land	290 10 subdivisions	Town of Bosa. Although it was rural land, it was classified as urban and not subject to a partial master plan.
Ciudadela El Porvenir, direct project implementation, direct purchase of land	326 114 subdivisions	Town of Bosa. Urban expansion land.
Ciudadela Nuevo Usme Partnership	160 2 subdivisions	Town of Usme
Ciudadela Campo Verde Partnership	209 1 subdivisions	Town of Bosa. Urban expansion land.
Project Usme-Ciudad Futura Public development based on partnership management	2100 acres. This assumes that all the expansion land will be planned a developed.	Town of Use. Urban expansion land.

ficulties when attempting to formulate a partial development plan. Table 2 makes clear that a high percentage of the financial investment related to the projects is allocated to land purchases, and prices are not that low considering that these were peripheral land areas with no urban infrastructure. In the case of El Porvenir, evidently 68 acres were removed by eminent domain in an informal settlement, which is in the process of being consolidated. Not only is it curious that a public agency should purchase land in an informal settlement in order to build affordable housing units, but this also increased the prices for existing subdivisions (in Colombia, informal developers usually sell lots of 72

Table 2
Land Purchase Price Data

Project	*Total Purchase Value*	*Value/m² (Pesos)*	*Ratio of land price to total investment (infrastructure costs plus land purchases)*	*Value/m² (USD)*
Ciudadela El Recreo	$ 37,158,529,306	$ 32,241	36%	16.00
Ciudadela El Porvenir	$ 49,926,360,000	$ 37,823	52%	18.91
Ciudadela Nuevo Usme	$ 12,695,150,000	$ 19,531	35%	9.76
Total	$ 92,324,210,000			
Average		$ 29,515	43%	14.75

square meters), which then have improvements added by the families.

In the case of El Recreo and El Porvenir, 290 and 326 acres were purchased respectively, as previously indicated. In the case of El Recreo, all the land subdivisions were purchased during the prior agreement phase. For El Porvenir, 37 acres or 11 percent of the total project area was acquired by expropriation via the courts, and the rest during the prior agreement phase.

The compensation prices for El Recreo were on average US$16/m² as mentioned previously.

The most relevant data presented here indicates the significant differences in the compensation price per square meter, which varies from US$2 to US$21 per square meter.

In the case of El Porvenir, because of the number of subdivisions purchased, some of the data has been provided in the

TABLE 3
COMPENSATION PRICES

Number	*Name of the property*	*Area (m^2)*	*Value (Pesos)*	*Value/ m^2 (Pesos)*	*Value/ m^2 (USD)*
1/13/2001	La Victoria	214,526	4,569,841,406	21,302	11
1/10/2001	La Travesía	647	5,774,406	8,930	4
1/10/2002	Santa Marta	15,674	404,335,350	25,797	13
1/10/2003	Capri	18,555	504,179,465	27,172	14
1/10/2004	El Camino	1,428	15,777,562	11,045	6
1/10/2005	Santa Isabel	6,373	149,767,615	23,500	12
1/06/2001	El Recreo	146,216	1,159,776,764	7,932	4
01/012001	Ciudad Colón	109,467	2,189,335,200	20,000	10
01/07/2001	Globo 3	3,547	16,513,287	4,655	2
01/09/2001	Globo 4	3,030	33,463,147	11,045	6
01/14/2001	Santa Ana	25,600	594,353,700	23,217	12
01/05/2001	Globo 2	6,756	28,375,914	4,200	2
01/12/2001	El Nogal	26,237	627,008,275	23,897	12
01/03/2001	Lugano	233,513	2,013,937,763	8,625	4
01/04/2001	La Bomba	269	5,745,012	21,368	11
01/08/2001	Sin	65,676	448,567,080	6,830	3
01/02/2001	San Jorge	267,738	5,666,868,107	21,166	11
01/15/2001	La Escuadra	7,282	145,644,600	20,000	10
	Total Area	1,152,534.05	18,579,264,653.00	16120,361	8

Source: Metrovivienda.

Appendix. However as indicated, a similar situation is observed at this location, but showing some variations due to the presence of an informal settlement in process of consolidation. Owners and residents have received relatively low compensation amounts, particularly when compared to the compensation paid to owners of undeveloped land.

This project reveals the fact that certain civil judges conceded high compensation amounts; however this did not occur in the majority of cases, nor is the difference as great as that in Ecuador, if the judgments issued by courts in that country and reported in other chapters of this book are any indication.

According to information provided by the manager of Metrovivienda in response to a request for information on this subject, once a court case has been initiated, Metrovivienda continues negotiating with the owners, sometimes arriving at an agreement based on commercial assessments carried out at the beginning of the purchase process, during the voluntary phase. This is partly related to the fact that a court case is sometimes inevitable, when the property is not totally legal, as with informal settlements.

There are several explanations for the higher compensations issued by the judges: in some cases judges take into account future damages and lost profits, which although recognized by law can result in compensating the owner for hypothetical profits that are not necessarily realistic. This would be the case here, because undeveloped land—typically purchased by Metrovivienda—rarely generates profits, except when used for agricultural production. In other cases, assessments requested by the agency are updated with the Consumer Price Index (CPI) for the period between the voluntary negotiation phase and payment of the court judgment. And in other cases, the judges recognize improvements that cannot be considered to relate to federal regulations on assessments, because these improvements were made without a permit.

Metrovivienda's manager also recognized the "lack of thoroughness in the valuation techniques used by the court experts, resulting

in substantial differences between the two valuations" when responding to a formal request for information on October 11, 2010.

This detailed review, based on information provided by Metrovivienda does not reduce the perception of the strength of eminent domain, however it indicates a strong tendency for prior agreements, as well as for granting compensation amounts that exceed market values; likewise during the first stage, Metrovivienda emerges as weak in terms of its capacity to decisively control prices.

The Operation Usme project, recently renamed Usme-Ciudad Futura, signals a change of course, as it applies all the strategies that Act 388 allows the municipal governments to use, including eminent domain by administrative decree.

Table 4 presents a summary of expropriations by administrative decree within Management Unit 1 of the Partial Plan "Tres Quebradas" (District Decree 438 of 2009), one of the four partial plans of the Strategic Operation Nuevo Usme–Llanos Integration Axis (District Decree 252 of 2007) .

In order to calculate expropriation and compensation prices, the project was announced in 2003, base assessments were made, and negotiations over many years were conducted to convince all the district agencies to recognize the change in criteria used for assessing land classified for urban expansion. Then, based on information provided by Metrovivienda,

> [the agency representatives] initiated the process of developing the previously described Management Unit 1 of the Partial Plan. As part of this process, they informed the current landowners not only by means of formal processes,[8] but also by holding multiple meetings in order to clearly explain the terms and conditions of a partnership designed to develop the management unit.

[8] Official communication requesting a management partnership, explaining in detail the goals of the project, the value of the land, the partnership options, the potential economic profit, the duration of the project, the period for return on investment (the land the owner would contribute to the project), and other operational specifications.

Table 4
Eminent Domain by Administrative Decree,
Partial Plan "Tres Quebradas"

Property	*Location*	*Area expropriated*	*Compensation value*	*Value/ m^2 in USD*	*Reason for expropriation*
Antigua Hacienda Santa Helena	Vereda El Uval	82,891.62 m^2	$394,348,757	2	Construct a barrier for the Fucha ravine and a segment of Usminia Avenue
Subdivision B Antigua Hacienda Sta Helena	Vereda El Uval	4,023.53 m^2	$10,058,825	1	Construct a barrier for the Piojo ravine.
Subdivision A Antigua Hacienda Sta Helena	Vereda El Uval	26,582.33 m^2	$106,041,428	2	Construct a barrier for the Piojo ravine and a segment of Usminia Avenue
Antigua Hacienda Santa Helena	Vereda El Uval	412,735.08 m^2	$3,058,366,943	4	Construct an intermediate and local road grid; system of open spaces and urban facilities
Subdivision B Antigua Hacienda Sta Helena	Vereda El Uval	22,723.19 m^2	$162,470,808.50	4	Infrastructure works, intermediate and local road grid; open public space and urban facilities system
Subdivision A Antigua Hacienda Sta Helena	Vereda El Uval	104,205.04 m^2	$765,907,044.00	4	Infrastructure works, intermediate and local road grid; open public space and urban facilities system

Lack of desire on the part of landowners undermined results from these procedures, thus, after declaring public interest causes and emergency conditions, the voluntary sale process was initiated. Once the purchase offers had been submitted, and given that the landowners of the properties in the Management Unit 1 of the Partial Plan "Tres Quebradas" did not show an interest in selling their properties voluntarily, eminent domain resolutions were issued, following correct procedure.

In the area where this Operation is underway, there are at least four types of owners: an informal developer who possesses a significant extension of land, two banks that received land from this developer as part of a payment, absent landowners who are waiting for urban development of their properties, and to a lesser extent farmers who work the land directly either as owners or tenants.

The first parcels to be expropriated belonged to the informal developer and one of the banks. Their reaction to the administration's initiative and particularly to the limits on prices was to use all types of maneuvers and subterfuges to oppose the expropriation, some bordering on acts of corruption. In different social circumstances and with some formal differences, this situation is similar to that of the Country Club, where Mayor Peñalosa decided to expropriate the polo field of one of the clubs frequented by the upper classes of Bogota, with an excellent central location in the city. The intention was to extend a vital road in order to improve circulation in a high income area and create a large park, as public spaces are an obsession for this mayor. The crux of the problem did not refer to the expropriation per se, although its symbolic impact was apparent, but related to the application of compensation rules, determining that the land should be assessed in terms of its current uses: a private endowment. Today, almost ten years after the eminent domain decree, and four years after the land area was handed over to the agency in charge of construction and park management, an intricate series of cases, or delayed cases, filed in civil and administrative courts by some

of the best lawyers in the field of urban development, have kept the amount of final compensation in limbo, and there is a considerable risk that this amount will end up being higher than the amount stipulated in the regulations. Something similar happened in the case of the expropriation of the informal developer, however, the legal proceedings were probably less sophisticated.

The other aspect concerns farmers who lived in the area who were affected not only by the imminent loss of their land, but also by a reduction in the amount they would receive for their subdivisions. Without ignoring the importance of their social predicament, which forced the mayor to freeze the operation for four years (2004–2007) and postpone a final decision, it is pertinent to ask ourselves if higher compensation prices would not have reduced their resistance to leave their land. There are some who think that attachment to land represents an intangible that should be recognized in the compensation amount, in cases of eminent domain. Although we cannot develop the argument further in this chapter, our position is that compensation should only offset the property being relinquished and provide adequate compensation. Any other payment, although legitimate and pertinent when the owners form part of a vulnerable population, must be recognized and calculated aside from the eminent domain process, as a complementary element in the social program, but without these good social intentions influencing the compensation amount, as these contribute to maintaining and justifying the effects of the land market, with its inequities and exclusions.

However, this resistance to eminent domain is part of a general problem in urban development: the displacement of low income population that results from development projects.

This aspect of the problem leads us to the following final point: should the reasonable aim to deny expectations for higher prices from land declared as potentially urban, while obliging landowners to partake in the financing of urban conversion, be tempered by the (legitimate?) expectations of impoverished

or vulnerable social groups attempting to participate in the financial benefits of urban development, as it transforms the territory they live in? One of the answers resides in the principle and techniques that direct equitable distribution of charges and benefits, particularly in the case of urban redevelopment or renewal projects.

CONCLUSION: DOES URBAN RENEWAL REPRESENT A BREAKING POINT FOR EMINENT DOMAIN?

The use of eminent domain for urban renewal projects creates a legal problem that has not yet been tackled by the courts. The law determines that urban renewal when not directed by any social component, and usually accompanied by a gentrification process, qualifies as a social interest project, therefore subject to eminent domain, irrespective of the type of resident, owner, or social composition of the affected areas. Therefore, this type of project often provokes a clash with the property owners, creating a great challenge for urban policies. This tension is exacerbated with the added option of expropriating in favor of third parties.

This is another situation that challenges the apparent strength of eminent domain. Does urban renewal qualify as a general interest project? Some would argue that urban renewal makes it possible to recover deteriorated areas threatened by lack of safety, dominated by undesirable urban activities, or taken over by all kinds of mafias. The prior stigma, at times justified, at times the result of moral outlook directed towards areas where urban renewal is planned, does not surprise. This often mistakenly identifies a need for police action where infact urban management is required, or aims to disqualify the occupation of well-located areas by low income groups and their economic activities. It is one thing to renovate deteriorating non-residential areas, such as industrial estates, and another is to substitute one social class for another.

At the time of writing this chapter, this apprehension is taking hold in the Bogota agenda. Some neighborhood communities that feel threatened by development projects maintain an uncertain dialog with the planning authorities, who with declining or non-existent aspirations for social and urban reform are acting as technocrats and bureaucrats, serving the interests of real estate developers. Up until now, an area that according to the district government was under the control of the worst mafias was razed and replaced by a park, and other small projects were implemented, comprising a few city blocks in relatively empty areas. In the meantime, the combination of mass transit and urban redevelopment, or the design of private projects with emphasis on high rise construction and gentrification have benefited from eminent domain procedures with compensation based on the previous land use and expropriations in favor of third parties. In these cases, the law has been interpreted literally. Project proposals presented by organized groups that have a different view of urban redevelopment are rejected.

The future situation is uncertain and will largely depend on the decisions taken by politicians, mayors, and municipal councils; planning or urban renewal directors; neighborhood leaders and their capacity to comprehend the different aspects of urban process; and perhaps also on the judges. The course this takes will provide a laboratory for continuing to understand and disentangle the ambiguities of eminent domain and, more importantly, of property rights.

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Appendix A
Land Acquired by Eminent Domain via the Courts at Ciudadela El Porvenir

Property	*Area (in m²)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
105210064-000000	110.29	1,400,683.00	Process finalized by transaction	1.400.683,00	The property was transferred by agreement under the terms of the purchase offer.
105314089-000000	412.78	5,366,140.00	21,533,246	21.533.246	No comments.
105222036-020000	508.71	10,725,760.00	Not carried out.		In process of voluntary negotiation.
105222036-000000	1107.12	69,334,731.00	Not carried out.		In process of voluntary negotiation.
105314049-000000	1359.61	39,211,152.00	74,340,000	74.340.000	No comments.
105314045-000000	1362.03	39,280,945.00	73,036,413.73	73.036.413.73	No comments.
105314051-000000	1364.43	39,350,161.00	76,549,323	76.549.323	No comments.
105314050-000000	1369.02	39,482,537.00	81,898,751	81.898.751	No comments.
105314048-000000	1369.42	49,137,413.00	105,645,827	105.645.827	No comments.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
105314041-000000	2349.11	36,528,661.00	105,314,041	105.314.041	No comments.
105210076A-00000	4547.91	161,739,383.00	654,734,000	654.734.000	No comments.
105314039-000000	12094.01	223,739,185.00	806,000,000	806.000.000	No comments.
105314062-000000	12774.61	153,295,320.00	479,773,069	479.773.069	No comments.
105222004-000000	12975.58	340,789,898.00	659,801,699	659.801.699	No comments.
105210076-000000	17910.29	546,639,791.00	1,046,412,443	Not yet paid	The judge has not issued an order to transfer the property to Metrovivienda.
105314040-000000	17929.54	344,103,732.00	678,996,480	Not yet paid	The judgement is in process of being recorded.
105314033-000000	21046.07	481,135,461.00	1,646,305,233	1.646.305.233	No comments.
105314060-000000	30793.18	402,494,060.00	1,124,192,850	1.124.192.850	No comments.
03-25-26	72	7,200,000.00	Not carried out due to direct negotiation.	7.200.000,00	The property was transferred by agreement under the terms of the purchase offer.

Property	*Area (in m²)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
03-40-37	72	8,640,000.00	Not carried out due to direct negotiation.	8.640.000,00	The property was transferred by agreement under the terms of the purchase offer.
20531402-004	72	5,040,000.00	7,012,206	7,012,206	No comments.
20531403-002	72	5,393,920,00	Not carried out due to direct negotiation.	5.393.920,00	The property was transferred by agreement under the terms of the purchase offer.
20531421-02	72	5,040,000.00	No court assessment was carried out.	Voluntary negotiation in process.	Voluntary negotiation in process.
20531422-02	72	5,040,000.00	7,500,000	7,500,000	No comments.
20531425-7	72	5,040,000.00	Not carried out due to direct negotiation.	5,040,000.00	The property was transferred by agreement under the terms of the purchase offer.
20531427-4	72	5,040,000.00	Not carried out.	In process of expropriation.	Expropriation process not yet concluded.
20531428-1	72	5,400,000.00	Not carried out due to direct negotiation.	5,400,000.00	The property was transferred by agreement under the terms of the purchase offer.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053146801-A1	68	5,122,275,00	Not carried out due to direct negotiation.	7,645,776	Property was transferred and compensation updated using CPI.
2053146802-A2	72	5,449,500	Not carried out due to direct negotiation.	7,947,477	Property was transferred and compensation updated using CPI.
2053146803-A3	72	5,040,000.00	6.127.548	6,127,548	No comments.
2053146804-A4	72	5,040,000.00	6.127.548	6,127,548	No comments.
2053146805-A5	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146807-A7	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146808-A8	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146809-A9	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053146810-A10	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146811-A11	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146812-A12	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146813-A13	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146814-A14	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146815-A15	72	5,040,000.00	Not done due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053146816-A16	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146817-A17	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146818-A18	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146819-A19	72	5,400,000.00	6,565,230	6,565,230	No comments.
2053146902-B2	87	6,106,100,00	Not carried out due to direct negotiation.	9,114,285	Property was transferred and compensation updated using CPI.
2053146903-B3	72	16,800,000.00	34,500,000	34,500,000	No comments.
2053146904-B4	72	5,040,000.00	8,654,306	8,654,306	No comments.
2053146905-B5	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.

Property	*Area (in m²)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053146906-B6	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053146907-B7	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053146908-B8	72	5,040,000.00	5,040,000	5,040,000	No comments.
2053146909-B9	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053146910-B10	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053146913-B13	72	7,662,000.00	8,004,333	8,004,333	No comments.
2053146914-B14	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053146915-B15	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053146916-B16	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053146922-B22	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053146923-B23	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053146924-B24	72	5,040,000.00	7,940,539	7,940,539	No comments.
2053146925-B25	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146926-B26	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053146927-B27	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053146929-B29	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053146932-B32	72	5,040,000.00	Not done due to direct negotiation.	7,350,240	Property was transferred and compensation updated using CPI.
2053146935-B35	72	5,040,000.00	6.127.548	6,127,548	No comments.
2053146936-B36	72	5,040,000.00	6.127.548	6,127,548	No comments.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053146937-B37	95	7.192.500,00	Not carried out due to direct negotiation.	10,735,902	Property was transferred and compensation updated using CPI.
2053146938-B38	91	6.409.200,00	Not carried out due to direct negotiation.	9,566,708	Property was transferred and compensation updated using CPI.
2053147001-C1	70	5.257.500,00	Not carried out due to direct negotiation.	7,847,620	Property was transferred and compensation updated using CPI.
2053147002-C2	74	5.231.800,00	Not carried out due to direct negotiation.	7,809,259	Property was transferred and compensation updated using CPI.
2053147006-C6	72	5,040,000.00	6.127.548	6,127,548	No comments.
2053147007-C7	72	5.370.000,00	In process.	Pending.	No comments.
2053147008-C8	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147012-C12	72	5.330.400,00	Not carried out due to direct negotiation.	7,956,434	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147013-C13	72	5,040,000.00	6.127.548	6,127,548	No comments.
2053147015-C15	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147016-C16	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147017-C17	72	5.541.000,00	10.960.000	10,960,000	No comments.
2053147018-C18	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053147101-D1	72	5.400.000,00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053147104-D4	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053147105-D5	72	5,040,000.00	6.127.548	6,127,548	No comments.

Property	*Area (in m²)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147106-D6	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147109-D9	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053147110-D10	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147111-D11	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147112-D12	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147113-D13	72	7.341.000,00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053147115-D15	66	4,620,000.00	Not carried out due to direct negotiation.	6,896,054	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
205314 7116-D16	66	4,620,000.00	Not carried out due to direct negotiation.	6,896,054	Property was transferred and compensation updated using CPI.
2053147117-D17	66	4,620,000.00	Not carried out due to direct negotiation.	6.896.054	Property was transferred and compensation updated using CPI.
2053147118-D18	66	4,620,000.00	Not carried out due to direct negotiation.	6.896.054	Property was transferred and compensation updated using CPI.
2053147119-D19	67	4.697.000,00	Not carried out due to direct negotiation.	6.850.015	Property was transferred and compensation updated using CPI.
2053147201-E1	72	5.400.000,00	6.385.230	6.385.230	No comments.
2053147203-E3	72	5,040,000.00	6.127.548	6.127.548	No comments.
2053147205-E5	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147207-E7	72	6,283,680,00	10,960,000	10,960,000	No comments.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147208-E8	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147209-E9	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147210-E10	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147211-E11	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147212-E12	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147213-E13	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147214-E14	66	4,620,000.00	Not carried out due to direct negotiation.	6,734,720	Property was transferred and compensation updated using CPI.
2053147215-E15	66	4,620,000.00	Not carried out due to direct negotiation.	6,734,720	Property was transferred and compensation updated using CPI.
2053147216-E16	66	4,620,000.00	Not carried out due to direct negotiation.	6,734,720	Property was transferred and compensation updated using CPI.
2053147217-E17	66	4,620,000.00	Not carried out due to direct negotiation.	6,734,720	Property was transferred and compensation updated using CPI.
2053147218-E18	97	7.323.225,00	Not carried out due to direct negotiation.	10,931,029	Property was transferred and compensation updated using CPI.
20530147221-E21	66	4,620,000.00	Not carried out due to direct negotiation.	6,896,054	Property was transferred and compensation updated using CPI.
2053147222-E22	66	4,620,000.00	Not carried out due to direct negotiation.	6,896,054	Property was transferred and compensation updated using CPI.

Property	*Area (in m²)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147223-E23	66	4,620,000.00	Not carried out due to direct negotiation.	6,896,054	Property was transferred and compensation updated using CPI.
2053147224-E24	72	12,240,000.00	Not carried out due to direct negotiation.	17,850,582	Property was transferred and compensation updated using CPI.
2053147225-E25	72	16,960,000.00	Not carried out due to direct negotiation.	24,734,140	Property was transferred and compensation updated using CPI.
2053147226-E26	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053147227-E27	72	6,857,587.00	8,337,339	8,337,339	No comments.
2053147228-E28	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147230-E30	72	5,040,000.00	9,720,000	9,720,000	No comments.
2053147231-E31	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053147232-E32	72	5,040,000.00	6,127,548	6,127,548	No comments.
2053147234-E34	72	5,040,000.00	6,127,548	6,127,548	No comments.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147235-E35	72	5,040,000.00	Not carried out due to direct negotiation.	8,640,000	Property was transferred and compensation updated using CPI.
2053147304-F4	72	5,040,000.00	6.127.548	6,127,548	No comments.
2053147305-F5	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147306-F6	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147307-F7	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147308-F8	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147309-F9	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.

Property	*Area (in m²)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147310-F10	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147311-F11	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147312-F12	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147313-F13	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147314-F14	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147315-F15	72	5,040,000.00	Not carried out due to direct negotiation.	7,350,240	Property was transferred and compensation updated using CPI.

Property	*Area (in m^2)*	*Commercial Assessment*	*Court Assessment*	*Amount Paid*	*Comments*
2053147316-F16	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147317-F17	72	5,040,000.00	Not carried out due to direct negotiation.	7,522,968	Property was transferred and compensation updated using CPI.
2053147319-F19	98	6,919,150.00	Not carried out due to direct negotiation.	10,327,886	Property was transferred and compensation updated using CPI.
20531401-015	72	5,737,500	Not carried out due to direct negotiation.	5,737,500	Property was transferred and compensation updated using CPI.
20531469-000000	2,580.00	12,582,513	In process.	Court assessment in process.	No comments.

Note: CPI = Consumer Price Index

Chapter Five

Constitutional Change, Judges, the Social Function of Property, and Eminent Domain in Colombia

María Mercedes Maldonado and Diego Isaías Peña

INTRODUCTION

One of the premises of this book is that eminent domain provides a suitable point of departure for understanding the institution of property, a premise that becomes more interesting when we analyze the participation of the courts in disputes arising from expropriation in Colombia, a country where the influence of the constitution on the law and government action is particularly strong. Thus attention should be paid both to the process by which constitutional provisions are generated and the corresponding case law, indicating how Colombian jurisprudence is one of the most innovative in Latin America, how this represents part of a broader process, and how the Constitutional Court Justices actively participate in constructing a version of society, based on constitutional changes and the affirmation of social rights. For this reason, before reviewing the jurisprudence of the main components of the constitutional formula (the social function of property, the balance between the interests of the affected owner and the community, and the possibility of expropriation by administrative decree), we examine the discussions from the Constitutional Assembly of 1991, referring to the Constitutional

Assembly that managed the constitutional reform of 1936, when almost all the provisions of the current Constitution were adopted. We review the social function of property in greater detail, in order to appreciate the importance, or at least the more or less widespread presence of this concept in Latin America's constitutions. As indicated in the previous chapter, legislation referring to urban eminent domain is fairly inclusive of public interest and social interest causes, in terms of general legal definition and also in terms of the agencies permitted to expropriate, including expropriations in favor of third parties, expropriations by administrative decree in a number of cases, and compensation based on the interests of both the owner and the community. In other words, there is a certain differentiation between Colombian legislation and property right guarantees provided by constitutions and statutes in other nearby countries, making it particularly interesting to review the opinion of the judges.

This chapter also discusses a subject of growing importance: the increasing participation of the courts in social issues, and their sometimes controversial role, not only in interpreting but also creating the law, which includes defining and orienting the role of government actions. This has created a new constitutional discourse, where as explained by the Colombian jurist Diego López (2004), abstract legal concepts are substituted by legal principles expressed as open ended and actionable, fundamental rights or social rights, complementing general clauses in the statutes with citizen initiatives and legal interpretations, thus providing a systematic and goal oriented interpretation of the law based on these principles.

Constitutional Provisions and Constitutional Vision

The text of the Colombian Constitution on eminent domain, whose fundamental aspects have been in effect since 1936,[1] establishes the following:

> Art. 58 Property has a social function that creates obligations. Likewise, it has an environmental function.
>
> Rights to private property and other rights granted by civil laws are guaranteed and cannot be ignored or violated by subsequent laws. When applying a law enacted for public interest or social interest causes, should a conflict arise between the rights of private parties and the needs expressed by the law, private interest must yield to public or social interest.
>
> Eminent domain is permitted for public utility or social interest causes by way of a court judgment and prior compensation payment. Compensation must be determined, taking into account the interests of the community as well as the affected party. In cases determined by statutory legislation, eminent domain can be initiated by administrative decree, but subject to later legal action in the form of an administrative dispute, including dispute over compensation.

The text of the article approved in 1991, enabled uncompensated expropriation for reasons of fairness, a concept that had already been established in the constitutional reform of 1936. However in 1999, a further reform eliminated the possiblity of uncompensated expropriation, in order to overcome problems related to the constitutionality of international treaties, which included stipulations to protect foreign investments.

The 1991 Constitution is one of the most important reference points for Colombia's recent, hectic political and social life and feeds into institutional transformations that have occurred with varying degrees of momentum in Latin America, with constitutional reform representing the main symbolic point of reference. From the point of view of certain groups in society, particularly intellectuals, this constitutes an important milestone in the difficult and unfinished business of achieving peace, and more globally for the structuring of society. After multiple attempts to overcome legal impediments to reforming the Constitution,

[1] The changes added in 1991 are related to the environment and the application of administrative expropriation. It also added the clause that compensation must be determined by weighing the interests of the affected owner and the community. The remaining provisions were included in the 1936 reform.

this was resolved by convening a Constitutional Assembly, at a time when the the Liberal Party was in power, taking a fundamentally technical and modernizing approach to government. President César Gaviria Trujillo, elected in a campaign during which three candidates or precandidates were assassinated, mostly by drug traffickers, accidentally became the heir to Luis Carlos Galán, an important political leader, well known for his attempts to overhaul political practices and fight openly against drug traffickers, at various political and social levels.

The Constitutional Assembly was organized by direct popular vote, based on an alternative that emerged as the result of a broad citizen movement, making it possible to remove legal obstacles that for years had prevented an in-depth constitutional reform. This alternative approach is known as the seventh ballot.The Constitutional Assembly claimed strong legitimacy with representation from diverse political and social groups, including the M-19 guerrillas, culminating in the most successful peace process of many that had been implemented in the country. During the constitutional process, the M-19 obtained 19 seats out of its 71 leaders. Antonio Navarro Wolff played a leading role in the adoption of the new Constitution, acting as one of the presidents of the Assembly, alongside representatives of traditional parties such as the conservatives and liberals. But beyond these circumstances, although possibly anecdotal, it is accepted that all forces and social sectors of the country were present at the assembly and the Constitution significantly reflects the consistent attempts to rebuild society and its institutions, seeking a path of negotiatiation in order to emerge from this long and complex conflict.

The 1991 Constitution, in conformity with legal processes that were occurring at that time in several other countries, combined the expansion of human rights with generous declarations particularly in the social context, creating the Constitutional Court, a body able to implement these rights, sanctioning measures such as protective injunctions or class actions, while simultaneously

reaffirming a market economy, which always plays a central role in modernizing processes.[2]

As indicated in the introduction, most of the constitutional provisions regarding property were enacted in the 1936 reform, another milestone in the history of the Colombian constitution, thus we have reviewed the discussions that took place at both these times, particularly because the concept of "social function of property" was adopted in 1936, whereas in 1991 this concept was somewhat weakened.

THE CONSTITUTIONAL REFORM OF 1936

Colombian legal doctrine has almost unanimously recognized that the most important modification made to the 1886 Constitution in effect until 1991, constituted statute No. 1 (or *Acto Legislativo No 1*) of 1936, which changed its individualistic and conservative focus to lay the foundations for a social and interventionist legislation and adoption of social policies (Ponce de León n/d; Botero 2006). Fernando Hinestrosa (1996), one of the most recognized civil lawyers in the country commented in his analysis delivered at the 1991 Constitution, that the constitutional reform of 1936 was strongly influenced by the positivist teachings of August Comte, who advocated "always make responsibilities contingent to rights,

[2] An analysis conducted by César Rodríguez (2009), a sociologist of Colombian law, in his book *La globalización del Estado de Derecho* (Globalization of the rule of law), following up on arguments of Boaventura de Sousa Santos about the confrontation between hegemonic and a counterhegemonic globalization, illustrates this idea with two institutions that represent these two different visions of the 1991 Constitution: the independent central bank, which for Rodríguez, following Maxfield, symbolized the neoliberal project, and the (activist) constitutional court, which is essential to enforcing the democratic and civilian guarantees of political rights, given the legacy of authoritarianism, and protecting the social rights at the judicial level, thus broadening the concept of a state governed by the rule of law (Gargarella, Domingo, and Roux 2006, in Rodríguez 2009).

in order to better subordinate personality to sociability." At the time, he pointed out that the meaning, concept, and grammatical expression "property is a social function that implies obligations," is asserted in the 1991 Constitution.

We can argue that this debate is part of what the legal anthropologist Michel Alliot characterizes as the social response to the deep disorder caused at various levels, by the institution of private property. Interpreted at the time as the key factor for disassembling the privileges of feudal lords, corporations, and the church in medieval Europe, and also as a means for liberating people from their enslavement or communal ties to the land, this was actually transformed into a means of exclusion and impoverishment, especially in Latin America because of the intention to create an absolute right without positive obligations.

The discourse that accompanies the 1936 reform subverts the traditional idea of property as the basis of citizenship and in the words of Hinestrosa (1996), of dignity based on property. Concentration of wealth made possible by private property, together with the ways in which this enables various exploitative labor practices, as well as discrimination and abuse, plus the prevalent distortion concerning the right to property in the discourse concerning people's rights, presumably inspired debate when viewing private property from different perspectives, in the case of movements such as socialism, social movements of the second half of the nineteenth century in Europe, and the Catholic Church.

As described by Batista Pereira and Coral Lucero (2010), the discussions that took place in Congress concerning the reform of 1936 explicitly included the intention to break with the theory of natural law and the strong orientation towards individualism inherent in property rights, instead emphasizing ideas centered on the obligations of the property owner towards society. While some congressmen were well aquainted with the writings of León Duguit (1915), other recognized sources for this reform exist: the Weimar Constitution and the Russian Civil Code. These sources describe attempts during the implementation of this

statute and also Act 200 of the agrarian reform in Congress in 1936 to oblige owners to use their property to fulfill social needs or economic requirements. The Weimar Constitution of 1919 stated: "Property creates obligations. Its use should simultaneously serve the common good," and according to the Russian Civil Code, property rights should only be protected, when not used against society.

It is important to remember that at this time, a discussion focussed on the problem of rural land, with two main issues that concerned civil servants, congressmen, and other interest groups, such as the church, the conservative party, and the most important newspapers of the time: the first is the role played by land in wealth creation and the second is eminent domain. According to theories espoused by Duguit and adopted by congressmen and government representatives, wealthy people have specific social responsibilities, and their wealth should only be augmented in order to satisfy general needs. A third point of discussion emerges here, particularly concerning deliberations related to Act 200 of 1936, which questions the formal approach to property, where greater importance is assigned to the title holder than to the person working the land. The discussion centered on the possible reversal of domain for those who did not adequately work the land; not an expropriation in the strict sense, and also on the distribution of unoccupied land by the federal government, which was the real motive behind tepid initiatives towards agrarian reform for the purpose of land redistribution.

Social function is thus the main motive for state intervention, contradicting arguments promoting economic liberalism and imposing obligations not only on the property owner, but also on the state, stipulating that it should cease to be a simple regulator of private relations, to become a true agent of social change. This intervention by the government is not meant to eliminate property rights, as some argued in the 1936 discussion, but rather to "ensure that (the owner) employs his wealth in order to achieve

this goal."[3] In the case of property, the intent is to protect the social value of certain functions, such as labor and human life. Property can then be defined as a legal institution, created in response to a social need: to meet the goal of guaranteeing certain individual and collective needs (Duguit 1915, 37 and 170, in Batista Pereira and Coral Lucero 2010).

According to these authors, the most important motivation of the liberal majority referred to the interpretation provided by Duguit concerning social interdependence, the goal of the state in favor of society, the obligations of property owners, and the social endeavors that the property owner is thus able to perform.

We cannot emphasize enough, how this bears a direct relationship with the subject of this chapter, in the sense that resistance on the part of Conservative representatives was due not only to their basic ideological position, rejecting any theories considered to be socialist, but also to the potential lack of guarantees for prior compensation, in cases of eminent domain.[4]

Another subject that was discussed in 1936 and regarded by Hinestrosa (1996) as very significant was to justify eminent domain not only for significant public interest causes as defined by the law, with the intervention of the courts and providing full prior compensation, but also for social interest causes. Another element introduced to the discussion was that of fair compensation "with the aim of avoiding a fixed, inert and mechanical method for determining compensation; instead offering a lesser amount than the actual value of the property, in order to achieve the goal of fairness. The judge can then assess the circumstances of each

[3] According to Duguit: "I am not saying, nor have I ever said or written that the economic status represented by private property is disappearing or must disappear. I am only saying that the legal status on which its social protection is based is changing. Nevertheless, private property is still protected against all threats, including those emanating from the government. Furthermore, it appears to offer greater protection than traditional approaches." (Duguit 1915, 180)

[4] These authors refer to the arguments given in favor of the Senator Angulo project, representing the conservative majority.

case and determine appropriate compensation" (Hinestrosa 1996). The possibility of uncompensated eminent domain was also considered for the first time for reasons of fairness, when the courts voted positively by absolute majority of its members on this subject.

According to Hinestrosa (1996), the social function of property enables the state to equitably compensate an owner, whose property has been expropriated, i.e., pay him fair compensation, implying that the owner has the right to recover the value of that transferred to the public domain, while directly or indirectly subtracting the benefits that the owner has received or will receive, as the result of actions on the part of the administration, as well as any added value that did not result from his own labor and investments and which therefore pertains to the community.

As for the appropriate use of land, which was the main justification for the 1936 reform, and the application of the formula of social function to property, President Alfonso López Pumarejo stated in his speech to Congress in 1935 that

> property, as recognized by the government, is based not only on title deeds, but also on social function, and that land ownership implies using it to produce economic benefits through positive actions that are only viable by active possession, such as planting or sowing, raising cattle, constructing buildings, fences, and other tasks of equal significance.

Moreover, "Land should be acquired in a country like ours with two prerogatives, whose scope and limits are stipulated by law: labor and title deeds, and likewise this latter does not convey a permanent right to own land without cultivation" (Martinez 1939, 15, in Batista Pereira and Coral Lucero 2010).

Finally, the "social function of property" would provide scientific legitimacy to the reform. The Judge of the Supreme Court, Eduardo Zuleta Ángel, appeared in the House of Representatives to defend this concept, and declared that even though the reversal of property rights in cases of abandonment was not established in European legislation, the principle

> fits beautifully with the ideas of contemporary legal scholarship concerning property and does no more than codify in law, the fact neither

> "communist" nor "Bolshevik," but simply scientific, that property is not an absolute right, and that a property owner has social obligations, because the interests of the society in which this right was created and endures must not be violated. (Martinez 1939, 166, in Batista Pereira and Coral Lucero 2010)

Simultaneous to the appearance of these new theories of public law that formed the basis of the constitutional and legal reforms of 1936, according to Batista Pereira and Coral Lucero (2010),[5] a Supreme Court known as the "Golden Court" attempted a similar process in the context of private law. This Supreme Court was fairly active in matters of property and eminent domain, and from 1936 to 1940 attempted to develop legal theories that disputed classic legal interpretations, following the works of Gény or Josserand "with the aim of producing changes and introducing limits to the traditional concept of property," while also introducing concepts such as the social function of property, abuse of property, exemption from guilt owing to good faith, unjustified enrichment, and the theory of unforeseeable circumstances into principles for local law. However, its impact was short lived, and the brilliant jurisprudence, pronounced in the words of the authors cited above vanished in the 1940s, together with a failed attempt to reform the Civil Code and the weakened agrarian reform project. Apparently, the constitutional changes adopted almost fifty years later, not without difficulty, appear to have resulted in more permanent transformations to the concept of property rights.

[5] Whose work, it must be said, is inscribed in the line of thought of the Colombian legal scholar Diego López (2004) in his book *Teoría impura del derecho* (Impure Theory of Law), where he discusses the conditions for the development of legal theory in countries considered peripheral, and vindicates the connections between texts and ideas as an object of that theory, arguing that the law can be interpreted as a network of interlinked theories, texts, and practices that can be studied independently since said network, as a whole, forms a legal vision for lawyers, judges, professors, and students of law.

THE DEBATE IN THE 1991 CONSTITUTIONAL ASSEMBLY

In 1991, the members of the Constitutional Assembly also intensely debated the inclusion of the clause "property has a social function which implies obligations," and the role this phrase would play in determining the extent of property rights, an institution that the Assembly members considered essential for the economy

> to create wealth, and extend this to society as a whole, in order to stimulate creativity and productive energy among the population, as well as creating attachment, stability and security, representing an aspect of social organization used by the community to seek and attain happiness or [the] tangible and possible forms of happiness. (Marulanda et al. 1991)

For government representatives, the guarantee of private property was an "essential principle of economic freedom, together with the market economy, which allows the private appropriation of the means of production and other results obtained through the personal exercise of any economic activity" (Presidency of the Republic of Colombia 1991). The discussion focussed on which came first: property as a natural right of the individual or as a social function; and concerning the not-easily-recognized convergence between right and function.

The assembly members from the Conservative Party once more defended the concept of property as the natural right of the individual. One of whom, the former president of the Republic, Misael Pastrana Borrero, said that "it is more beautiful to say that property is a human right than to assign it other attributes, because this implies that the state should pay more respect to what we define as a natural right, forming something inherent to the individual and not just a circumstantial attribute." Others argued that "to define [the right to property] as a function is to deny that it is a right"[6] or that "a body is different from its

[6] Plenary session of June 10, 1991.

functions"[7] and furthermore: "if there is no private property, there is no individual freedom, we are slaves to the state; if we intend to defend liberty, we must make property a real object." The legal formula proposed by the assembly members was not to abuse the right to private property, which affirms this as a right.

Professional organizations also stated their opinion in the Assembly: "We think it is contrary to the most basic logic to say that property is a function. Property is not a function [as] it has an identity which consists of a right [that] has certain social functions."[8]

The government and the assembly members from the Liberal Party defended the opposite position, which considered that property was simultaneously a social function and a right. For the government, the social function of property "means that its inherent power is not granted exclusively to the individual interests of its owner, but also and essentially paying attention to the social aim of its enjoyment on the part of society" (Presidency of the Republic of Colombia 1991, 151).

The government defended property as a social function because it considered this to be the foundation of eminent domain and the extinction of domain (or *extinción de dominio*):

"When we say that property is a social function, it means that when property does not perform its social function, it ceases to be property, and this is the basis to understanding the constitutional aspect of the extinction of domain."[9]

[7] Commission Five, April 22, 1991.

[8] Declaration of Jorge Humberto Botero to Commission Five, April 18, 1991. Botero spoke on behalf of the following professional associations: Colombian Association of Small Industries, Acopi, National Industry Association, Andi, Asobancaria, Colombian Construction Association, Camacol, Fasecolda, National Federation of Retailers, Fenalco, Agricultural Society of Colombia, SAC, and Acoplásticos.

[9] Declaration of the Government Secretary to Commission Five, April 22, 1991. Emiliani and Lloreda considered that this was an unnecessary preventive measure.

The Liberal Party issued a declaration entitled "The State and the Economy" at the beginning of June, 1991, which stated:

> In 1936, at the behest of the Liberal Party, property was defined as a social function. This constitutional ruling has made possible legal outcomes such as the extinction of domain (property that does not perform its intrinsic social function ceases to be property); extremely useful for implementing social programs of agrarian and urban reform. (Serpa et al. 1991)

Presentations to the Plenary Session by Commission Five and subsequently by Arias and Marulanda also defended the concept of property as a social function; the standpoint presented by Arias and Marulanda said the following:

> [T]he social function, in relation to property, captures the concept of solidarity and legitimizes eminent domain . . . allows everybody to benefit from its results and eliminates the discrimination of rights according to level of wealth. . . . The democratization of property is another way of making its social function intelligible.

A more pragmatic approach was taken by these two positions, which proposed leaving Article 20 of the old constitution intact, because it had not endangered property rights over more than sixty years, and therefore there was nothing to fear from that formula. For some, "the economic and political system in Colombia does not extend the expression of [social function] beyond the fact that property has a social function."[10] Based on this view, the declaration that property has a social function, as well as the guarantee of property rights acquired as the result of civil laws were maintained.

The principal innovations related to eminent domain came from the government proposal, and touched on three subjects:

1). Criteria for establishing compensation;
2). Eminent domain by administrative decree; and

[10] Commission Five, April 23, 1991.

3). The impossibility of court litigation for justifying equity, as invoked by the judge when deciding that a particular expropriation does not merit compensation.

In the following analysis of jurisprudence referring to eminent domain, we consider this statement in more detail.

The government proposed replacing the original term indemnification *(indemnización)* for compensation *(compensación)*, arguing that the latter implied that the owner should emerge indemnified (unscathed), in other words without being damaged, while in the case of compensation, the "amount would not be determined based exclusively on the interest of the individual, but also based on the interests of the community" (Presidency of the Republic of Colombia 1991). This formula, borrowed from the German Constitution, was based on the social or public purpose of eminent domain. The words of the Government Secretary at the time provide a good example of this approach:

> [In the case of indemnification], eminent domain [should represent] a neutral operation [that] solely intends to replace the individual's expropriated property, [with] a value that tallies with its worth for the community as a whole. If this interpretation is adopted, we risk creating a supreme impediment for the eminent domain process, at least in those cases where besides the aim to alter the status of a property in order to achieve a common goal, there must be a redistributive element implicit in the eminent domain process."[11]

Opposition to this idea came once more from the Conversative Party. Assembly member Carlos Rodado Noriega said:

> [E]minent domain should not be applied as a means for redistributing income. . . . The adoption of a legal position that causes confusion to eminent domain [by] giving prevalence to public interest over private interest [as] a mechanism for redistributing property and income, implementing both at the same time, could lead to the abolition of private property and to the nationalization of all private property in Colombia.[12]

[11] Declaration before Commission Five, April 22, 1991.
[12] Commission Five, April 22, 1991.

Lloreda, on the other hand, resorted to the argument of foreign investment, and declared: "nobody is going to invest in Colombia, with the threat that his investment can be discretionally removed at any moment, by eminent domain."[13]

The Constitutional Assembly adopted an intermediate solution, maintaining the term indemnification but establishing that this should be calculated "consulting the interests of the community and the affected party," thus implying an acceptance of government arguments indicated above.

The government justified eminent domain proceedings by administrative decree saying that it was necessary to "streamline the application [of eminent domain], given the enormous social interest this entails and the multitude of difficulties its implementation has encountered in the past."

The arguments against eminent domain by administrative decree declared:

> [The proposal] is based on the fact that a court process implies great conflict. . . . I laugh at the notion that an administrative process will be shorter than a judicial process, and I am ignorant of cases that are so exceptional that they need to be expropriated without the courts. . . . [T]hese are more imaginary than real. . . . [T]hey would be a source of arbitrary decisions and corruption."[14]

Ultimately, the Plenary Session accepted the government proposal. Likewise, the government wanted to establish some reasons in the constitution for initiating eminent domain proceedings by administrative decree (these consisted of agrarian reform, urban reform, and the construction of public roads; however, the legislative body was permitted to enact others) and stipulated that an owner subject to eminent domain could go to court only to request a review of the proposed compensation amount "not to discern whether or not the expropriation decree was correct, but simply to determine whether the amount paid to the property

[13] Commission Five, April 22, 1991.

[14] Joint session of Commissions One and Five, April 30, 1991.

owner was sufficient" (Presidency of the Republic of Colombia 1991). The first proposal was rejected with the argument that there are different categories of reasons for applying eminent domain (constitutional and legal). Concerning the second, the Government Secretary withdrew the proposal, declaring that the government never intended to preclude the right of the owner to dispute the legality of an eminent domain decree.

Finally, the government proposed that the reasons for equity invoked by the legislator when deciding that there was no need to compensate the owner in specific eminent domain cases are legally indisputable. Although this proposal was accepted by the Constitutional Assembly, in 1999 Congress issued Legislative Act No. 1, which repealed the last paragraph of Article 58, ruling out the possibility of expropriation without compensation in Colombia.

Assembly member Perry explained the elimination of two sentences in the first paragraph of Article 30:

> [T]he term "just title" is replaced with "in terms of the law," which is more accurate, as the term "just title" has been subject to many interpretations, and we have concluded that if the title is just then it complies with the law. . . . There is no need to distinguish between individuals and corporations."[15]

Concerning the phrase "in accordance with civil laws," this was modified to include not only civil laws, but all laws.

Property and Eminent Domain in Constitutional Jurisprudence

The Constitutional Court, created in 1991, as mentioned previously, performs two essential functions: to deal with constitutional actions that any citizen can bring against any rule with legal status, and to review certain judgments issued by lower courts in cases of protective injunctions (or *acciones de tutela*), i.e., actions taken throughout the country to protect fundamental rights via

[15] Commission Five, April 23, 1991.

the courts.[16] In this context, the Court has made important pronouncements related to the social function of property and its relationship with eminent domain. It is worthy of comment, even although apparently obvious, that in all cases this initiates with a complaint filed by a citizen, establishing the scope and limit of what a judge can dictate.

PROPERTY RIGHTS AND THE SOCIAL FUNCTION OF PROPERTY

Beyond the discussion in the Constitutional Assembly defining the distinction between property as a right or as a function as summarized here, and even recognizing the inconsistencies in certain rulings derived from certain Duguit texts, and how difficult it is for legal experts to dispense with such simple concepts as subjective rights, the Constitutional Court defined the social function of property by applying a curious twist, given the supposedly positivist goal of replacing subjective rights with the formula of social function. This course consists of analyzing property rights in the light of the core or minimal content of a right, which, according to the Constitution cannot be violated, and whose effective exercise in the context of economic, social, and cultural rights must be respected by the authorities and individuals, and for which states are obliged to provide prompt guarantees. However, the Court includes social function in the context of rights, applying an important caveat, as it conditions or even questions its status as a fundamental right. This position resolves the debate concerning the issue of property as a right, leaving open the possibility that different categories of rights may also generate security and welfare.

[16] In fact, the assumption is that any judge is a constitutional judge, and as such his main responsibility is to defend the Constitution and, specifically, because a petition for protective injunction (*tutela*) can be filed before any judge.

We will now review three relevant aspects of jurisprudence established by the Constitutional Court: its awareness (or intent) that it is contributing to the goals of civilization and progress, that it can supplant the civil law attitude to property that tends to be more conservative and constitutional, and a clarification of the meaning of the social function of property and thus the right to property.

Constitution and Civil Code

A common thread runs through court rulings, that constitutional change has removed obstacles that impede thinking or attaining a future that is based on solidarity that goes beyond the nineteenth century concept of property defined by civil law logic, and the erosion of the concept of property as an absolute right in the name of public interest. The Court affirms the positive changes made to the civil law framework of property by means of constitutional reform, in addition to disputing the primacy of the law, particularly of codified law, i.e., the sovereignty of the legislature.[17]

One of the foundational rulings of jurisprudence concerning the social function of property to which we return later, is a good example of this discourse: the Constitution goes beyond the

[17] Long before the Constitutional Court was called to modify the Civil Code article on ownership, as indicated in the following, in the Constitutional Court ruling 006 of 1993 (written for the court by Eduardo Cifuentes Muñoz) who supplied the argument given by the Supreme Court of Justice in 1943 referring to the extinction of domain and asserting that property had ceased to be governed by the civil law framework and must now be interpreted under the provisions of the Constitution. This reconsiders the argument that the constitutional reform (of 1936) had modified the provision of the Civil Code and, therefore, "the judges, taking into account that the Constitution prevails over the law have to apply the former and not the latter, when ruling on questions of ownership." Supreme Court of Justice, General Business Branch (*Sala de Negocios Generales*), ruling of March 24, 1943, written by Aníbal Cardozo Gaitán. For more on the controversy over sovereignty of the legislator (see Lopez 2004).

markedly individualist concept of property rights, a remnant of the continental civil law tradition at a time when the systematic application of legal limitations to property "created a plethora of legal frameworks, with multiple limitations and obligations imposed on property. A distance was created from the uniform approach of the civil law concept ceasing to represent exceptions and special rules, instead superceding it and reducing it to a mere historical reference."[18] Finally, in a ruling with great symbolic value, it declared as unconstitutional the definition of property or ownership pronounced in the Civil Code from the end of the nineteenth century. Until that time, ownership of property was a right that could be exercised arbitrarily, as long as it did not violate a law or the right of a third party; henceforth, the term "arbitrarily" was considered negative, because it was considered contrary to the general interest, to the social function of property and to the concept of property in the context of the rule of law.[19]

Approach Inherent to the Social Function of Property

The same ruling, C 006 of 1993, summarized here describes the evolution of legal attitudes towards the social function of property. This initiated with the framework established by the Constitution of 1886, where the law guarantees a reciprocal distribution of natural rights, and its scope is defined by what it is not. Property is basically an exercise of freedom; therefore decisions about the goal and purpose of properties belong to their owners, with limitations imposed by legislation only in exceptional cases, which are considered external to the exercise of freedom in this particular circumstance. In other words, the owner can do with his property anything that is not expressly prohibited

[18] Ruling 006 of 1993.

[19] Ruling C 595 of 1999 of the Constitutional Court, written by Carlos Gaviria Díaz.

by law. What is protected is the freedom recognized by the law in specific circumstances.

Thus, an appeal is made to the principle of civil rights abuse, with the aim of harmonizing and coordinating the various entitlements or the coexistence of different property rights, not requiring any type of sacrifice for community benefit, but simply introducing the rule of using the law rationally, with the aim of resolving disputes between individual property owners.

As far as the ruling goes, property still potentially represents a right without limits. Even if we admit that regulations impose a limit on property, these are external to the property itself, and at most they reduce the scope or sphere in which owners can act freely, with the goal of satisfying their own interests and desires, and without the need to behave a certain way or pursue certain goals, because limits, rather than obligations, are at the periphery of property as a right.

The social function of property corresponds to the transition between economic systems and the requirements of economic development, the emergence of new actors and the subsequent decline of others, together with changes in the political forces that at any given time express the consensus of a new balance in social power, among other factors, creating options for the legislator in terms of the conflict between different interests. Responses are diverse: the industrial property model is applied; entrepreneurial activities are favored as opposed to the static use of property solely for extracting rents: forms of wealth are stimulated and regulated that distinguish land title from land control; land ownership, urban land and private mining resources are made contingent on effective and adequate exploitation and utilization according to the law; and overall, imposing use guidelines and rules for enjoying property inspired by preservation of the environment.

According to actors of the 1936 reform, the assembly members in that instance wanted to

> lower the barriers erected by the 1886 Constitution against the legislator associated with private property, focusing on the concept of property as a

> social function. In other words, an owner must use their property in a way that does not harm the community, benefitting it instead." (Speech by Dr Dario Echandia in the House of Representatives, February 24, 1936, cited in the 1943 ruling of the Supreme Court mentioned above).

Based on the concept of social function, representing a "definite milestone in Colombian constitutional law," the law can introduce any restriction to individual property that meets the social needs with which it must comply. If at any moment an individual property ceases to fulfill a social need, the legislator must intervene to organize another way of appropriating wealth. In a country where private property is recognized by positive legislation, the property owner is obliged to perform a certain social function, simply in relation to being the owner; and the scope of his property right must be determined by law and by appropriate jurisprudence, depending on the social function to be fulfilled: no other right other than that of complying freely, fully, and completely with his social function as property owner can be claimed. This implies that the concept of property as a subjective right is superceded by property as a social function, according to the 1938 ruling (Supreme Court, Plenary Session, March 10 of 1938, Dr Juan Francisco Mújica writing for the court).

Once the social aspect has been recognized, the role of the state is not confined to limiting private freedoms; the legislator can impose on the owner the social obligation of attending to the planning and urban development processes and, in so doing, may or may not recognize the absolute right of the owner to influence the development of cities and the guarantee of property rights to a planned social use, in terms of construction and urban development. Therefore, this is not only the basis for eminent domain, but also for the extinction of domain as a mechanism for removing property without compensation, in cases where the asset, and particularly land, is not used in accordance with the goals established by the community. It is also the basis for establishing conditions for issuing licenses for construction or urban development permits.

Despite the broad powers granted to the legislator in terms of defining social duties and obligations assigned to individual owners, particularly regarding property rights, "the intention is not to subject the social function of property to the discretionary will of local authorities in the development context, but simply to impose upon the owner of urban properties the duty of making these available for local urban development plans, which must be developed within the regulations or otherwise expressed, for the practical application of the law" (Supreme Court, Plenary Session, March 10 of 1938, Dr Juan Francisco Mújica writing for the court).

According to the same ruling, *usus*, which traditionally derived its power from property, became subordinate both to the concrete, general, and specific decisions of urban planning and development state authorities.

Subsequently, in the discussion concerning the 1991 Constitutional Assembly, we make clear that besides the economic aspect traditionally associated with the social function of property, we now have to add the idea of equality, as economics is not sufficient for legitimizing private property; it must also attend to the vindication and emancipation of the large number of people who are not property owners.

The jurisprudence produced by the Constitutional Court after 1991 added a new element to prevent the reference to social function of property from becoming simple rhetoric. For this purpose it "elevates"[20] social function to become a structural element in the right to private property. The right to private property and decisions concerning its use must be integrated with duties and obligations established by law expressing values, interest, and social goals that the owner must comply with in order to maintain and exercise this right. From this point of view, social interest and individual interest, within the framework of social function, contribute to providing content and scope to property rights.

[20] In the terms used by the ruling that is being summarized here.

The legal configuration of property as an expression of social function can imply either the suppression of certain powers, their conditional exercise, or in certain cases, the imposition of any of these. The Court addresses the principle of eminent domain without compensation in urban development policy, or so-called indirect expropriation, stating that "the law, without singling out any specific case, regulates property as indicated previously, without recognizing exceptions, and denying requests for compensation against this type of intervention. Limits are defined in terms of the principle of equality, and the law cannot impose excessive sacrifices on some, while not on others in the same situation as this would degenerate expropriation."

Constitutional jurisprudence, and in particular ruling 006 of 1993, characterizes social function as creating a balance between conflicting interests, and as an expression of the principle of solidarity. Specifically, it states that

> the guarantee of private property cannot disregard that the criteria of social function, with greater intensity in the case of economic property, affects its structure and determines its management. In a state governed by the rule of law, rights are granted to a person as a community member and these are combined with principles of solidarity and preponderance of general interest (Political Constitution, Article 1). The social function inherent to property is oriented precisely towards the interest of the community and as such it attempts to guide the owner so that, while pursuing the satisfaction of his own motives, he also responds to interests that transcend the context of the mere individual, with the threat that if he does not cooperate, his right may be cancelled, because of the decline in social function relating to his property. The need to create equitable power relationships in society precludes the separation of property from community; property cannot be abstracted from the community. On the contrary, legislation takes into account a convergence of multiple interests, where a balance must be found in terms of the specific formula for social function that is adopted.

Likewise it states:

> [I]n order to fully understand the meaning of constitutional guarantee, it is important to point out that social function is not an element that is

> external to property. On the contrary, it is integrated into its structure. Obligations, duties and limitations of any kind derived from the social function of property are introduced and incorporated into this particular context. The social nature of property rights makes it contingent to performing the functions and pursuing the purposes stipulated by law, outlining the range of behaviors on the part of the owner that will be tolerated, as long as the asset is used not only for his personal benefit but also in accordance with the highest pattern of sociability, conceived in terms of collective welfare and more equitable and egalitarian social relationships. It is not possible to make a precise determinination concerning the limits to this desired pattern of sociability. Social function as an expression of the principle of solidarity and the balancing of several conflicting interests is a general criteria that can only be specified in the historic context of economic and social relationships. Thus the legislator is considered to be the most elevated mediator of social conflict, particularly if we consider that this formula takes into account not only economic interests, but also those relating to social justice and equity.

Social function, as stipulated in Article 58 of the Constitution relates to obligations that are integral to property rights in a wider sense than the conventional relationship with the supply and demand market. The legislator has ample authority for defining these obligations. This approach is not trivial, if we consider that the original task assigned to jurists in medieval Europe, leading to the institution of property, was to enable land to circulate in the market as a fixed asset and in return free the owner from the obligations, burdens, and responsibilities derived from his role as feudal lord and from those of community relations. This is why property is so strongly linked to the value of freedom, particularly to free trade and the construction of citizenship. The absence of positive obligations to others was the first component in property rights. Obligations represent the most important aspect of social function.

What Then Is the Scope of Property Rights?

The question that then arises is: what is the extent of the impact of property rights? The Court's response is "the essential core," as indicated here, which, despite doubts concerning the intellec-

tual project of overcoming subjective rights, inserts property into the logic of social rights.

According to ruling 006 of 1993,

> Property and all patrimonial rights must be regulated by law, which will determine its scope with reference to its social function. The definition of property rights, a task relegated to the law should not elucidate its essential minimum content, because should that occur, either generally or for a particular case, this would indicate expropriation and in these circumstances, the appropriate result could only be achieved by eminent domain and payment of compensation.

In other words, legal limits to property rights cannot undermine the institution of property itself without implying that these rights have to be enforced in all cases.

Property is expressly guaranteed by the Constitution, is linked to economic freedom, and is also protected because it constitutes a base to the economic system (Arts. 333 and 150-21 of the Constitution). Legal regulations must therefore reserve a context, albeit reduced and conditioned for satisfying private interest and permitting concrete actions by the owner, which can neither be predicted nor abstracted. This irreducible core, guaranteed by the Constitution, is the minimum level of power granted to the owner for enjoying and disposing of an asset in order to receive economic benefit in terms of use or exchange value, thus justifying private interest in the eyes of society, while recognizing the longstanding features that distinguish a certain type of property. Undoubtedly, both of these would disappear if the limitations and social obligations imposed on the owner are unreasonable and thwart any personal uses and claims on a piece of property.

However, there are questions regarding the notion that property is a fundamental right protected by injunctions, or more precisely by the refusal to safeguard the right. The most important example is ruling T-506 of 1992, where Ciro Angarita Barón, writing for the court, declared that only in the event of a violation of property rights, resulting in obvious disregard for consti-

tutional principles and values that guarantee the right to life, dignity, and equity will property acquire the status of a fundamental right and therefore merit a protective injunction. In other words, property is considered a fundamental right, only when it protects the material conditions of subsistence, or when its disturbance affects the right to equality and to live with dignity; i.e., there must be an obvious link with fundamental rights.[21] Some constitutional rulings have adopted a similar stance, such as rulings C-295 of 1993, with Carlos Gaviria Diaz writing for the court, where the Court denied that property was one of the rights identified in Art. 93 of the Constitution, prohibiting any limitations on these rights during states of emergency; C-374 of 1997, José Gregorio Hernandez Galindo writing for the Court, analyzes the legislative proceedings of Act 333 of 1996 that "establish the regulations concerning forfeiture of property rights in the case of illegally acquired property," and determines that there is no need for a statutory law; and C-409 of 1997, José Gregorio Hernández Galindo writing for the court, analyzing the same Act 333 of 1996.

Jurisprudence on Eminent Domain and Compensation

Eminent domain constitutes an expression of the social function of property[22] and as described previously, it shares the ambiguities of property with those relating to social function.

[21] We can see similar conclusions in rulings T-483 of 1994, Carlos Gaviria Díaz writing for the court; T-440 of 1995, Antonio Barrera Carbonell writing for the court; T-554 of 1998, Fabio Morón Díaz writing for the court; T-284 of 1994, Vladimiro Naranjo Mesa writing for the court; T-087 of 1996, Vladimiro Naranjo Mesa writing for the court; T-259 of 1996, Julio César Ortiz writing for the court.

[22] See Ruling T-284 of 1994 of the Constitutional Court, Vladimiro Naranjo Mesa writing for the court

According to constitutional jurisprudence, private property is the prototypical economic right and together with the freedom of entering into a contract, it is the most significant expression of the economic freedom of an individual in a social state under the rule of law, as is the case in Colombia. By exerting this right, an individual can obtain goods and services to satisfy his needs. Despite social protection of the right to property, the expression of its social function and the prevalence of general interest lead to eminent domain, where by following a certain procedure, the right of the individual is denied, in spite of his wishes, giving precedence to the state.

A point of conflict emerges where the different elements that contribute to eminent domain and previously described ambiguities come together: how can we balance the interests of the community with those of the owner in order to determine compensation? Using this question as a reference, we will review some central aspects of the jurisprudence applying to eminent domain (Ruling C-153 of 1994, Alejandro Martínez Caballero writing for the court; and C-374 of 1997, José Gregorio Hernández Galindo writing for the court) which examined the constitutionality of the laws regulating the extinction of domain in the case of illegally acquired property and made a distinction between these provisions and eminent domain. A particularly important ruling regarding eminent domain for urban use was issued in 2002, when a detailed analysis of eminent domain was carried out, although the case was filed for a simple compensation dispute (Constitutional Court, ruling of constitutionality C-1074 of 2002, Manuel José Cepeda writing for the court). We analyze the following aspects:

1). The concept of "fairness" to determine compensation, in the context of a constitutional discussion.
2). The specific analysis of the social condition of the affected property owner.

3). The tension between the role of the legislator and that of the judge.

As for the concept of fairness, we have mentioned before that the National Constitutional Assembly of 1991 preferred the term indemnización (compensation) over other terms, stipulating that this must be paid before transferring the property, and must be determined by consulting the interests of the community, as well as those of the affected party. What are the implications of this definition from the point of view of the constitutional court?

The rulings of the constitutional court point out: "Even when the constitutional text does not explicitly mention whether compensation for expropriation must be fair, this can be inferred from the reference made in Article 58 of the Constitution, affirming the need to weigh the interests of the community against those of the affected party when determining compensation for eminent domain." The ruling states: "[T]his means that compensation must be fair, as expressed in the Introduction to the Constitution, and in Article 21 of the Pact of San José," where it is stated: "[N]o person can be deprived of his property for public interest or social interest causes except by payment or fair compensation and by following the procedure established in the law."

The Court emphasizes that Acts 9 of 1989 and 388 of 1997, which regulate instruments of urban reform and provide the guidelines that local administrations and citizens should follow, in order to comply with the social and public utility goals of urban planning. These laws promote the democratization of urban property and introduce rational factors for the design and development of urban centers. Even though urban reform shares with agrarian reform the goal of redistributing property, there are specific expressions related to the peculiarities of urban development and urban planning causing legislators to adopt special eminent domain regulations in the context of cities.[23]

[23] Constitutional Court ruling C-1074 of 2002, Manuel José Cepeda writing for the court.

According to ruling C 1074 of 2002, the reference to the interests of the community and the affected individual, introduced by the Constitutional Assembly of 1991, represent a fundamental change: the amount of compensation is difficult to determine in a general and abstract manner, without considering the context of each case; we need to weigh the specific interests presented in each case, so that compensation amount is really fair. This may influence the judge to establish an amount that is lower than the total damages caused by the expropriation, however never reaching zero, given that Legislative Act No. 1 of 1999 excluded the possibility of expropriations without compensation.

It is apparent that according to constitutional jurisprudence, compensation should be fair, implying a more complex analysis than a mere valuation of the asset being removed. The Court considers that compensation as guaranteed by the Constitution and the law is sometimes designed to repair, but not to provide, restitution. It must contemplate any emerging damages, as well as loss of income, but not the amount of money necessary to purchase an asset of the same characteristics as the one being expropriated (i.e.; it does not imply total reparation).

There are some cases, however, that can have the effect of restitution, depending on the court interpretation. These occur when the process involves either property or people with special protection from the Constitution. This is an interesting idea on the part of Colombian jurisprudence related to the impact of the rule of law in a social state concerning the application of a procedure such as eminent domain. Jurisprudence is not extensive on this subject, but it makes way for what promises to be a long discussion.

This analysis has revolved around two issues: the right to housing and people who are entitled to special protection. The Court has identified the need for special treatment concerning payment terms (because this was the matter in dispute, however the court made an externsive reference to the subject) for each circumstance. In order to protect the family home, when the affected

owner lives in the expropriated property, compensation must be complete and paid in cash.

The judge must weigh both the interests of the affected party and those of the community. Final compensation and payment terms cannot therefore be determined arbitrarily, violate legal parameters or be based on prejudices or discrimination, and must be reasonable in circumstances where the interest of the affected party and the community collide, and nor can they be obviously disproportionate.[24]

> The Court addressed the issue of the terms of payment in ruling C-192 of 1998, considering levels of compensation in the event of the expropriation of the family homestead.
>
> Therefore, in a practical situation, if the state needs to acquire a property for a use that the legislator has determined comprises public utility or social interest, but that property holds the family home and qualifies as a homestead, the Constitution stipulates clearly that there is no reason not to go ahead with the expropriation, however the family must be compensated promptly for both the property and the home; as well as covering the actual value of the asset. . . .
>
> . . . This ruling balances the interests of the community and the property owner, in determining the amount of compensation and the terms of its payment. It requires that in cases of homesteads, compensation be paid in cash and in full, so that the family that loses its home can replace it promptly with another one. In this very special case, compensation acts as restitution.

The court has reached the same conclusion for the homes of people specially protected by the Constitution, such as minors, disabled persons, and senior citizens among others. In these cases, compensation must be paid in cash and in a lump sum.

Similarly, jurisprudence has determined that if the process of eminent domain attempts to take a family home or the home of people specially protected by the Constitution, prior to paying compensation, this could potentially constitute a serious violation of the right to housing and a homestead (or *patrimonio familiar*).

[24] Constitutional Court, ruling C-1074 of 2002, Manuel José Cepeda writing for the court.

Other issues have potential for clarifying problems related to the concept of fairness and diffusing the tension between the courts and the legislature: the concept of compensation cannot be confused with that of price.

According to ruling C-153 of 1994 which refers to the position of the plenary session of the Supreme Court held on December 11, 1964, Julián Uribe Cadavid wrote for the court the following:

> It must be understood that the concept of compensation for expropriation cannot be confused with the concept of price, as the counterpart in a sales contract. The latter is the product of a bilateral agreement, of private law, a result of the freedom to enter into a contract. . . . Expropriation represents neither a contract nor even a forced sale, such as those in specific circumstances that are committed to public auction; it is essentially a different construct in public law, designed to address the interests of the community, so that the administration removes private property for a greater motive, an action that generates a damage, not a price, to be satisfied through compensation. This occurs even though the legislator uses the expression commercial price, as described in a previous chapter about Colombia.

PROBLEMS FOR DEFINING THE CHARACTER AND SCOPE OF COMPENSATION

According to the previously described ruling C 1074 of 2002,

> In constitutional law, it is relatively unusual to encounter constitutions that establish the precise elements to be covered by compensation. Some constitutions stipulate that one of the requirements of eminent domain is that compensation must be "paid in full." Similarly, other constitutions establish that the amount of compensation should consist of the market value of the expropriated asset. However, most constitutions refer to general concepts in order to qualify compensation. For example, the German Constitution stipulates that compensation must be "equitable." Others speak of the need for "fair" or "appropriate" compensation, both in countries embracing Anglo-Saxon tradition such as the United States, or Roman-Germanic tradition, such as France, Belgium, Portugal, or Switzerland. Some legislation also makes reference to just compensation. For example, Article 51 of the Spanish Constitution uses the expression "just price."

Form of Payment and Fair Price

> [A]s compensation is a way of freeing the owner who has been affected by expropriation from material damages, the means of payment must meet this goal. Thus if the payment issued or granted by the expropriating agency does not liberate the owner from damages, for example if they do not represent a real monetary value, or they cannot be converted readily to cash when the person subject to expropriation intends to negotiate these, or because they represent a mere expectation without economic value, as opposed to a guarantee of future payment by the administration in annual installments, then this would negate the obligation of paying in advance for the expropriation, as stipulated in Article 58 of the Constitution. Securities, given as compensation, must have an exchange value, i.e., they have to represent a real and definitive sum of money.

The Role of the Legislator and the Role of the Judge

The court judgment does not resolve this problem in its entirety; the legislator guides the judge, but it is the judge who ultimately determines what is fair, assuming his particular role as protector of rights.

According to the constitutional precept of Article 58, the legislator with power to configure a case of eminent domain may among other things define public utility and social interest causes, design procedures through which eminent domain will be implemented, and establish the rules that the judge will apply for determining compensation in each case.

In this context, the legislator can establish general criteria for defining community interest and that of affected parties and determine the degree to which the rights of the owner have been affected, aiming to guide the judge's decision. However, the judges have the obligation to protect the right to property, weighing the interests of the community and of the private party affected for each case, ordering the expropriation, but likewise determining fair compensation and payment terms. As guarantor of the endurance of individual rights, together with the legislator's parameters for expropriation, the judge must consider other constitutional provisions such as special protection afforded to

minors, seniors, or disabled persons, among others, as long as these are relevant to determining fair value and form of compensation, given that these constitutional clauses confer specific emphasis on particular interests at stake, that the judge must consider individually.

In the case of people who have special protection assigned to them, the judge can deviate from that established in the statutes, because otherwise "the judge would only comply with the text of the law, mechanically applying rigid rules, while ignoring the constitutional requirement of weighing and protecting the rights of certain groups, particularly vulnerable people."

Therefore, it is the judge's responsibility to impose compensation that respects constitutional principles, and to be capable of interpreting the legal clauses that regulate compensation by taking into account all interests at stake. If compensation does not conform to principles such as the inalienable defense of the family homestead, guarantees for the rights of minors, the physically, sensorially or mentally disabled, senior citizens, or other people assigned special protection, then the Constitution is being violated.

The Constitution does not mandate compensation in cash and in a lump sum in cases of expropriation affecting special needs people. However, the Constitution cannot prevent the judge from considering payments in cash and lump sums, when these are required to fulfill guarantees upheld by the Constitution. The conditional constitutionality of this rule was decreed by the court.

For the Court, this constitutional provision "demonstrates confidence on the part of the legislative assembly in the judge." The judge must guarantee the social function of property and protect the interests of affected owners, particularly those who are most vulnerable. However,

> the fact that the Constitution itself allows the judge to take these issues into account does not imply that the law can be disregarded, as consideration of other factors does not reduce the effectiveness of the law. . . . Weighing these factors does not imply that the judge has complete discre-

> tion, or that he can ignore the law, but simply that he is burdened with formulating an additional argument in order to justify attributing more importance to one interest or another. Similar limiting considerations apply to the inclusion of the social function of property.

This ruling, cited several times before, analyzes in detail the constraints considered by the Court and explains the dilemma faced by the judiciary, particularly concerning risks taken by judges. The risk of simply applying the law when the case does not involve the specific protection of a homestead as the law does not cover additional constraints would violate the Constitution. Likewise, if the judge decides to apply the Constitution directly, he will ignore the explicit parameters established by the Court for determining when to assign greater priority to the interests of the affected owner, considering a context where the social function of property is always recognized.

The other constraint refers to the presence of special needs people, where other rights, as well as property rights, may be explicitly affected; in this case, the judge could give more priority to the interests of the party subject to expropriation and determine a level of compensation that would appropriately guarantee the rights being affected.

Apart from this constraint and as an example, if the expropriated asset is the only economic sustenance for a senior citizen or a disabled person, and this person acquired the property in good faith two and a half years before, it would not be possible for the judge to order the full payment of compensation in cash, as this would violate one of the conditions established in Article 29 of Act 9 of 1989 for lump sum payments. Article 29 makes the condition that this form of payment is for 1). an asset that has a price that does not exceed 200 minimum legal monthly salaries; 2). an owner who "has been the same during the last three (3) years prior to notification of the purchase;" and 3). an owner who can "demonstrate that more than seventy percent (70%) of his net income is obtained from the property in question, or that the value of the asset represents at least fifty percent (50%) of his net worth."

The fact that a judge has the power to balance conflicting interests does not imply that the judge's ruling can result in unequal treatment in favor or against certain people. On the contrary, the priority given to each interested party must be determined in accordance with the principle of equity, precisely because compensation must be established, considering the circumstances of each particular case. This recognizes the fact that the legislator establishes the general rules, but cannot anticipate the circumstances of each individual case, and therefore after considering the interests in dispute, the judge may determine that in some cases the compensation is simply a means of indemnifying for damages and in others it is paid as restitution, without ignoring the framework established by the legislator.

Apparently applying general principles and statements for resolving hard core problems of eminent domain is not as simple as the constitutional standpoint would imply, as the final decision appears to refer to how much money the community intends to pay an owner who has suffered the loss of his property.

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Chapter Six

Eminent Domain in Quito: Institutional Change and Municipal Government

María Mercedes Maldonado

INTRODUCTION

This chapter comprises three apparently disconnected sections; however together they jointly illustrate different aspects of eminent domain in Ecuador, when applied as an urban management strategy for the case of Quito.

As in Colombia, Ecuadorean municipal governments make ample use of eminent domain. These governments have become stronger in the midst of acute institutional instability at the national level, as well as successive constitutional changes. However, these do not seem to have affected the process of eminent domain. This chapter is divided into sections which consist of the institutional context at the national level and the strengthening of municipal governments, legal regulations related to eminent domain, and conflicts relating to its application.

Eminent domain in Ecuador has been affected by typical problems: uncertain rules for determining compensation, the explicit power of the courts to determine compensation with consequent impact on the public budget, and the legal ambiguities of trying to compensate for loss of property rights. These conflicts also reveal the strong defense of public interest on the part of government officials, both within the courts and despite

them, as described in chapter seven. As becomes evident, this case highlights the contradiction between a general discourse directed towards social transformations triggered by the latest constitutional change and the conservative positions adopted by judges.

In this chapter, we review the institutional context that enables these reforms and reinforces the power of the Quito metropolitan government, as well as that of cities such as Guayaquil or Cuenca that form part of the Latin American tradition of strong municipal governments. We also review the legal framework of eminent domain and identify the principal conflicts.

In the second section, we analyze the most important aspects of the last constitutional reform and describe how rights to property and eminent domain have not changed much despite frequent alterations to the constitution and to the general context in which they operate. It is too soon to know whether these changes will affect eminent domain. In section three, we provide a descriptive summary of the legal regulations applied to eminent domain in Ecuador, as a basis for understanding its implementation in Quito.

Institutional Instability, Constitutional Changes, and the Strengthening of Urban Governments

As is common in Latin America, the recent political process in Ecuador has been marked by considerable instability, with constitutional reform playing an important role. As president, Rafael Correa has established a certain measure of stability, but this cycle has not yet culminated and his political proposals, as well as the success of his transformative projects and the implementation of the most recent constitution, are still in doubt. In spite of this, the government of Quito seems to have strengthened, becoming an important political referent, despite the permanent tension that the urban dynamics of Guayaquil creates with the

central power in the capital. The intention to regain control of certain functions and responsibilities constitutes an aspect of its political outlook.

Several factors have caused urban governments to wager a great deal on creating their own institutions and developing policies and programs to produce physical transformations and improve living conditions for their populations, in contrast with the weakness shown by the national government that is constantly floundering. In this area, eminent domain plays a relatively important role. By contrast, institutional transformations are not as important.

Based on texts written by certain Ecuadorean political scientists and historians, in the following we describe the main features of the recent Ecuadorean political process, with brief references to the twentieth century, in order to understand the institutional framework of this country, as well as the causes, actors, and types of claims behind the frequent constitutional changes, as these represent an important factor in the search for stability in the as yet unconsolidated political system. This first section ends describing a simultaneous process in the municipality of Quito, but in the opposite direction, as this has now expanded to become a metropolitan district.

INSTABILITY OF THE NATIONAL GOVERNMENT

The recent manifestation of institutional instability in Ecuador is well known.[1] Between 1972 and 1979, there were 2 military

[1] Instability was also manifest during the twentieth century. Between 1925 and 1948 there were 27 different governments, of which only three were chosen by direct elections, twelve were caretaker governments, eight represented dictatorships, and four were elected by assembly. The longest period of constitutional stability was between 1948 and 1961 (only exceeded by the present one) with three consecutive democractic governments. The cycle of instability returned in 1961, with one constitutional succession, a military coup (1963), the nomination of an interim president (1966), the creation of a

dictatorships; the first a nationalist and revolutionary government related to the Armed Forces, followed by a military triumvirate between 1976 and 1979. These governments attempted to establish a nationalist model based on economic development, i.e., a reform model based on increasing oil production; in this sense they were not as repressive as the dictatorships of the Southern Cone.

The military triumvirate called for a referendum in 1978 in order to choose between two constitutional proposals (the one in effect since 1945 or a new proposal), and once the Constitution—regarded as progressive—had been approved, it called for elections, using a run off voting system, which attempted to strengthen the only political parties authorized to field candidates for executive, legislative, and regional organizations.

This opened a path towards relative stability, with a succession of populist, reformist, social democrat, and conservative presidents. In 1996, the constitutional government of Abdalá Bucaram was toppled through an impeachment process in Congress that alleged mental incompetence, indicating a rejection of extreme corruption. He was succeeded by two presidents nominated by Congress, a process which was finalized by convening a Constitutional Assembly, resulting in a Christian Democrat government elected by citizen vote. The elected president, Jamil Mahuad (1998–2000), was also ousted 15 months into his government, and replaced by another triumvirate composed of an Army general and two civilians, one of whom was indigenous. This only ruled for a few hours because the Armed Forces decided to replace Mahuad with the Vice-President, Gustavo Noboa, following the constitutional line of succession (Paz and Cepeda 2000).

Constitutional Assembly, the nomination of another interim president (1967), the election of a president (1968), a "coup within a coup" (1970), and then another military coup (1972). There were certainly no shortage of reasons for considering that instability was the main problem facing the political system in Ecuador (Pachamo 2007)

In the two subsequent decades, there were 10 governments (5 between 1996 and 2000), each with a different political orientation. These changes occurred in the context of economic crisis, with the nationalist development model being replaced by a business model oriented towards economic development and imposing neoliberal principles, one of the most evident being the conversion of the currency to the United States dollar.[2] This period was also marked by an armed conflict with Peru, which influenced the electoral process and the legitimacy of the presidents.

The attempt to strengthen political parties was unsuccessful and they are now largely discredited. At the beginning of the 1990s, the indigenous movement assumed increasing presence and political significance, expressed both in terms of indigenous uprisings, as well as by political parties. This created a process of resurgence of indigenous nationalities, multiculturalism, and multi-ethnicity, which together with regional movements led by oligarchs had a strong impact on the constitutions of 1998 and 2008.

The Armed Forces and indigenous movements have been important political actors in recent events occurring in Ecuador. The country has a long history of military interventions and coups,[3] the first in 1925 followed by 1935–1938, 1963–1966 and then two periods in the 1970s: 1972–1976 and 1976–1979. A number of these governments introduced social reforms to state policy, for example enacting a labor code, an agrarian reform and continuous activities and programs to support low-income populations, as well as the construction of highways, roads, and other infrastructure to improve communication with remote regions, and the creation of schools and health centers in indigenous communities, etc.

[2] Followed by an inflation rate of 60 percent and a large currency devaluation, which had an effect on eminent domain.

[3] The authors we consulted highlighted the difference between one and the other. In some cases the military have intervened to restore the constitutional order.

Coups were generally an institutional decision on the part of the Armed Forces, rather than the product of political movements or a few officials; thus the Armed Forces have been an important bastion of the constitutional system, filling the political void created by the civilian elites and constructing a direct line of communication with the population, particularly the poor.

According to Cecilia Ortiz (2006), the Armed Forces have voiced concern about the "social" fragmentation of the country and expressed the need to build a strong nation based on internal cohesion and the concept of progress as a source of national strength. Its strategy for national integration is based on a direct relationship with the population and policies to elevate the rural masses from the primitive conditions that from their point of view reduce the power of the nation; in the words of the author "therein lies the importance of introducing the indigenous population to the ethos of modernization." The goal of national unity as a strategy for defense gave these governments legitimacy, as simultaneously they played a role in defending democracy, acting as mediators in political crises, or substituting for incompetent civilian elites.

The indigenous population mobilized to topple Mahuad, organizing "people's parliaments" together with other social movements, occupying the legislative palace supported by a group of officials and soldiers, and attempting to do the same with the court premises and the government palace. They formed a "National Salvation Board" in the congressional building, that included Lucio Gutiérrez, an Army colonel, Antonio Vargas, the most elevated indigenous leader in CONAIE (Confederation of Indigenous Nations of Ecuador), and Carlos Solorzano Constantine, a former Supreme Court Chief. Five hundred officials from the War Academy, the Army Training School, and the Polytechnic Institute, in other words, the army's intellectual elite, labeled by the press as the "academic military," joined the "coup." According to statements from those participating in the "coup" at the time and other information gathered later, these young

and middle rank officials joined the indigenous movement because it reflected a deep national aspiration for change, and because "everybody" wanted to oust Mahuad. In this sense, the situation was more of a popular rebellion than a military coup. As mentioned previously, the following day the Board transferred the government to the legally elected Vice-President.

According to Ecuadorean authors such as Simón Pachano (2007), the Ecuadorean constitutional and legal framework tends to lack consistency and internal cohesion, with an absence of coordination concerning its goals, as well as tending towards instability, dispersion, and fragmentation. Frequent changes in the law have affected, rather than boosted the capacity for economic improvement and for solving social conflicts, in addition to offering appropriate conditions for representation and participation. It has also produced a breach between the law and the actions of politicians, so that the process of political give-and-take tends to occur outside the institutions that comprise the political system, and conversely the lack of formalism and institutional practices exhibited by sociopolitical leaders is a consequence of unstable laws and regulations.

Finally, citizens lack confidence in the institutions (not only as regards political parties, but also concerning the effectiveness of legal guarantees and democratic processes) as well as in the democratic system as a whole. Although these types of fatalistic analyses are common in political studies of Latin America, a quick meeting with officials and former officials and discussions held during a process of change in Quito's municipal government suggest otherwise.

Concurring with other authors, we agree with the analysis made by Pachano (2007) that political activities have often been marked by a strong constitutional and legal debate, thus "the Constitution has become an arena for political confrontation and at the same time the object of political dispute." This is one of the reasons that the plan supporting a return to constitutional order, designed and controlled by the military government instituted

between 1972 and 1979 was known as the Plan for the Legal Restructuring of the State and is considered the basis for a period when democratic institutions flourished, not only due to the constitutional reform but likewise in all areas of political activity. This resulted in the creation of three legal commissions, representing all social and political sectors.[4]

According to Pachano (2007), whereas previously political problems were solved by a coup d'état, now there is repeated implementation of procedural and regulatory reforms. During the greater part of the twentieth century, political disputes were solved by interrupting the constitutional process and installing a new regime, a procedure that was legitimized by repeated practice. The cycle of *weak government–coup–constitutional assemblies–election or nomination of a new government* is maintained, but constitutional assemblies have been replaced by legal and constitutional interpretations that have ultimately been instrumental for preserving democratic institutions. This was how the military interventions of 1997 and 2000 were resolved, but it has also been the method for resolving political deadlocks between the executive and legislative branches.

Pachano (2007) states "in practical terms, the constitutional order has not been ruptured, but the same cannot be said at the conceptual level, especially considering that institutions and legal procedures are an integral part of democracy." For this author, as a result of these behaviors, a flexible legal framework has been configured, subject to as many interpretations as necessary, in

[4] The first commission was formed to reform the Constitution of 1945, usually considered the country's most progressive to that point. The second was formed to draft a new constitution, and the third to prepare a law on political parties and an election law. The last step in the process was a referendum (January of 1978) to decide between two constitutional projects. The voters selected the new constitution and the new election law and for the first time in its history, the law on political parties went into effect. This started the longest period of democracy in the history of Ecuador, which was nevertheless subject to successive constitutional changes (Pachano 2007).

order to build transient majorities or to overcome a particular obstructing issue, generally created by the actions of the same people who are attempting to solve this. Initiating with the Constitution, the legal framework has not been the basis for political action; instead it represents one of the components for negotiation. "Constant alterations in regulations and procedures are not an attempt to create better conditions for the political process, but a means for adapting to the specific interests of each opposing group."

Pachano (2007) adds that the design of the legal framework has been one of the causes of this new manifestation of instability. Its lack of coherence and its heterogeneity is fed by constant reforms and by inconsistency between regulations and declared political goals. Not only has this resulted in a regulatory patchwork, but in a process "driven by a tireless Penelope, constantly constructing and tearing down her own work," thus explaining the title of his book. Finally, Pachano (2007) concludes: "Despite, or perhaps due to four popular elections, a Constitutional Assembly and countless constitutional and legal reforms; the Ecuadorean legal framework is still an incomplete, heterogeneous and contradictory product."

Pachano (2007) argues that finally Ecuador has established a state-centered economic model with a corresponding political outlook, which usually occupies a position with the capacity to influence the assignment of resources and control public sector perks. This author portrays the most important outcome as the implementation of a rentier state, where all social groups without exception contend for the resources controlled by the state. The goal is to take control of state levers for gaining access to the country's resources, which adversely overloads the central government with demands, while creating a permanent social conflict resulting from the striving for advantages at all political levels; thus forcing the government to embark on long negotiations with each of the social groups, at great cost in money and political capital, while creating fertile ground for corruption.

This mechanism has integrated a wide range of social groups and created a framework for political and social culture, accepted and supported by important social and political groups. However, because of its character, this has been a source of conflict and distortion in terms of the social practices for the entire Ecuadorean political group. In any event, as Pachano points out, "the prevalence of this rentier state helps explain the institutional design and reforms that have consistently been applied."

A last aspect of Ecuadorean institutional architecture consists of regional differentiation along ethnic lines. From the 1980s onwards, when indigenous people emerged as important social and political actors, their presence and claims have been incorporated into the national political system, causing certain basic themes to become a part of the political agenda.

The recently proposed institutional structure relies on two basic assumptions: strong parties and majority governments for reinforcing the existing precarious social contract. In 1979, the right of illiterate people to vote was enacted for the first time in history, which in practice incorporated large numbers of people into the electoral processes, particularly rural and indigenous populations. This measure was complemented by a run off presidential election, in an attempt to install governments with strong popular support, as during the electoral history of the country, most presidents, with a few rare exceptions had won the vote with small percentages, narrowly surpassing other candidates. According to Pachano (2007), the resulting pattern has been negative, both in terms of meeting goals and for achieving stability and governance; no consolidation of strong national parties that were independent of interest groups occurred, nor was it possible to create majority governments in the strict sense of the word, i.e., with the necessary and sufficient political clout and governmental position for implementing policies.

The contradictory nature of the measures adopted in this process was reinforced by successive reforms in the national legal framework.

A series of legal and constitutional reforms was initiated in 1983 (only four years after the enactment of the Constitution), a process which has not yet been culminated. None of these was based on an overall vision of the political system, nor has it responded to a desire to adjust the system to meet global objectives. All of these, points out Pachano (2007),

> have emphasized partial aspects, taken in isolation and almost exclusively in response to circumstantial needs. This has created a system where regulations and contradictory provisions coexist and are superimposed, resulting in outcomes that are totally different from the original intent, as well as situations that cause more conflict than those prior to their introduction.

THE STRENGTHENING OF URBAN GOVERNMENTS

Meanwhile, in sharp contrast to the instability of the national government, strong administrations were being formed in the most important cities of the country (Quito, Cuenca, and Guayaquil), with innovative management strategies and outcomes that have been recognized not only domestically but also internationally, such as the program to recover the historic center of Quito, a mass transit system based on articulated buses, a system of green and recreational areas, and programs for municipal housing.

In order to offset problems created by weakness in national government, local governments were adopting practices or modifying their legal systems in order to take control of contexts that had traditionally been the responsibility of national government, as well as creating a special framework for legal procedure. The Quito Metropolitan District Act (*Ley de Régimen para el Distrito Metropolitano de Quito*) of 1993 granted the municipality new powers and allowed it to create decentralized and participatory processes in the metropolitan administration (Vallejo, 2009). The main functions transferred to municipal control consisted of land use regulation, management of the transit system, the environment, the development of participatory processes, and more recently, tourism, citizen safety, and infrastructure. These functions have reconfigured the institutional structure of the munici-

pality, making it a lot more efficient than the national agencies, even though it has attracted some criticism.

The 1998 Constitution reaffirms the principles of decentralization, deconcentration, and participation manifested in the prior constitution and laws, and introduces a progressive transfer of functions, attributes, obligations, responsibilities, and resources to autonomous sectors or regional agencies, with an unusual condition: it establishes an obligation to decentralize at the request of a sectorial agency and has the operational capacity to implement this, however no transfer of responsibility will take place without the equivalent transfer of resources and conversely there will be no transfer of resources without transfer of responsibilities.

The regulations for the Decentralization Act (*Ley de Descentralización*) establish certain modalities and procedures for a sector agency to petition transfer of responsibility, and a fixed period of thirty days for the central authority (cabinet secretary) to process the application. Should this deadline expire, tacit approval of the petition is assumed.[5]

Vallejo (2009) identifies four distinct periods during the past thirteen years of decentralization: the effort to rationalize and improve administrative efficiency, linked to private investment in the provision of services (1993); the empowerment of local management especially at the provincial level (1998–1999); the transfer of responsibilities to sector governments in exchange for central government resources, on the basis of individual agreements (initiating in 2001); and the proposal for an autonomous regime that can be accessed by any county, province, or

[5] Data from the master's thesis by René Vallejo Aguirre "Quito, de municipio a gobierno local. Innovación institucional en la conformación y gobierno del Distrito Metropolitano de Quito, 1990–2007" (Quito, from Municipality to Local Government: Institutional Innovation in the Formation and Government of the Quito Metropolitan District, 1990–2007). See also Ojeda and Vallejo (2009).

association (2006). The 2008 Constitution, approved during President Correa's term of office has a recentralizing focus that attempts to recover the responsibilities and resources that were transferred during the previous period, which in reality appears not to have been extensive, except in Quito and other big cities.

Vallejo's (2007) work provides a rough reconstruction of the recent evolution of urban governments in Quito: firstly a period (1988–1992), where the Christian Democratic government of Rodrigo Paz established a modernizing approach that attempted to consolidate at the local level, expressed in the intention to convert the municipality into a metropolitan district, defining a "new form of territorial organization, local administration and community participation that intended to regain the control and direction of urban growth in the municipality, by introducing comprehensive and flexible coordination with other municipalities, the state, social organizations as well as the private sector" (Carrion and Vallejo 1994, 29). This project responded to the short term expectations resulting from expansive growth in a context of crisis in the city, together with institutional decay in the sector agencies, exacerbated by the national government of Febres Cordero, whose Implementation Units (*Unidades Ejecutoras*) developed projects and investments emanating from the central state.

During this period, the emphasis was on urban management and greater provision of services for "marginal" groups in society, i.e., a policy of social redistribution, later reclaimed by more recent governments and as explained by Vallejo (2009), a recognition of new issues such as transport and security. A process to secure international cooperation was also promoted with the modernization of the municipal administration by introducing a computerized land registry, as well as procedures created by the Finance Directorate (*Dirección Financiera*) to improve municipal finances, in addition to implementing personnel training, on the part of the new Human Resources Directorate (*Dirección de Recursos Humanos*) and the Municipal Training Institute (*Instituto de Capacitación Municipal*).

The second period (1993–2000) marks the consolidation of the metropolitan district, by then legally approved and led by two Christian Democratic mayors: Jamil Mahuad (1992–1998)[6] and Roque Sevilla (1998–2000). During this period, the municipalities acquired new functions and responsibilities, becoming decentralized and delegating tasks to regional administrations, while also encouraging citizen and community participation in management and promotional functions. The Local Government Development Program (*Programa de Desarrollo del Gobierno Local*) was created in 1994 to define a new role for the municipality and create implementation strategies for a new set of metropolitan institutions and forms of government. According to Vallejo (2009), this period was characterized by state reforms with a neoliberal focus, introducing a rational approach with administrative efficiency, linked to the participation of private investment for the provision of services.

While not fulfilling all expectations in terms of territorial reorganization and redistribution as originally planned, according to Vallejo (2009) the implementation of the modernization law made it possible to redefine territory in a geographically accessible way. Urban and suburban metropolitan regions were separated, while full responsibility for land management, administration of the rural land registry within the Metropolitan District, and the amplification of skills related to transport and environment was assumed with the explicit intention to promote and integrate community participation, not only in terms of financing projects designed to satisfy these requirements, but also in terms of identifying these needs, while planning for the implementation and maintainance of public works or services.

Likewise, new public companies were created, private companies were contracted to provide public services, and mixed state-private partnerships were formed to provide services, implement

[6] Who would later be deposed as President of the Republic, as indicated above.

or maintain public works, and generally provide commercial services; community agreements were signed for urban planning, the preservation of the environment, and the provision of services to areas of influence in the District, the Metropolitan District, and neighboring municipalities.

The local government development program assumed a new role as "facilitator, promoter, regulator and coordinator for fostering development" (Municipio del Distrito Metropolitano de Quito [MDMQ] 1995, 6) comprising three implementation strategies: institutional development, community development, and decentralization, which Quito analysts view as innovative at the institutional level, generating new and lasting conditions for urban government.

This has ushered in a new stage, which integrates new municipal responsibilities and includes a broad spectrum of urban sectors or activities. For example concerning land management, this has undergone more than a transfer of responsibilities, so that the traditional municipal function has been expanded, with local government recovering sole and exclusive competence of metropolitan territory in terms of regulating the use and exploitation of land and has taken control of the excessive fractioning of subdivisions in the suburban periphery located in the valleys that surround the city, facilitated by agencies at the national level, promoting expansive and dispersed growth in areas with no infrastructure services that in some cases are unsuitable for urban growth. Similarly, from 1994, it assumed the administration of the rural land registry, transferring and updating its statistical database, thereby increasing tax revenue.

This was followed by two terms of Mayor Moncayo, a retired general, whose principles for government were oriented towards integration, sustainable human development, democracy, and the environment intending to create a new political ethos, social solidarity, increase community participation, with promotion of public-private partnerships and decentralization, in an attempt to "convert government from a functional organization to a ter-

ritorial organization that facilitates citizen participation for the purpose of installing a democratic municipal administration."

Three strategies were promoted in order to achieve this government plan: an institutional development program, the design and implementation of a system of participatory management, and the creation of a general plan for territorial integration.

During this period, government assumed new responsibilities, while complementing and maximizing existing and partial ones, as well as decentralizing municipal duties to local rural organizations. A principal new responsibility consisted of airport administration, where in the light of management problems faced by the national government, a corporation was created to be in charge of refurbishing and managing the current airport, as well as selecting and hiring a contractor to build a new one, together with a tax free shopping area and technology park. The main source of dissension with the central government concerned the distribution of revenue from airport fees.

In 2002, the municipality transferred the responsibility for planning and promoting tourism, together with resources derived from the concession, renewal, and collection of a Single Annual Operating License (*Licencia Única Annual de Funcionamiento*) for tourist establishments in the metropolitan district, as these were granted to the municipality by Official Record No. 609 of 2002. Similar strategies were employed to provide many other services.

Some decisions regarding the transfer of central tax revenues, such as income tax were left to the taxpayers themselves, who were permitted to allocate up to 25 percent of the amount of taxes they contributed to specific municipal programs. These resources have added up to 35 million dollars a year, and have financed some of the programs and agencies that are representative of the city's transformation, such as *Vida para Quito* (Life for Quito) created in 2001, in charge of protecting and preserving the environment, large metropolitan parks, and the system of parks and recreation areas in general.

In summary, as expressed in an interview by Fernando Carrión, who was Planning Director during the Mayor Paz administration and councilor during two previous periods, the municipality of Quito is strong and has a high degree of legitimacy, which has made it possible to undertake the development of projects and programs developed in recent decades and to carry out major expropriations.

Constitutional Changes and the Right to Property

Despite successive changes in the Constitution, provisions in the context of property rights and eminent domain have witnessed few modifications. This subject has not been explicitly discussed in the search for a better institutional framework or attempts to transform government process. The "shadow" of Hugo Chavez (i.e., the trepidation that Rafael Correa might take a similar approach) was apparent in the Constitutional Assembly of 2008, although the constitutional texts were maintained without major modification, as shown in box 1.

According to an analysis undertaken by Echeverría (2009), the main alteration to the 2008 Constitution, apart from the institutional changes we have described, was to transform a state under the rule of law, to a constitutional state under the rule of law, with the intention of involving people affected by the economic crises that affected the country in previous decades.

It also provides these members of society with more options for claiming and enforcing their rights. The state (understood as the central government) is in charge of establishing these rights, which according to Echeverria (2009) amends the classical liberal principle of protecting society (or the individual, we might add) from the discretionary or arbitrary actions of political power, to participate directly in the material creation of social and economic rights. For these and other purposes, the power of the President of the Republic is reinforced, while the participation of organiza-

tions representative of the people are reduced and responsibilities that previously pertained to urban governments are recovered, so that a direct channel is established between the President and *civil society* or *the people,* by means of monitoring and control and by enforcing rights as directly stipulated in the Constitution,[7] thus reducing the role of legislation.[8]

This expansion of rights and this particular means for their aprobation is accompanied by a redefinition of the economic model, possibly representing the most demanding context, where capacity for converting rhetoric into concrete action is tested or as expressed by certain authors, comprising a utopic expression of the new legal framework. The principle of *good life* or *sumak kausai,* in the language of the Andean Indians, questions the western logic of development and market economies, particularly neoliberalism, and proposes an alternative ethos of human coexistence. This recognizes the unity of diversity and questions the violence of the capitalist system, creating new relationships with nature, expressed in the idea of conferring rights to nature itself. Authors such as Echeverría are skeptical that this blossoming of rights, emerging from *sumak kausi* can be satisfied based on a traditional economic system, while attempting to dispense with the logic of capitalism. At this point, it is not possible to analyze the content of the Constitution, nor is it relevant to this chapter; however we describe the following aspects, in order to comprehend constitutional change in Ecuador.

Considering property rights and eminent domain once again, the possibility for nationalization, contemplated in the 1978 Constitution, was eliminated in 1998, and reinstituted in 2008. Confiscation of property was banned repeatedly. The main innovation, presented in Article 321 was to recognize different

[7] With a strong legal and regulatory framework.

[8] According to Echeverria (2009), in the model of the new constitution, the main responsibility of monitoring bodies and the Constitutional Court is to guarantee the application of this constitutional mandate.

"forms" of property, such as public, private, community, state owned, associative, cooperative, and mixed. The most important modification to the initial proposal presented in the Article related to property rights was the addition of an "environmental aspect" to the classic formula promoting the social function of property.

Eminent domain is associated with the right to housing, habitat, and preservation of the environment and it grants municipalities the option of reserving and controlling areas for future development, in accordance with general provisions in the law. Moreover, the same Article 376 prohibits benefitting from land speculation, particularly when land is changed from rural to urban use or from public to private use.

A number of Ecuadoran jurists identify a possible contradiction between the concept of property rights as a fundamental privilege related to freedom, and its eventual implementation within a framework of urban development that prioritizes improvements in the quality of life of the population, and the construction of an economic system that is fair, democratic, productive, supportive, and sustainable, based on an equitable distribution of the means of production and the recovery and conservation of nature (Articles 275 et seq., in Egas Reyes 2009, 331).

As indicated previously, the Constitution stipulates that the government should protect the individual against any state or private interference concerning the enjoyment of his property, implying that any form of confiscation is prohibited; however the right to property also has limits imposed by the same Constitution, one of the most important refers to the use of property as an instrument for development, complying with economic principles specified in the Constitution (Egas Reyes 2009, 332).

In the words of Pérez Luño, quoted by Egas Reyes (2009), even in the 1998 Constitution, property represents more than just a right to exclusive and unlimited enjoyment; it is viewed as the right to participate in the fruits of the economic process, where everyone is guaranteed to fulfill their potential, consistent with an overarching social and democratic vision. The social

function of property as expressed in the Ecuadorean constitutional framework aims to redistribute incomes, thus generating a series of responsibilities for property owners. Concerning the environmental aspect of property, the principal concept introduced by the Constitution refers to the interpretation of the inherent rights of nature, which according to Egas Reyes (2009) intends to ensure that human beings continue enjoying its benefits in a sustainable way, balancing the ecosystem to ensure the future. Limitations on property, derived from its social and environmental function, are stated more explicitly in the second instance, where there are Articles permitting state intervention or restricting private activities.

Box 1: The Right to Property and Eminent Domain in Ecuadorian Constitution

1946 Constitution

Article 183. Guarantees the right to property, subject to its social function. The confiscation of property is prohibited; should it occur, the rights of the affected party will not be affected, nor will they expire, and will result in an injunction for damages against the authority that ordered this, as well as against the Treasury.

Article 183.

. . . An owner cannot be deprived of his property or denied possession of his goods, except with a legally verified judicial or expropriation order, related to a public utility cause.

Only the Treasury, municipalities, and other public law institutions can initiate expropriations for a public utility cause.

Eminent domain proceedings for construction, expansion of roads or their improvement, railroads, airports, and townships are governed by special laws.

Only authorities that exercise a judicial function, compliant with the law, are permitted to make judgments that either prevent or interfere with the right of free contracting, transfer, and inheritance of property. Orders issued by other authorities are invalid and will not be obeyed.

TEXT FROM THE 1979 CONSTITUTION, REFORMED IN 1984

Section III. About Property

Article 48**.** Property, in any form constitutes a recognized and guaranteed right enjoyed by the government for organizing the economy, as long as this complies with social function. It should cause an increase and redistribution of income, enabling the entire population to share in the benefits of wealth and development.

Article 47. The public sector may nationalize or expropriate properties, rights, and activities pertaining to other sectors, in favor of the state or any other of the sectors mentioned previously in order to preserve the social order, having paid prior, fair compensation as stipulated by law. Confiscation is prohibited.

TEXT FROM THE 1998 CONSTITUTION

Chapter 4
Economic, Social, and Cultural Rights
Section One
Property

Article 30. Property, of any type, provided it fulfills its social function constitutes a recognized governmental right, which is guaranteed for the purpose of organizing the economy. Property must act as a tool for increasing and redistributing income, whilst giving the population access to the benefits of wealth and development.

Intellectual property is recognized and guaranteed in accordance with the terms of the law and operational covenants and treaties.

Article 33. In order to foster the social order established by law, government institutions are permitted to expropriate property owned by the private sector, following procedures and timelines specified by law and with prior fair assessment, payment, and compensation. All confiscation is prohibited.

Text from the 2008 Constitution

Article 66. The following people's rights are recognized and guaranteed: . . . 26. The right to property of all types, subject to social and environmental responsibility and function. The right of access to property is regulated by the implementation of public policies, among other measures.

Article 321. The state recognizes and guarantees the right to public, private, community, state, associative, cooperative, and mixed property, which must comply with its social and environmental function.

Article 323. In order to implement social development plans and manage the environment and the collective welfare in a sustainable way, state institutions, for public utility or social and national interest causes may remove a property by applying eminent domain, provided there is prior fair assessment, compensation, and payment as defined by law. Any form of confiscation is prohibited.

Article 376. In order to ensure the right to housing, habitat, and environmental conversation, municipalities may expropriate, reserve, and control areas for future development, as defined by law. Benefits obtained from landuse speculation are prohibited, particularly when landuse is changed from rural to urban or from public to private.

Tensions Produced by Legal Rules Concerning Eminent Domain

Laws relating to eminent domain enable a special exercise of public authority that exceeds the interests of the private parties affected: this permits municipal councils to determine public utility causes in each case, the legal criteria to determine compensation, the option of paying compensation in installments, and above all the right to take a property by eminent domain and transfer it to a third party, such as a housing cooperative in the case of affordable or low income housing programs. This constitutes one of the most interesting aspects in the debate concern-

ing the application of eminent domain in Latin America in the near future.

In this context, expression of public power is curtailed by balancing legitimate interests of the affected party with possible benefits for another private party, allegedly representing general interest. The description of recent tensions concerning application of eminent domain for urban purposes in Colombia identifies possible conflicts when expropriations are paid by third parties involved in the installation of urban renewal programs declared to be of social interest.

Eminent domain has been regulated by the Municipal Charter Act (*Ley Orgánica de Régimen Municipal*) and the Public Contracting Act (*Ley de Contratación Pública*). These provisions were recently incorporated into the Organic Code for Territorial Planning, Autonomy and Decentralization (*Código Orgánico de Ordenamiento Territorial, Autonomía y Descentralizatión*, or *Cootad*), with no major modifications. In the following, we examine each of the factors that can be used to justify eminent domain, as presented in the introduction: public utility, procedures and participation of different public agencies, and compensation.

CAUSES OF PUBLIC UTILITY

These are defined in each case by Municipal Councils, complying with the following legal requirements established in the municipal charter for forced expropriations:

1). A specific declaration stating that a property must be transformed in a certain way or employed for a particular purpose;
2). This declaration must be derived from a lawful ordinance, or from approval of urban master plans and a decision stating that urban areas must be developed forthwith;
3). Programs for implementing plans, ordinances, or laws should contain an unequivocal estimate of forced expropriation, in order to comply with the first requirement; and

4). A deadline must be imposed for performing the specific function described, also stating that the property owner has not complied with this, either fully or substantially.

Any person or legal entity may request that a municipality expropriate real estate, complying with the two preceding articles in this law, in order to build affordable housing or to implement urban development and low-income housing programs (Article 22).

In this situation, the Municipal Council can declare that a property represents public utility and social interest, and thus proceed to accelerated expropriation, as long as the applicant can justify the need and social interest of the program, while demonstrating his economic or financial capacity and indicating the value of the real estate to be expropriated, in compliance with applicable legal clauses, as described in the following article.

Any real estate expropriated by the municipality under these circumstances may be sold by this corporation for the following purposes only: 1). The implementation of multifamily housing programs by the Ecuadorean Social Security Institute (*Instituto Ecuatoriano de Seguridad Social*) or the Cooperative Savings and Loan Associations for Housing (*Asociaciones Mutualistas de Ahorro y Crédito para la Vivienda*); and 2). The construction of affordable housing by legally constituted housing cooperatives.

Property that has been removed by the Housing and Urban Development Ministry must be exclusively employed for affordable housing programs that are managed directly by this institution. The sale price of the subdivisions must include the cost of expropriations, any improvements introduced by the municipality, and the increase in value, should this occur.

Procedures

The Municipal Charter Act establishes the following responsibilities and general attributes for municipal councils to "Declare property subject to eminent domain to be of public utility or social

interest, without the intervention of any central government agency in this process." However, the administration decides, which expropriations must be contemplated in the municipal plans.

The eminent domain process initiates with an analysis of the technical and legal reports of any projects to be implemented. This task is carried out by the Commission on Property and Public Space (*Comisión de Propiedad y Espacio Público*), composed of five Councilmen with access to technical and legal assistance, who then submit a report about the expropriation to the Council to be reviewed and approved by the entire Council.

The declaration of public utility and the occupation agreement may cover the entire property or only the area strictly requiring expropriation. Areas deemed indispensable for planned expansion of the project may be included in the declaration of occupation.

When eminent domain involves the need to occupy only a part of the property, so that retaining ownership of the unexpropriated portion is no longer profitable, the owner will have the right that such expropriation comprise the entire property, in conformity with Article 799 of the Code of Civil Procedure.

Once the Council issues a resolution of public utility and formulates an occupation agreement, all stakeholders will be notified within three days. If any parties affected by the expropriation cannot be located, notification will be made by means of publication in widely circulated national newspapers, for three consecutive days.

Once the declaration of public utility has been made, the expropriated owner(s) may file a petition with the Commission of Property and Public Space, disputing the assessment and also requesting that the expropriation decision be reconsidered. For this, the commission must consider the possibility of ordering a new assessment, as long as this does not exceed the limitations defined by law (with an increase of up to 10 percent). The Commission may request new technical and legal reports, and will issue a new report for consideration and approval by the Council (either ratifying the expropriation or modifying the decision).

Expropriation Judicial Proceeding

A case is filed in a civil court only in order to determine the amount of compensation to be paid, as long as the expropriation is for public utility. The declaration of public utility or social interest can only be made by national or municipal executive agencies and can be disputed in administrative hearings, but not in court.

The eminent domain process must be initiated by the State Attorney General or designated official if the expropriation is for the benefit of the state or the city attorney. For expropriations initiated by other public sector agencies, the complaint must be filed by their respective legal representatives.

Once the complaint is duly filed and accepted, the judge must nominate one or more experts to value the property. At this moment, the judge will require all possible stakeholders to exercise their rights within fifteen days, to be counted simultaneously for all parties. Likewise the judge will establish the deadline for the expert(s) to submit their reports; not more than fifteen days after the expiration of the previously mentioned deadline.

No other charges will be admitted to the lawsuit, and all claims made by parties will be considered and resolved in the judgment.

In order to calculate the compensation amount, the judge will take into consideration any documents filed with the complaint. If the expropriation affects only part of the property that was valued, a proportional price will be established. However, when the area to be expropriated includes most of the property or its value is higher or its quality exceeds that of the other area, or has some other type of advantage, its price must be determined fairly, in accordance with the expert's report.

The judge will issue a judgment within eight days of the expert's report being issued; this judgment will only rule on the price to be paid and the claims filed by the interested parties. This judgment is subject to appeal but not reversal.

When expropriations are deemed to be urgent by the requesting agency, the property will be occupied immediately. This occupation is ordered by a court in a preliminary judgment, provided that the court order includes the price to be paid for the property, as estimated by the person subject to expropriation. The case will proceed following the steps described in the preceding articles until a final compensation amount is determined. An expedited occupation order cannot be appealed and must be executed without delay.

When a new street is opened or an existing street is widened, resulting in the property gaining access to it either directly or nearby, thus increasing its value in a way that would not otherwise have happened, it must pay taxes to the national government, provincial council, or municipality, depending on whether the property is rural or urban.

When the expropriated property has industrial facilities that cannot continue to operate as a result of expropriation, this damage must also be compensated. If the facilities can be moved to another property within the same area, the compensation can be reduced to the cost of the disassembly, removal, transportation, and reassembly of the industry in question.

If three months have elapsed since the judgment was issued and the compensation price has not yet been determined, the judge is able to cancel the expropriation, on the petition of one of the parties and the plaintiff will be responsible for paying court costs. A further expropriation proceeding on that property cannot be initiated for five years after the previous case has ended.

If the property has not been employed for the reason motivating expropriation within a period of six months from the date the last judgment was served, or work has not been initiated within the same period, the previous owner can repurchase the property for the same amount as that received in compensation, by filing a case before the same judge and following the same pro-

cess. The ruling accepting the repurchase of the property will be recorded, and act as a property title.

Compensation

Fair compensation stipulated by the Constitution in the municipal statute is determined as

> the value of goods or rights expropriated at the time proceedings were started, without including the added value resulting directly from the project that triggered the expropriation and its future expansion. Any improvements introduced after the initiatiation of the expropriation proceeding will not be covered by compensation.

The municipal statute declares that in all cases of eminent domain, the owner must receive five percent more than the normal price established by the courts in order to compensate for intangible damages. This amount will be paid to the owner in cash at the rate and within the term established by the municipality, by mutual agreement with the owner; such periods cannot exceed five years.[9] All amounts paid in installments will accrue legal interest.

The price paid will be exempt of any fees, taxes, or other type of fiscal or municipal levy.

The municipality may agree with the party affected by the expropriation to purchase the property or rights freely and by mutual agreement; in this situation, once the terms of the purchase have been determined, the case will be closed.

The value of the property should be determined by adding the value of the land to that of any construction on it, where applicable. This is considered to constitute the intrinsic, proper, or natural value of the property and will be used to calculate taxes and other non-taxable events, as in the case of expropriation.

[9] With the exception of expropriations for affordable housing programs, in which case an initial payment of 30 percent of the compensation amount can be made, with the rest spread over 20 years.

The following factors must be taken into account in order to establish the value of the property:

1). The value of the land, calculated from the unit price of the urban or rural land determined by comparing the sale price of areas or subdivisions with similar or equivalent conditions in the vicinity, multiplied by the subdivision area;
2). The value of any construction on the property, considering the price of any permanent building erected on the subdivision, calculated in terms of its replacement value; and
3). Replacement value, determined by calculating the construction of the structure to be valued by applying up-to-date construction costs and then depreciating this in proportion to its useful life.

While the municipal statute was in force, compensations were paid based on values recorded in the municipal land registry. This was one of the main reasons for conflict, as it was difficult to agree on the authenticity of these valuations; this procedure was thus changed in 2005 in the Charter Act of the National System for Public Contracts, which determined that compensation should be based on a valuation implemented by the Municipal Assessment and the Cadastre Directorate (*Dirección de Avalúos y Catastros de la Municipalidad*) for the region where the property is located, taking into account current market prices in the area. Should there be a mutual agreement between the municipality and the owner, compensation cannot exceed 10 percent more than this assessment.

When a direct agreement cannot be reached, an eminent domain case is opened in court; in this case, the judge is not constrained by the valuation carried out by the Municipal Assessment and Cadastre Directorate.

When properties are transferred with a purchase resulting from a declaration of public utility, the owners must have paid all taxes on this property, except for the levy related to improvements and the real estate transfer taxes, which will not be assessed on

this type of purchase. If there are any overdue taxes, the amount will be deducted from the compensation.

The active participation of the Municipal Council in the eminent domain process should be emphasized, as not only must it determine the public utility cause in each case, but also process the claims or petitions of the owners and schedule hearings to consider their objections, at times even resulting in a reversal of the eminent domain decision resulting from lack of legitimacy of the public utility cause or special social or personal circumstances of the affected party. As for the compensation amount, there is no large margin of negotiation because the law, as mentioned previously, establishes precise limits for determining the amount to pay. Until 2005, compensation values were low because they were based on assessments from the land registry, and property and related tax rates were kept relatively low for a long period due to a political decision taken by the municipalities. With the adoption of the dollar as the currency, valuations fell even further.

During this period, many court cases were brought against eminent domain declarations because the judges were not constrained by valuations related to the land registry, and as a result expropriations were significantly delayed and municipalities faced high compensation prices.

From 2005 onwards, compensation has been based on market values, determined by the Municipal Land Registry Office, thereby reducing court disputes. Contrastingly, there is a greater acceptance of the use of eminent domain for public works construction, green and recreational areas, and affordable housing.

The Practice of Eminent Domain and its Conflicts

The city of Quito has applied eminent domain from the beginning of the 1990s in order to build parks, roads, and complementary works for the transportation system, including the airport, as well as for affordable housing programs and to protect

the architectural heritage. Expropriation is applied constantly, almost daily and continually, and generally expropriations are not violent, do not generate strong resistance from any social group, and are condoned by public opinion, which affirms that general interest trumps the interest of affected owners, even if their income is low.

As mentioned here, although in some cases compensation is determined by mutual agreement, a large percentage of expropriations made prior to 2005 were subject to judicial processes in order to augment compensation.

In the legal framework as explained, the municipality decrees the expropriation, occupies the property, and allows the court to reconsider the amount of compensation. Some cases can take years or even decades and in many instances they have reached the Inter-American Court of Human Rights and still remain unresolved.

The main expropriations in Quito have been to create two metropolitan parks to the north and south of the city, one of 1500 acres (600 hectares) and the other of 815 acres (330 hectares), the latter with urban infrastructure or suburban subdivisions that could have benefitted from the process of urban expansion. From the administrative point of view the main advantage was that these were areas that had been declared as protected for many years, even though the courts did not recognize this type of municipal land regulation.

Another area of 750 acres (300 hectares) was also expropriated for affordable housing programs to be developed by the municipality. The size of these expropriations is large, if we consider that the Metrovivienda Land Bank of Bogota, a city significantly larger than Quito, took possession of a total area of 980 acres (397 hectares) of land, purchased either by direct agreement or voluntary sale, eminent domain, and partnerships with owners over a period of ten years.

The officials we interviewed (former directors or secretaries of territorial organizations, planning agents, housing program direc-

tors, the former Director of the Metropolitan Land Registry Department, or consultants for the current mayor) agree that the municipal government always inclined towards using eminent domain for important projects such as those indicated, even at the risk of legal conflicts and other problems associated with expropriations, prioritizing construction and the development of social and environmental programs, created by the mayors. They took advantage of the legal option of occupying properties by paying the value as defined by the Land Registry as compensation, and then waiting for the court process to determine the final price.

Generally, mayors have had control over the Council and have succeeded in getting them to approve expropriations, with some exceptions such as an avenue in the south of the city, which according to those interviewed was not approved for political reasons unrelated to the expropriation per se.

Some mayors, such as Rodrigo Paz, have led the process and participated directly in negotiations with owners in order to avoid going to court and in these cases, the declaration of eminent domain was sufficient to formalize or close the negotiation.

Paz is also notable for creating land reserves for affordable housing programs, and under his Planning Director, Fernando Carrión, 667 acres (270 hectares) were expropriated in partnership with the Ecuadorean Housing Bank. However, the municipality was not successful in terms of urban development, and the implementation of programs was problematic.

As just mentioned, large landowners resist expropriations for housing projects more than those earmarked for public works. They argue that eminent domain is only justified when expropriated properties are used for communal purposes, which is not so in the case of housing. In this context, they even faced opposition from illegal land brokers or "loteadores pirata" as they are known in Ecuador, who in the 1990s blocked expropriations, taking advantage of the municipality's lack of resources.

The main problems are:

- Delays in the process, creating uncertainty over the prices that the municipality will end up paying, with resulting impact on the budget.
- The tendency of civil judges to order very high compensation, in some cases higher than market prices. Compensation varies between very low amounts when valuations are carried out by the land registry, which according to some of those in charge of the process, range between almost confiscatory or—at the other extreme—a very high, "disproportionate" amount ordered by judges, that in some cases raises suspicion of corruption. There are also problems of negligence on the part of the municipal officials in charge of the process. This weakness in the legal defense of the public sector is a common problem in many countries. Generally, the municipality is on the losing side of court cases of eminent domain, in some cases annulling them. These cases are long and result in high interest payments.
- As the result of lack of resources, the municipality has resorted to barter, paying some expropriations with land of its own, to the degree that it actually ran out of land. We were unable to accurately establish the scope and effects of this form of payment, but there is a question of how much this process costs and who benefits from this.
- Even though there is an assumption that the level of conflict has declined since 2005, when a new law came into effect permitting compensation to be determined by a public agency at market prices, interviewees stressed the advantages of negotiation. However, doubts also continue concerning the amount of compensation agreed upon, and its impact on the public budget.
- No institutional policy exists concerning this matter, and there is no solution to court processes that drag on for

years. Some officials fear that pending court cases may jeopardize the financial wherewithal of the municipality.

- Unequal access to justice means that large landowners are often more capacitated to manage these processes, sustaining them over time and even reaching the Inter-American Court, while lower income people generally have to accept the sometimes low prices that are offered, particularly during the period when compensation was determined with outdated assessments, based on the cadastre.

Final Commentary

One of the most interesting aspects referring to the tension concerning the application of eminent domain in Ecuador is the contrast between an expanding discourse that declares and protects citizens' rights, driven by constitutional changes (with or without effective mechanisms for enforcing these), and eminent domain regarded as an economic right. From a legal perspective, how should a balance be reached, between applying an instrument that manifests such a strong expression of the power of the state for defending general interest, while simultaneously compromising such an essential subjective right, as that implied by the right to property?

A case filed by owners of an expropriated property in the Inter-American Court will help us resolve these questions. This is the subject of the next chapter.

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Chapter Seven

Courts, Human Rights, and Compensation for Cases of Eminent Domain: Case Studies in Ecuador

María Mercedes Maldonado and Diego Isaías Peña

It is particularly interesting to analyze the legal proceedings associated with eminent domain in Ecuador because the law permits the courts to play a significant role in determining the amount of compensation, as opposed to other countries such as Colombia, where this flexibility does not exist.

In Ecuador, the law imposes strict limits on local administrations, particularly Municipal Councils, and grants judges the authority to determine compensation amounts. In other words, the law explicitly grants the court the power to order payments from the public treasury, and even grants them the authority to reject expert valuations.

Similarly, because the law makes it possible for the government to take possession of a property before the eminent domain process has concluded in order to proceed with public works, and in some instances these cases reach the higher court and final compensation is not determined for years. This generates a great deal of uncertainty over a long period of time, both for the government and the property owner, with regard to the final amount that should be paid for the land.

This brings us to the following question: in a complex field such as that of the land market, which presents so many difficulties

even for economists, does a judge have the required knowledge and skills to translate the abstract notion of justice into a specific compensation amount?

In this context, an obvious tension exists between the public administration, responsible for promoting eminent domain cases, and the courts, because there are important differences between the interpretation of the constitutional principles of property rights and the laws that regulate these. The administration is inclined to defend the general benefit, whereas the courts defend owner interests.

In order to analyze these tensions, we have chosen some key cases as examples, where certain patterns of conflict are repeated, as described above.[1] Most of these were related to a set of expropriations carried out in the city of Quito.

As indicated in the chapter describing the practice of eminent domain in this city, in 1981 the municipal government initiated an important project to expand green areas, preserve the environment, and provide recreational activities, by creating a large reservation area in the city. This initiative was implemented with Ordinance 2091, which approved the *Plan Quito* to create what is today the Southern Metropolitan Park (*Parque Metropolitano del Sur*), together with another park in the northern part of the city, the Guanguiltagua Metropolitan Park (*Parque Metropolitano Guanguiltagua*).

In 1991, Quito's Municipal Council declared 300 undeveloped land parcels for public use, in order to create the northern park, comprising a total area of 1500 acres (600 hectares). Agreements were reached with the owners of 80 percent of the area,

[1] This case study was researched by María Mercedes Maldonado and Diego Isaías Peña with field work performed in Quito in August of 2010, supported by case documentation done by the Ecuadorean attorney María Belén Moncayo and Internet searches done by Diego Isaías Peña. We thank attorney Diego Guerra, an official of the Municipality of Quito, for his comments regarding the court proceedings.

either by exchanging their properties for land owned by the city, or by completing the expropriation process in court. Some owners accepted prices that were apparently low, but they reflected the rural status of the land, both from the regulatory point of view, as well as in terms of their practical use. A different situation arose in the case of the owners of the remaining 20 percent of the area. The leaders of a housing cooperative, owners of some 67 acres (27 hectares), adopted a belligerent attitude towards the administration for years, until they obtained a compensation of one million dollars from an Ecuadorean Supreme Court ruling, equivalent to US$3.70/m^2. In other cases, the compensation amount was significantly higher (between US$7 and US$19.84 per square meter).

One of the cases studied has special relevance because the expropriated owners, a family of large landowners since 1935, had access to the necessary resources to take the case all the way to the International Court of Human Rights. This case has provided an overview into the way international conventions or treaties interpret property rights, and how they reconcile principles and general statements relating to human rights with the principally technical process of establishing a specific sum as compensation, in favor of the owner affected by the expropriation.[2]

A COMMON PATTERN: CONFLICT CONCERNING THE AMOUNT OF COMPENSATION

The fundamental conflict in the eminent domain processes in Quito revolves around determining compensation in favor of the property owner. The declaration of public utility, which the Municipal Council has the power to make for each case, usually does not generate major controversy and owners subject to expropriation do not usually question this.

[2] This is a problem that was discussed from another perspective in the chapter five "Constitutional Change, Judges, the Social Function of Property, and Eminent Domain in Colombia."

It is apparent from interviews conducted for this research that the eminent domain process has a high degree of legitimacy in Ecuadorean cities, and government officials are firm in their intention to promote an amount of compensation that reflects general interest and not only the interests of those affected. This double intention results in many owners accepting payments that were set during the negotiation phase, even when perceived as low amounts, whereas others have the social and economic resources to go to court and defend their interests through a number of legal channels. These cases characterize eminent domain as a confiscatory process, causing judges and court experts to justify exorbitant amounts of compensation, in the absence of solid arguments and failing to consider the type of zone where the properties were situated at the time of the announced expropriation, and in some cases even taking into account predicted land value assuming future development or as a result of future public investment projects, destined to be installed near the land areas.

The case studies illustrate some of the tensions that are common when negotiating the indemnification, namely what is the value or price that is owed to the property owner. Other questions that arise: Do straight-forward expectations form a part of property value, and must they therefore be included in the compensation? Should additional payments be allowed for damages such as lost profits, excessive damages, and other moral damages beyond the price of the expropriated property set by law? Should urban regulations be considered, when determining the compensation amount? These case studies have the advantage that they mostly involve projects for creating large metropolitan parks in rural areas. In contrast with urban land, where prices are influenced by a more complex set of factors, these questions are easier to answer in the context of rural land.

The position of municipal authorities is always contested by the court judges. The compensation ordered by the judges tends to incorporate the expectations of future land use and satisfy the interests of the owners by obtaining unusually large sums, argu-

ing that recognizing any amount other than the market value (without defining the meaning of "market value" from the legal point of view) would imply confiscation, which is banned by the Constitution. Another interesting point is that as the hierarchical level of the court reviewing the case increases, the compensation amount tend to increase.

A brief description of three representative cases follows here, concluding with an analysis of the one that reached the Inter-American Court of Human Rights.

THE PUYOL CASE

This eminent domain case was declared by the municipality of Quito for a parcel owned by Ana Carolina Puyol Cabrera, in order to create the Southern Metropolitan Park, whose boundaries had been defined years before. The municipality of the Quito Metropolitan District filed an eminent domain case against the landowner, based on a declaration of public utility issued by the Metropolitan Council in February of 2006 and in May of the same year, the land was occupied.

The expropriated land comprised an area of 193,200 square meters and the municipality assessed its expropriation value at US$105,534, or US$0.54/m^2 an acceptable price for a rural parcel in many Latin American countries, except where there is an expectation that it will be converted to urban use.

The case was heard by the Sixth Civil Court of Pichincha, which ordered a first expert valuation. The assessor determined that the price of the land, plus the damages generated by the expropriation, was US$5,358,746, a sum that was 50 times the amount suggested by the municipality.[3] In order to determine its

[3] US$27/$m^2$, although the unit of measure used for rural land areas is different, but we have adjusted this to square meters tofacilitate comparison. This is the commercial price of a parcel for affordable housing in Bogota, a city with a larger population and a more vibrant real estate market, where the demand for land is much higher than in Quito.

value, the assessor calculated potential investments in the area, considering its possible uses. The land did not have any access to public residential services; however, the assessor considered that in all cases this was a possibility in the future. And the property did not have adequate road access to urban infrastructure.

The Quito Metropolitan District Attorney challenged the expert's valuation in court, arguing among other things that the expert had issued several reports that were biased and damaging to the municipality. The challenge highlighted the fact that the valuation had not taken into account the zoning and land use of the parcel, which was reserved for environmental protection and a park area, with construction restricted to 3 percent of the land area and also subject to height restrictions. Besides this, prior to the declaration of public utility, the land was mainly used for agriculture.

Alluding to the disagreement between the parties, the judge ordered another expert valuation. In this second assessment, the new assessor considered an area of 243,000 square meters, applying an eclectic method known as "equitable market and residual cost," arriving at a value of US$1,984,752, equivalent to US$8.16/$m^2$. The valuation was based on the fact that prior to expropriation, the land had been assigned as having development potential. However, upon being declared a zone of environmental protection and historic preservation, it could not be compared with other parcels with similar characteristics in the area, because none existed.

When contesting the second expert valuation, the Quito Metropolitan District Attorney argued that, as in the case of the first valuation, several factors that negatively affected the price in the area were not taken into consideration (such as the fact that the land was in an environmentally protected area and that the parcel had an irregular shape) and above all, that the expert was recognizing the improved value, generated by a number of public works, previously undertaken in the area.

The Sixth Civil Court of Pichincha issued its judgment on July 22, 2008. It determined that the declaration of public utility

could not be used to justify a confiscatory action, as this was banned by the Constitution; thus, the government had to pay a fair price.

> Eminent domain must respond to both public interest and private interest; therefore, compensation must be paid at a fair price. We also need to remember that eminent domain implies a forced sale imposed by the government or another public law agency, in order to meet a need of social or public utility. This requirement does not allow the government, as in the present case, to allege the existence of factors that negatively affect private property; therefore the judge in circumstances such as these is legally required to determine the fair price according to the circumstances of the case, and the opinion of the expert assessor is not necessarily sufficient to determine the price, and much less assess the arguments made by the public authority.

Referring to these arguments, and considering that current laws do not require compliance with expert valuation reports, the judge ordered a compensation amount of US$3,645,000. The municipality appealed the ruling, using the same arguments as before to contest the assessments, but the Provincial Court of Pichincha confirmed the judgment, ruling that eminent domain cannot be the reason for the affected party suffering a loss. It further stated that the compensation amount should make it possible for the property owner to obtain a similar property to the one he owned previously.

The municipality filed an injunction to annul the judgment, but during this process the parties reached an agreement, according a compensation amount of US$2,249,818 (US$11.64/m^2). The agreement was ratified by the Sixth Civil Court of Pichincha.

THE BEEDACH CASE

As part of the project to create the Southern Metropolitan Park, in the year 2006 the municipality of Quito's Metropolitan District filed an eminent domain petition against Rodrigo Beedach Santomaro, based on a declaration of public utility, issued by the

Municipal Council. The expropriated land consisted of an area of 350,000 m^2 and was initially valued by the municipality at US$212,272 (US$1.60/m^2).

During the judicial process, the first expert assessor from the Puyol case submitted a report by request of the judge, in which he suggested two values. One considered an average or replacement value, estimated at US$20,335,287 and the other a potential market value of US$8,133,624. Both quantities were exorbitant and quite distinct from the proposals made by the municipality. One of them was obviously excessive (US$58/$m^2$ for rural land).

The municipality filed an objection to the valuation, alleging that the area considered by the assessor was larger than the one intended for expropriation. It also argued that the land was environmentally protected and that its main use, prior to the declaration of public utility, had been agricultural.

The judge ordered a second professional valuation which determined a value of US$3,982,918 (US$18.76/m^2). The municipality also objected to this report, claiming that it did not take into account the protected status of the land and that the increased value generated by a neighboring road project had not been subtracted. Civil Judge 24 of Pichincha accepted the parameters of the second assessor in his judgment, but without any rationale ordered, a higher compensation of US$5,212,942; equivalent to US$24.55/$m^2$.

The municipal representative appealed this ruling, but the First Civil Superior Court, instead of backing the appeal, decided to increase the compensation amount even further. It stated that eminent domain could not be applied in order to disguise confiscation and recalculated the land value with reference to the cadastre valuation. It then declared a compensation amount of US$7,167,850.

The Alvarado Case

This was an eminent domain case filed by the *Municipality of Quito v Maria Guadalupe and Lidia Schoeneck de Alvarado* in order to

acquire a parcel of 89,883 m^2. The process started with a declaration of public utility by the Municipal Council in order to construct the third section of Quito's Eastern arterial road (*Vía Oriental*). In its petition, the municipality initially argued that no compensation was obligated, in conformity with Article 249, Section 3c of the Municipal Charter, as explained below.

The judge in charge of the case ordered a professional valuation, which determined that the property had a value of US$3,598,400 (US$40/m^2). The municipality objected to the assessment, arguing that Article 249, Section 3e of the Municipal Charter, which was in effect at the time of the expropriation, stipulated that when land declared of public interest by government agencies occupies less than 50 percent of the total area of the property, no compensation payment was obligated. Subsequently, the Constitutional Court rejected this ruling, applying Resolution 1112000 of 2000, which argued its unconstitutionality.

It also argued that the valuation omitted the fact that when the property was declared of public utility, it was removed from the market, affecting its price. Likewise, it maintained that the valuation was based on a comparison with neighboring properties at the present time, without analyzing land prices and building costs in the area, or incorporating the improved value related to public services implemented in the area by the municipality, subsequent to the expropriation decree. It also highlighted the fact that the valuation did not reduce the price due to factors such as the size of the parcel.

A second professional valuation applied the residual method, using nearby parcels as a basis for comparison. Using this methodology, it determined that the price of the parcel at the time of the expropriation was US$238,562, but at the present time its value was US$2,103,697 (US$23/m^2).

The municipality accepted the land valuation carried out at the time of the expropriation. However, it argued that the calcu-

lation was made with reference to an area larger than the one specified in the eminent domain action.

The second Civil Judge from Pichincha accepted the valuation corresponding to the price calculated at the time of the expropriation (i.e. US$238,563) and ordered payment of interest. She did not modify the area defined by the assessor.

The municipality appealed the sentence, however the Superior Court ruled against this, increasing the amount of compensation based on the concept that eminent domain cannot be used as a confiscatory mechanism, and that a fair price must be paid enabling the owner to purchase a parcel with similar characteristics. For this purpose, it used as reference another expropriation implemented by the aqueduct company, and ordered a compensation value of US$1,803,169.

The municipality filed two more injunctions; one requesting annulment from the Supreme Court, which was denied, and the other for special protection from the Constitutional Court. This last appeal was decided on October 8, 2009, negating the petition, deeming that the case had not violated any rights for effective and impartial protection, in terms of defense and legal security. The Ecuadorean Constitutional Court did not make any pronouncements regarding property rights.

Human Rights, International Justice, and Eminent Domain: The Case of Salvador Quiriboga

As indicated in the introduction, the most interesting case constituted the expropriation of 160 acres (65 hectares) for the Northern or Guanguiltagua Metropolitan Park, the owners of which inherited the property between 1974 and 1977 from their father, who in turn had purchased the area in 1935. These owners opposed persistently and implemented several simultaneous court actions against the declaration of public utility, the compensation established by the municipal government, and also

the eminent domain petition. For this purpose, they filed many administrative and court appeals. These procedures are described in detail here, because the most important argument, made before the Inter-American Court, referred to the delays in the legal process and the resulting effect on the owners, preventing them from either enjoying their property or receiving adequate compensation.

Proceedings in the Ecuadorean Courts

As stated in the petition filed by the Inter-American Commission before the Court, on May 13, 1991, Quito's Municipal Council declared the property to be of public utility and subject to expedited occupation and expropriation, together with other land areas. The owners, the Salvador Chiriboga siblings, appealed the public utility declaration to the Government Ministry, representing the pertinent jurisdiction according to the Municipal Charter.

Some years later, those affected requested permission from the Quito Municipality to develop approximately 7.5 acres (3 hectares) of their property, which was denied on September 7, 1994, by the Planning and Classification Committee (*Comisión de Planificación y Nomenclatura*). On January 12, 1995, the owners filed a subjective or full jurisdiction appeal before the First Administrative District Court, requesting that the administrative ruling on the part of the Planning and Classification Commission be declared void and illegal.

Although these petitions in court had not yet been fully decided, on August 28, 1996, the Municipality of Quito filed an eminent domain petition, and on September 24 of that year, Civil Judge Nine of Pichincha authorized the immediate occupation of the land area, after the payment of a sum established by the Municipality in accordance with Ecuadorean law. The compensation amount was 225,990,625 sucres (US$300,000, equivalent to US$0.50/$m^2$), a sum the owners refused to accept, considering it insufficient.

The order was served on the owners on June 6, 1997, who requested its annulment, given that several requirements of Ecuadorean law with respect to expropriation had not been fulfilled. In the meantime, the municipality took possession of the land area, felled trees, initiated construction, and banned the owners from the property. On September of 1997, Civil Judge Nine of Pichincha accepted the petition filed by the owners, finding that the municipality had not complied with all the constitutional and public contracting requirements. The municipality appealed this decision, but the appeal was flatly denied. On February 17, 2008, Civil Judge Nine recused himself from the case and referred it to the First Administrative District Court, which never took charge of the case. Subsequently, we return to this legal process.

In the meantime, in 1997, the Government Ministry issued Ministerial Agreement 408, revoking the decision to declare the property of public utility. Days later, it issued Ministerial Agreement 417, negating the prior Ministerial Agreement. In December of 1997, the owners filed a subjective or full jurisdiction appeal before the First Administrative District Court, requesting the annulment of Ministerial Agreement Number 17 and requesting that their property rights with regard to the land be recognized and respected. When the Inter-American Commission filed its petition before the Court, the subjective petition had not yet been resolved, but in the meantime, as indicated forthwith, the Constitutional Court confirmed the legality and constitutionality of the municipal proceedings in 2001.

In parallel, the owners filed an appeal for injunctive relief before the First Administrative District Court 1, arguing that the expropriation had violated the rights guaranteed by the Constitution, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, and moreover, that it did not comply with the national laws on eminent domain. The Administrative District Court refused to consider the appeal, a decision which was appealed to the Constitutional Court. On September 15, 1997, the Constitutional Court ruled that the

lower court could not recuse itself and had to consider the injured party's appeal. The District Court then denied the appeal on October 2, 1997, considering that the eminent domain process initiated by the Municipality had been legal. In spite of this, the owners appealed the decision to the Constitutional Court. On February 2, 1998, the Court confirmed the legality of proceedings carried out by the municipality, declaring that it had acted within the legal authority provided by law, having produced the necessary technical and legal reports and in the light of the court authorization for an immediate occupation.

As if this were insufficient, in January of 1995, the owners filed an appeal for protection of rights before the Second Court of the First Administrative District Court 1, in order to request that the administrative decision on the part of the Planning and Classification Commission issued on September 7, 1994, rejecting the petition to develop 7.5 acres of the property, be reversed and declared illegal. This appeal was rejected in December of 2002. Similarly, they filed an appeal for protection of rights in February of 1996, before Courtroom Two of the First Administrative Court, objecting to the actions of the Municipal Attorney General, who had sought a reversal of the actions of the Government Ministry, which had accepted a claim against the declaration of public utility, by default. This appeal was also rejected by the Ecuadorean Supreme Court on February 13, 2001.

Some of the complaints filed by the owners against the municipal administration were resolved quickly by the courts, and particularly by the Constitutional Court, which confirmed the constitutionality and lawfulness manifested by the municipality. In others, particularly the consideration of the initial petition for eminent domain, the proceedings were delayed, not only because of the constant motions filed by the owners and the active responses by the municipal representatives, but also due to inept functioning on the part of the Ecuadorean courts, as pointed out by the state representatives before the Inter-American Court.

The determination of the compensation amount, which is the responsibility of the judge, was subject to several professional valuations and corresponding objections. In 2007, when the case was pending at the Inter-American Court, an expert nominated by the Ecuadorean court, based on cadastre valuations of neighboring parcels made by Quito's Metropolitan District determined that the value of the property was US$78/m^2 and that the total value of the property was US$50,421,736.

The municipal representatives objected to the professional assessor's report because it neglected to consider factors that decreased the value of the land, such as the presence of high voltage transmission lines, the irregular topography of the property, restrictions on land use, the fact that the land was in a reservation area designated for protection and recreation, and the lack of public services and roads. The brief filed together with the objection stated that the assessor had compared the expropriated property with neighboring areas that did not have the same physical and zoning features and had arrived at an excessive value, in the absence of any clear methodology.

In 2008, given the irreconcilable dispute between the assessor and the municipality concerning the property valuation, the judge ordered another valuation, which found that the property was worth US$41.890.819 (US$ $28.19/m^2) and he ordered payment of US$18,201,930 in interest. The municipality also objected to this new professional valuation.

On April 3, 2009, almost one year after the final ruling issued by the Inter-American Court of Human Rights, the Ninth Civil Court of Pichincha issued a ruling on the case, accepting the second assessment and ordering payment of US$41,214.233 to the owner. As justification of his decision, the judge argued that, complying with Ecuadorean constitutional and legal norms, the purchase of an expropriated asset must guarantee that the owner does not suffer financially.

> [C]ompensation for expropriation is not a price paid to acquire the property, but from the legal point of view constitutes compensation for damages suffered by the owner for causes of public utility or social interest, for which he is not obliged to take responsility and thus it represents a real indemnity.

Initiating from this viewpoint, the judge determined that, although Article 242 of the Municipal Charter stipulates that valuations will be determined based on the value of the property at the time the eminent domain process is initiated, while other laws in the Code of Civil Procedure allow the judge to establish the amount of compensation and whether to take into account the experts' reports and the valuation established by the National Directorate for Valuations and Cadastre (*Dirección Nacional de Avalúos y Catastros*).

The municipality appealed this ruling, arguing that once the Inter-American Court had accepted the petition filed by the owners, the Ecuadorean courts ceased to have jurisdiction.

In fact, on June 3, 1998, only a few years after the eminent domain process was initiated, the case had been presented to the Inter-American Commission of Human Rights, citing the lack of progress concerning the cases filed in the various Ecuadorean courts. The Commission, after multiple proceedings, filed a petition in 2006, and the Inter-American Court issued a ruling on the preliminary objection[4] and the merits of the case in 2008, and awarded reparations in 2011, following procedures as detailed below.

Two matters were debated in the national and international courts: first whether eminent domain was justified, where both rulings left no doubt that it was. The other concerned the compensation amount, a matter fraught with ambiguities and contradictions, as we analyze in the following.

[4] In the meantime, it rejected the preliminary objection of the state, which had argued that the Ecuadorean court process had not yet been exhausted.

Proceedings Brought before the Commission and the Inter-American Court on Human Rights

Based on the information contained in the petition filed by the Inter-American Commission on Human Rights (IACHR) before the Court,[5] once the claim was submitted by the owners, a long process ensued attempting to reach an agreement between the parties. The objections and counter objections with respect to the petition filed by the parties took more than a year, and on October 5, 1999, there was a hearing in which the Mediation Center of the Attorney General of Ecuador offered to mediate the dispute and initiate a dialogue in order to arrive at an amicable solution. The parties agreed to keep the IACHR informed about their proposals and the time they estimated as necessary for completing the mediation process.

On March 2, 2000, the Commission held a second hearing on the case, which failed to reach an agreement, and the parties exchanged legal briefs for another year. On January 18, 2001, the owners requested a new hearing before the Inter-American Commission, which was rejected due to the large number of requests received for that session. On January 26, 2001, the Commission received a notice from the government, in which it restated its interest in arriving at a mutually amicable solution to the dispute, describing all the court actions taken by the owners subject to expropriation, and indicating that the owners had not yet exhausted all permissable procedures available in the Ecuadorean justice system. However, in September of 2011, the government reaffirmed that the authorities had acted in agreement with the laws and constitutional provisions regulating their actions.

[5] The petition can be seen in: *http://www.cidh.oas.org/demandas/12.054%20Salvador%20Chiriboga%20Ecuador%2012%20dic%2006%20ESP.pdf.* Oganization of American States, Inter-America Commission on Human Rights, petition before the Inter-American Court of Human Rights, in the case of Salvador Chiriboga (case 12,054) v. the Republic of Ecuador. Ruling on the merits of the Inter-American Court of Human Rights, May 6, 2008, *http://www.tc.gob.pe/corte_Interamericana/seriec_179_esp.pdf.*

After a new exchange of communications between the parties, the IACHR approved Report No. 76/03 on October 22, 2003, in which it admitted having acted in case #12,054 "which alleged violation of Articles 21(2), 8(1), 25, 2 and 1 of the American Convention on Human Rights." The Commission again offered its services to the parties in order to arrive at an amicable solution to the issue, and in November the representatives of the injured party stated their willingness to find a solution, but that it was impossible given the disagreement between the parties with regard to the compensation amount.

After two further years of communications between the parties, on October 15, 2005, during its 123rd Session, the IACHR approved Report No. 78/05, which addressed the essence of the case, and concluded that the Ecuadorean government had violated rights to legal guarantees (Article 8), private property (Article 21), and legal protection (Article 25), as well as the general obligation to respect and guarantee all rights stipulated in Article 1 (1) of the American Convention, and had failed to adopt domestic legal provisions, as stipulated in Article 2 of the same international document. In this report, the Commission recommended to the government of Ecuador:

1). To grant full reparation, determined in an impartial and independent manner, including the payment of fair compensation for the correct value of the property and for the time the owners were prevented from using and enjoying it.
2). To adopt all necessary measures to implement legislation on eminent domain, in the real situation.
3). To adopt all necessary measures to prevent similar cases from occurring in the future.

Once this recommendation was received, the expropriated owners petitioned to file the case in court, and the state requested a three month deferment in which to submit a report on the internal proceedings, which was granted. In addition, the government waived the right to file appeals beyond this period. After a year,

in which several reports were submitted, including one referring to the death of the judge who was familiar with the expropriation process, the procedure to replace him, and the nomination of professional assessor in December of 2006, the owners insisted on taking the case to the Inter-American Court, and their petition was finally granted by the Commission on December 8.

Proceedings in the Inter-American Court initiated in December of 2006. In addition to filing the petition and responding, in October of 2007, there was a public hearing during a period of extraordinary sessions, in which the Attorney General of Ecuador, representing the Government of Ecuador and presenting arguments provided by the delegate of the Municipality of Quito, emphasized the fact that the petitioners had had access to various types of Ecuadorean courts, and that the Ecuadorean Constitutional Court represented the authority issuing decisions of final resort, and reiterated that the property was subject to a declaration of public utility, and all due process measures had been followed accordingly.

Once the final arguments were presented, in May of 2008, the Inter-American Court issued a ruling on the preliminary objections and on the merits of the case, rejecting the argument presented in Articles 2 (wherein states commit to adjust their internal legislation to adopt the freedoms and rights guaranteed by the Convention), 24 (which establishes the principle of equal treatment under the law), and 29 (concerning the interpretation of rules) had been violated, but ruled that the right to private property, stipulated in Article 21.1 of the American Convention and the right to legal guarantees and protections, stipulated in Articles 8.1 and 25.1 of the same Convention, all in relation to Article 1.1 of this instrument had been violated.

In particular, it considered that the right to a fair trial within a reasonable period of time, presided over by a judge or competent court in order to determine rights of any kind (Article 8), and the right to legal protection, particularly the right to a simple and timely appeal or any other effective appeal to protect against

violations of fundamental rights had been violated. Finally, the Court considered that the Ecuadorean government had violated the right to private property, citing the impossibility of being deprived of property, unless with payment of fair compensation, for public utility or social interest causes, and in the cases and according to the forms established by law.

In spite of this, for the officials of the Ecuadorean Government, the condemnatory ruling was a triumph for the government because it recognized that the constitutional and legal framework of the country concurred with the standards of the Inter-American Convention on Human Rights. Likewise, the court determined that compensation had to be calculated based on the market price of the property, prior to the declaration of public utility, i.e., without taking into account expectations related to urban use, as argued by the owners. This ruling trumped the arguments of the petitioners, who had claimed a disproportionate amount of compensation of up to US$150 million, based on a calculation of US$200/$m^2$ (for rural land that was reserved for environmental conservation), in addition to damages for violation of human rights, as customarily applied by the Court.

In its ruling concerning the merits of the case, even though the Inter American Court concluded that the property rights of the owners had been violated, it did not make a pronouncement on one of the central points of the controversy: the calculation of the amount and payment of just compensation for the expropriation of property, as well as the payment to redress violations as specified in the ruling. This aspect was left to discretion of the Ecuadorean system, having once again been invited to reach an agreement, during the six months from the date of the ruling; and the Court reserved the right to review the agreement in order to verify whether it complied with the standards of the American Convention and in the event that an agreement was not reached, to determine the adequate reparation payment.

In order to comply with the ruling, the parties met several times in Quito during the year to establish an agreement con-

cerning compensation price, but once again this dialog was inhibited by discrepancies between the parties. While the owners were asking for a payment of almost US$152 million, the state was offering no more than US$6 million, based on a valuation carried out by the Professional Valuers Association of Ecuador, and considering that the property was classified as rural land—this represented an adequate or even elevated sum, for this type of land, when compared with other Latin American countries. Even though the owners reduced their claims to US$55 million, waiving interest payments, no agreement was reached, and the Ecuadorean state declared the need to initiate new litigation, paving the way for an order by the Inter-American Court to pay court costs.

At this point, the conflict had ceased to be a matter for the municipal government, and was in the hands of the Attorney General of Ecuador, the Ministry of Foreign Relations, and the Ministry of Justice and Human Rights, created in 2007 with the aim of assuring the endurance of the country's human rights for its citizens and improving the administration of justice.

During the negotiation stage, the owners' representative filed complementary petitions, directly related to determining compensation value while taking on the role of victims, as if suffering serious violations of actual human rights, for example, the right to life or to personal integrity. They proposed that the park be named "Guillermo Salvador Tobar," after the person who had initially bequeathed the land to the current owner, and emulating the struggle against impunity, they requested an investigation and public report on those responsible for the expropriation, as well as publication of the ruling, this representing the only claim accepted by both parties. As if this were not enough, during this stage there were repeated debates concerning guarantees to prevent a repetition of these types of actions, might very likely have forced a reform of the Municipal Charter, although the Court had declared that it complied with the standards of the American Convention. Lastly, they discussed the category of ecological

reserve, assigned to the expropriated properties by the municipal government.

After more than two years of trying to reach an agreement, and a renewed exchange of legal briefs and observations, the Court decided to take charge of determining compensation, prompted by the Ecuadorean government representatives themselves among others, who asked the Court to rule on proceedings, in the context of the Ecuadorean court cases still pending.

The Arguments

After the sequence we have just described, we now present the arguments made by the Commission, the Ecuadorean government, and the Inter-American Court.

The Position of the Inter-American Commission on Human Rights

On October 15, 2005, in its report referring to the admissibility of the case, the Inter-American Commission on Human Rights recommended:

1). To grant full reparation, calculated in an impartial and independent manner, including the payment of compensation for the correct value of the property and for the time the owners were deprived of its use and enjoyment.
2). To adopt all necessary measures to implement legislation on eminent domain, in the real situation.
3). To adopt necessary measures to avoid similar cases in the future.

The arguments related to property rights and eminent domain consisted of the following:

1). Although the right to private property can be subordinated to the general interest, a reasonable balance must be found, in terms of the means employed and the stated objective, when restricting a person's right to have access to their property.

2). The American Convention allows governments, in certain circumstances, to deprive individuals of their property, if the objective is to provide for the common good. In these circumstances, it is understood that the government seeks to fulfill certain objectives related to general welfare, if these cannot be attained by other less onerous means. However, the exercise of eminent domain is not discretionary, nor is it exempt from limitations designed to prevent it from becoming confiscatory. Nobody is obliged to support the public treasury disproportionately, in comparison to the rest of society.
3). For an expropriation to be compatible with property rights, as enshrined in the American Convention, it must be based on "public utility or social interest causes; upon payment of fair compensation; and limited to cases and according to forms established by law." Here, the concept of "integral compensation" is defined as one that provides the owner economic indemnity. Likewise, compensation must be paid prior to the government taking possession or exceptionally, within a short period of time after the government has taken possession of the property. The balance between the people's right to property and the government's capacity to take possession of their property in exceptional cases, when justified by public interest, can only be achieved with effective payment of compensation.
4). If governments were able to take over people's property for prolonged periods of time without paying the corresponding compensation, there is no doubt that the right to property in terms of the American Convention would be subject to the whim of government officials. This would also result in the effective enjoyment and protection of the right to property becoming illusory.
5). The proceedings and evidence to date were not sufficient to issue a legal decision and an impartial and independent body to definitively value the expropriated property and

order the immediate payment of fair compensation. The Commission found that the payment made by the municipality was unacceptable, even though it complied with Ecuadorean law, because a). it was unilaterally established by the agency that initiated the expropriation; and b). Ecuadorean law stipulates that the compensation amount must be determined within a short time by the courts should there be no agreement between parties.

6). Fifteen years had passed since Quito's Municipal Council declared the property of the Salvador Chiriboga siblings of public utility and subject to expedited occupation[6] and expropriation, without providing the owners the compensation they deserved for having been deprived of their property.

7). As ruled by the European Court of Human Rights,

> abnormally lengthy delays in the payment of compensation for expropriation lead to increased financial loss for the person, whose property has been expropriated placing him in a position of uncertainty, especially taking into account the monetary depreciation which occurs in certain states. Similarly, the same European Court has stated that those affected by this type of delay suffer an excessive individual burden, disrupting the fair balance that must be maintained between the general protection of the right to peaceful enjoyment of property and the requirements of general interest.[7]

Arguments on the Part of the Municipal Authorities and the Ecuadorean Government

The Ecuadorean authorities focused their arguments directly on the valuations introduced to the process by the Ninth Court of Ecuador. They argued that these valuations had not taken into

[6] In fact, the effective occupation of the property took place in 1997.

[7] The cases cited by the Commission were *Eur. Court H.R., Case of Akkus v. Turkey*, 60/1996/679/869, ruling issed on July 9, 1997 §29; *Aka v. Turkey*, No. 107/1997/891/1103, ruling of September 23, 1998, §49; *Eur. Court H.R., Case of Baskan v. Turkey*, No. 66995/01, July 21, 2005, §21.

account the regulations establishing the Metropolitan Park as a zone of ecological reserve for recreation with community facilities and questioned the comparative or business approach applied by the valuer, who referred to "commercial areas with great added value, urban development areas, and high quality land with a degree of consolidation, construction, and architectural features of urban properties; all completely removed from the physical reality of the property facing expropriation."

Likewise they also questioned the consideration of neighboring parcels used to define the value, as these were zoned for urban development and a different type of land use. Similarly, the officials argued that the expert's valuation report failed to deduct the improved value generated by a road project close to the area, as indicated by law. For these reasons, they considered that the professional valuer's report was not up to technical standards and thus illegal.

The Ecuadorean Government defended itself before the Inter-American Court, claiming that it was necessary to find a balance between public and private interests, so that neither of them would be adversely affected. Corrrespondingly, it affirmed that the property owner had a right to compensation for his property, but not to become unjustifiably wealthy at the expense of public interest. It argued that the delay in the eminent domain process was due to the multiple legal petitions filed by the owners, many of which were not pertinent for achieving the goal they asserted, whereas in contrast, the Municipality of Quito had complied with all regulations and requirements in order to advance the process.

With respect to the right to property, it pointed out that although this institution was created by Roman law as an expression of individual rights, granting comprehensive rights to the owners without limitations, during its evolution in Roman and Germanic law, certain limitations were introduced, when the common good derived benefit.

The defense declared that viewed from this perspective, modern states guarantee the right to private property, provided

that it fulfills an "economic and social function," which in practice imposes a number of possible limitations.

This evolution as applied to property rights was incorporated into the Ecuadorean legal framework:

> The Political Constitution of the State has incorporated the most relevant aspects of this property debate in its Article 30, stipulating that the following criteria must be complied with for it to exist: it should fulfill its social function, in which case the State shall recognize and enforce its compliance as a right . . . and further on in Article 33, when it defines the essence of eminent domain as a social goal, regulated by law and legal proceedings; it introduces the basic exception to private property. This is more or less consistent with the scope of this institution, in Latin American legislation.

Based on the American Convention on Human Rights and a number of rulings from the Inter-American Court of Human Rights, the defense maintained that the Inter-American system protects the use and enjoyment of property, but recognizes that it is subordinate to the general interest, when stipulated by law. In this sense, the deprivation of property can be carried out, in exchange for a fair compensation payment. Among the cases cited by the State are *Awas Tingi v. Nicaragua*, *Palamara Iribarne v. Chile*, and *Yakie Axa v. Paraguay*.

Government representatives maintained that the expropriation of the property that belonged to Mrs. Salvador Chiriboga had implemented, while respecting these provisions, as it was declared of public interest as stipulated by law and correct compensation was paid.

Likewise, concerning the specific subject of compensation, the government affirmed that Mrs. Chiriboga's property was never intended for urban development, and therefore its value could not be calculated in terms of this potential.

> [T]he 1973–1993 Master Plan, defined *Quito and its Metropolitan Area*, and in *Plan Quito* from 1981, the limit for areas for urban development was fixed at an elevation of 2,860 meters above sea level; with several categories (protected forest, green belt, or protected area). All subsequent studies re-

> affirm this initial determination and therefore Mrs. Salvador Chiriboga's property was never included in the area for urban development until it was declared of public interest, together with other properties totaling 1376 acres, destined to the creation of the Metropolitan Park.
>
> The outcome of this legal perspective on property valuation implies that what is exchanged in the marketplace is neither an object nor a tangible good, but rather a set of rights, which in the case of the City of Quito are stipulated in the Quito Metropolitan District Land Regulations and in the Land Use and Occupation Plan. . . .
>
> . . . [T]he valuation cannot consider this property as anything but undeveloped land, and therefore the closest parcel to the property in question provides the analogous parameter. . . . Ultimately, we are talking about rural land. The mere existence of other parcels in the vicinity that are zoned for urban use does not alter the historic categorization assigned to this property by the Municipality of Quito.

Based on the previous arguments, the government considered that the valuation method applied to this case should not consider its market value in terms of an urban parcel and thus it was impossible to apply a comparative methodology. The assessment should instead consider criteria typically applied to rural land, such as the agricultural return on investment, the location, and soil quality. However, the government also recognized that the valuation should also take into account that the property was located on the periphery of the city and as such it should not be assigned an exclusively rural classification, in terms of value.

> Its legal classification as environmentally protected land generates social and ecological public benefits, with reference to its role in flood control, water resource protection, providing landscape or passive recreation and environmental protection, etc., which must be valued by applying methods for public property with no market value, generally producing a higher value than if we simply used the comparative or residual methods, where applicable.

From this, the Government argued for a methodology that took into account the prices of rural land in the vicinity, balanced by the prices of urban land in the vicinity. The proposed value was calculated at US$6,043,635.25.

The Arguments and Ruling of the Inter-American Court

For its part, the Inter-American Court of Human Rights avowed that Article 21 of the American Convention recognizes the right to property as one that enables its owners to freely exercise the use and enjoyment of their property; this right can be limited by social interest. In this respect, it stated:

> The social function of property is an essential aspect of its existence and therefore the government may limit or restrict the right to private property for the purpose of guaranteeing other fundamental rights that are vitally important for a specific society, while always respecting the definitions stated in Article 21 of the Convention, together with the general principles of international law.

Limits are applied to the Government in terms of its authority to deprive someone of his property rights, in relation to certain conditions that define the way this is justified, the guarantee of fair treatment to the person subject to expropriation, and the proportionality and need for the measure. Therefore:

> for the deprivation of a person's property to be compatible with the right to property, this must be based on public utility or social interest causes, subject to the payment of fair compensation, performed in accordance with the cases and forms established by law and in compliance with the Convention.

This also stated that

> the restriction of the rights enshrined in the Convention must be proportional to the interest of justice and comply strictly with the achievement of this goal, interfering as little as possible with the effective exercise of [a] right. . . .
>
> . . . The exceptional nature of this action means that any restrictive measure must be based on achieving a legitimate outcome for a democratic society, in accordance with the aims and purpose of the American Convention. Thus, it is important to analyze the legitimacy of public utility, and the procedure or process employed to achieve this goal.

In this particular case, the Court confirmed that the declaration of public utility was justified and based on the law; thus, it could

be considered proven that the expropriation was proportional and based on a legitimate need. In this regard, it concluded that the creation of the Metropolitan Park adhered to a general social interest, compatible with the rules defined in the American Convention.

The greatest deficiency found by the Court had to do with the delay in resolving the petitions filed by the owners that negated the declaration of public utility. The fact that these issues had not yet been resolved when the Inter-American Court issued its ruling constituted a violation of the principle of reasonable timeliness and the effectiveness of internal resources. Apparently, the Court did not consider that this delay could have been caused by the owners themselves, who filed several legal petitions with the purpose of obtaining higher compensation.

With regard to compensation, the Court stated that according to the Convention, this is an essential precondition to the existence of eminent domain, and must be adequate, timely, and effective. Likewise, it pointed out that in order for the compensation to be fair, one has to refer to the commercial value of the property, prior to the declaration of public utility. In this regard: "This Court considers that in order to comply with fair compensation payment, this must be adequate, timely, and effective."

As just mentioned, the Court considered that in cases of expropriation, in order for fair compensation to be adequate, it must be based on the commercial value of the property before it was declared of public utility, striking a fair balance between general interest and individual interest.

Taking this into consideration, the fact that the eminent domain process lasted more than 10 years without producing a definitive decision concerning the amount of compensation implied that one of the basic requirements for legitimately revoking the right to property had not been fulfilled. The Court considered that the temporary payment, based on the cadastre valuation, was insufficient, although consistent with Ecuadorean internal legislation. This payment, in the opinion of the Judges,

did not comply with the standards imposed by the American Convention, or with international standards and principles, in the light of the fact that the Government had not set the definitive value of the property or approved the payment of fair compensation to Mrs. Salvador Chiriboga during a period that exceeded 10 years. The Court considered that this delay rendered the expropriation an arbitrary procedure.

The Court concluded that

> [s]pecifically, the Government failed to comply with the stipulations established by law, violating the judicial protection and guarantees, considering the fact that the remedies filed exceeded the reasonable term and were ineffective. The foregoing has indefinitely deprived the victim of her property, as well as of the payment of just compensation, causing both factual as well as legal uncertainty and resulting in excessive charges imposed on the victim, transforming the expropriation into an arbitrary procedure.

Finally, as already mentioned, the Court ordered that the amount and payment terms for fair compensation related to the expropriation of property, as well as any other measure needed to repair the violations identified in the present ruling should be determined by common agreement between the government and the owner's representatives, who reserved the right to verify whether this agreement complied with the American Convention on Human Rights and likewise determine the pertinent reparations, expenses and court costs.

The Court refrained from evaluating the validity of the criteria presented by the government for determining whether the compensation amount was adequate or whether the position adopted by the petitioners was justified, while barely mentioning the need to reach a prompt final decision concerning compensation and the legal status of the property, applying internal legal procedures.

As for the compensation amount, in expropriation cases such as these, this should be determined, taking into account the commercial value of the property prior to the declaration of public

utility. In this regard, this attributed partial legitimacy to the government, but without making a specific statement for the court resolution. The Court stated:

> 98. The Court considers that in expropriation cases, in order for just compensation to be adequate, the commercial value of the expropriated property, prior to the declaration of public utility must be taken into account, but also striking a fair balance between general interest and individual interest, as referred to in this Judgment (paragraph 63 above).

The Ruling in Terms of Reparations and Court Costs

As the parties could not reach an agreement, the Inter-American Court had to become involved in the debate concerning apt criteria for determining compensation, and in particular, how to define the actual sum of money to be paid. Thus it was forced to abandon the abstract discourse on human rights and start defining technical parameters about the behavior of the market; an area which was outside its expertise.

The following details the arguments adopted in this ruling, with the following points: 1). the rejection of an international expert's report; 2). substantive arguments and expert valuations: general principles and expertise; 3). Inconsistency between the valuation criteria and the amount of compensation. How should the amount be finally determined? and 4). The dissenting opinions that relaunch the substantive debate concerning how to define the value of an economic right such as that relating to property, in a manner consistent with the discourse on human rights.

The Inter-American Court Dismisses an International Expert Valuation

In order to obtain a decision from the Court concerning compensation, in a public hearing on September 24, 2009, the parties declared that one of the points they had agreed on was that the Court had sufficient evidence to determine fair compensation, in compliance with the ruling of May 6, 2008. In spite of this, they indicated that should it be necessary, they would resort to an

international entity to carry out a valuation and also offered to submit a list of persons and international bodies capacitated to produce the expert report.

As is usual in Court proceedings, the first stage consisted of an attempt to reach an agreement. Once the list had been submitted, the Court clerk indicated that an agreement might be reached concerning the nomination of a professional assessor, who worked for one of the companies submitted by the repre-sentatives, and was affiliated to an entity recommended by the government.

Representatives from the Ecuadorean government insisted on nominating an institution, or another organization associated with it, instead of a person or private company and thus proposed that the Court submit the case for virtual discussion at the American Assessment Forum (*Foro Americano de Tasaciones* [FAT]), also suggesting that the designated assessor and a Court officer pay a visit to the Metropolitan Park in the City of Quito. In the light of this stance and the lack of agreement, the proposal to name an international expert was dismissed and the parties re-iterated that the Court had sufficient evidence to determine a fair compensation amount.

Substantive Arguments and Professional Valuation: General Principles and Expertise

Once the international expert's valuation had been discarded, the Court began to consider valuations that had been carried out within the Ecuadorean and Inter-American court systems (two and three, respectively), starting from the premise that

> any violation of an international obligation that causes damage carries with it the obligation to adequately repair this damage; this is one of "the fundamental common law principles of contemporary International Law, regarding government responsibility.

The central argument on the part of the Court was that the damage was inflicted by the absence of fair compensation. Thus, the ruling reveals an ambiguity between granting reparations for delay in pay-

ment and compensation for the expropriation of the property.

In the opinion of the court, parameters of international jurisdiction used to determine the value of fair compensation are as follows: 1). fair compensation is "that which allows the victim to retain his economic integrity," in other words, that does not imply damage to his patrimony; 2). the value of compensation must be identical to the value of the property being expropriated that is causing a reduction in the property owner's assets; and 3). one way to measure the value of a land parcel is to consider its market value, or the amount needed to purchase other properties, similar to the one being expropriated.

Referring to these parameters, the Court established two substantive criteria in order to determine the amount of compensation, one more definitive than the other: 1). the commercial value, prior to the declaration of public utility; and 2). a fair balance between general interest and individual interest.

The ruling analyzed the concept of material, as opposed to intangible, damage. With respect to the first one, there was some confusion: it stated that in this case, material damage was not being analyzed from the traditional perspective of emerging damage or loss of earnings (loss of profits), but rather the absence of payment of fair compensation, causing material damage to the owners, related to the internal responsibility of the state. The Court, from our point of view, overlapped and confused the damage caused by delay in payment, which is normally resolved by adjusting for currency devaluation or taking into account interest rates, together with the requirement to determine the economic content or value of the expropriated property.

The court repeated this argument, pointing out that the uncertainty of not knowing the compensation amount due to delays in the legal process was more damaging than the measure itself, tilting the balance between general interest claims and safeguarding the right to property. This aspect was reflected in the Court's ruling on the situation; noting that neither the subjective nor the full jurisdiction petitions filed by the Salvador Chiriboga

siblings, nor the expropriation petition filed by the government were resolved in a reasonable period of time and nor were they effective.

However, the analysis of intangible damage, not usually recognized in cases of eminent domain, sometimes even complicating the notion of damage, emphasizes the difficulties of embedding property rights in the context of civil and political rights, as is the case with the American Convention on Human Rights.[8] Human rights refer to the suffering and afflictions caused directly to a victim and their relatives, the impairment of values that are very significant for human beings, as well as alteration in non-monetary aspects of living conditions for the victim or his family.

According to the owners' representatives, one of whom died during the proceedings, for reasons unrelated to the case, they had "experienced a great deal of worry . . . being subjected to a situation of complete insecurity regarding their assets (and their family's assets) during several decades, due to delays in the court system." Mrs. Salvador Chiriboga declared in one of the public hearings that the legal process had had a very strong impact on her health.

The Governent representatives on the other hand, pointed out that:

> not all (human rights) violations have the same detrimental effect . . . although human rights are interdependent and have the same hierarchical value and importance, a very serious violation such as an extrajudicial killing or torture cannot be compensated at the same level as intangible damage, related to violation of private property and due process; this would delegitimize international justice and gravely impair the credibility of the Inter-American system. . . . Mrs. Salvador Chiriboga referred to emotional issues, which must be respected, however they are not relevant to this case; the same is true for the rest of the relatives, who presented their declaration, as if they were a family with few resources, whose health had deteriorated as a result of the municipal action. This is far from the reality.

[8] When it is instead an economic right, not one of the fundamental human rights.

On analyzing this point, the Court cited as jurisprudence, cases that were substantially unrelated to a discussion about property rights, such as cases of kidnapping, torture, and the murder of five persons, including two children (the case of the "street children" v. Guatemala Ruling of May 26, 2001. Series C, # 77), or another case of arbitrary detention, torture, and forced disappearance of 70 individuals by the Brazilian army between 1972 and 1975, during the military dictatorship (1964–1985) or a case concerning the cruel, inhuman, and degrading treatment of two Mexican citizens while they were in detention and under the custody of members of the Mexican army (case of *Cabrera García and Montiel Flores v. Mexico),* where the right to life, personal integrity, personal freedom, or legal protection were at stake.

These references make clear the difficulty of framing the right to private property in the same categories, statutes, and processes as those applied to the international defense of human rights and reflects not only a certain lack of experience on the part of the Court, but as revealed in the following, a difference of opinions among the Court Judges.

Once the substantive criteria used for the ruling had been defined, the Court began by considering the different valuations carried out previously, in order to determine the amount of money that reflected those criteria and the more general and abstract concepts related to property rights.

The representatives of the expropriated owners argued during the substantive and reparation phase that the value of the property could not be less than US$130.60/$m^2$, including the value of a eucalyptus forest, and they indicated that the amount of fair compensation for the property amounted to US$84,326,787, plus interest. The arguments of the owners focussed on the "urban prospect" of the property, given its location inside the city and the socioeconomic level of the neighboring area, the existence of infrastructure and services in the contiguous area, the size and physical characteristics of low slopes and attractive landscapes, and strangly enough, even the decision of the municipal author-

ity to create the park was mentioned as a factor increasing the value of the land and as representing a feature of great importance for the City of Quito.

Another important point of discussion also emerged. The municipality, despite the rural zoning of the expropriated land, and having reserved the land for a park, continued to calculate the tax imposed on the undeveloped land, as applied to areas within the urban perimeter. This was the argument used by the expert assessor, when they compared the price of the property with land zoned for urban development, probably affecting the final decision. The municipality recognized that this was a mistake and offered to return the taxes that had been unduly paid. The discussion relating to this issue is not relevant to this context, as the taxation applied to a land parcel is subject for another legal discussion and not necessarily a basis for determining market value.

The government representatives indicated that they would recognize a compensatory settlement, established within the framework of the national or Inter-American litigation system, if it was based on an impartial valuation and linked to the real value of the property, discounting its improved value, and adjusted to the reality of the country, the municipal budget, and, above all, to the criteria adopted by the court and that the eventual indemnity should not imply either the enrichment or impoverishment of the property owner. The representatives pointed out that the values demanded by the owners as compensation were excessive, because they were equivalent to the square meter value of properties defined by urban zoning that could be marketed freely as urban parcels.

The basic argument for the valuation carried out by the government was emphasized as proof that the property was never classified as urban land nor considered for urban zoning in terms of the Municipal Plan, and that its only possible use was for agriculture. Besides this, they pointed out that neither the judgment

rendered in the Ecuadorean courts, nor the valuation presented by the owners had taken into account that the property was in an environmentally protected area, with minimum occupancy coefficients, and was subject to several limitations and restrictions, directly influencing its price.

Complying with these criteria, the value proposed by the state was US$9.26/m^2, or a total value of US$6,043,635 for the property.

The main argument put forward by the Inter-American Commission did not relate directly to the conditions defining the price of the property, but rather to the fact that the owners had been deprived of the possession of their property and had struggled for years to obtain justice for their case, while subjected to a situation of legal uncertainty. Thus, they insisted on the need for a fair, adequate, timely, and effective compensation. However, they also stipulated that compensation had to be based on the commercial value of the property, prior to the declaration of public utility.

Besides the valuations, the Court also took into consideration other complementary sources used in order to arrive at a fair price. The Court studied the tables showing values for land parcels acquired in the same area, resulting from agreements, exchanges of properties for other municipal assets or court judgments relating to properties exceeding 30,000 m^2. A wide range of prices was revealed; from US$1.52/m^2 for property exchanges, to U$8.19/m^2 in the case of court judgments. In second place, it considered valuations carried out by other experts in the Ecuadorean courts, together with legal decisions for other expropriated properties in the area, including urbanized parcels. The average compensation price awarded by the Pichincha Courts was US$47.52/m^2.

When reviewing the rulings of international courts, such as the European Court of Human Rights and the Permanent Court of International Justice, the court discovered that they applied different calculation methods on which to base their decisions

concerning reparations. Among these featured the exploration of prices in real estate markets for similar properties. In conclusion, it decided to examine the valuations proposed by all parties, discarding those that manifested significant differences.

According to the Court, a fair valuation corresponds to "the value that the property had at the time it was dispossessed." In international arbitration courts, compensation value is determined based on "fair market value," equivalent to full and effective reparation for the damage suffered by the owner. The Court noted that these courts normally base their decisions on expert valuations, but they have also determined property value, based on an approximation, using the valuations proposed by the parties. As evident in the following, this argument is important because the Court, applying methodology commonly used to bring parties closer together, merely averaged the experts' valuations, as if it were possible to reconcile the visions and interests of the parties, by applying supposedly technical criteria, in terms of the property value.

Inconsistency Between Criteria Used for Valuation and the Amount of Compensation. How is the Amount Ultimately Determined?

Ultimately, the Court averaged the various valuations of the property transcribed here, illustrating the discrepancy between the general human rights discourse and determining a fixed amount of compensation, and the risks of calling upon the justice system to establish the economic value of the right to property or lending to even greater confusion, the patrimony that must be restored.

The valuations taken into account were:

> a) amount paid by the municipality at the time the eminent domain petition was filed, based on the cadastre valuation of 225,990,625.00 Sucres in favor of the victim,[9] b) expert valuation by Vicente Domínguez Zam-

[9] We have omitted the reference footnotes which can be consulted in the ruling on reparation and court costs of March 3, 2011 (*http://www.corteidh.or.cr/docs/casos/articulos/seriec_222_esp.pdf*).

> brano, ordered by the court, of US$55,567,055.00, including the eucalyptus forest; c) expert valuation by Manuel Silva Vásconez, ordered by the court, of US$41,883,379.12, including the eucalyptus forest, based on a retroactive assessment of US$18,201,930.62 in 1996; e) judgment issued by the Ninth Court on April 3, 2009, for the amount of US$41,214,233.12 for the value of the expropriated parcel; f) expert valuation by Gutiérrez Castillo of US$58,111,875.00; g) expert valuation by Jakeline Jaramillo Barcia of US$42,180,504.47; h) expert valuation by Rodrigo Borja of US$1,174,735.00 for the eucalyptus forest, and i) expert valuation by Gonzalo Estupiñán Narváez of US$6,043,635.25.

According to the ruling (Paragraph 64),

> the previously mentioned expert valuations were mostly based on the commercial prices of urbanized parcels close to the area, adjusted to take into account for the different characteristics of the property. In contrast, expert assessor Estupiñán Narváez initiates with the rural value of the neighboring agricultural area and then adjusts this for the Quito area, based on the commercial prices of both areas.

In this respect, the Court notes that the respective differences between the valuations proposed for fair compensation are due to a disagreement between the parties concerning the legal status of the property and, in particular, concerning limits imposed on property use by the regulations the Municipality of Quito, a dispute which affects methods used for valuation.

The Court (Paragraph 66) confused valuation methods with valuation criteria. It stated that while the owners argued for the "urban prospect" of the land parcel and, therefore, the need to base the valuation on the value of neighboring urban parcels, in the case of the government representatives, the only valid valuation criteria referred to the agricultural return, the location, the agricultural quality of the soil, and the designation of the property as an ecologial reserve and recreational area, whose use and occupation were limited and restricted to the requirements of the metropolitan park. This second criterion brings to the fore another debate related to urban law: how pertinent is it to provide compensation for urban planning decisions or land use regulations? This subject is not addressed by the court ruling.

In summary, and according to the same Court, although the government takes into account the location of the property as a criterion for determining fair compensation, it prioritizes the legal restrictions on the use of the land imposed by the regulations of the Municipality of Quito. However, the most obvious factor is that the land, independent of its environmental restrictions and its designation as a park area, was being used for agriculture and was never used for anything else.

The Court apparently forgot the basic premise of the substantive ruling: fair compensation had to balance general interest against individual interest, and that meant that the expropriated property had to be valued according to its commercial value, prior to the declaration of public utility. Therefore, it did not take into account that this was agricultural land, both in practice and with reference to municipal regulations.

Although it questioned the comparison to other properties that did not share the same characteristics, it upheld the dubious notion of "essential characteristics," i.e., natural features (such as location, topographic, and environmental characteristics) and the legal status of the land parcel (such as restrictions, land use zoning, and possible future use).

As for the natural features, some of the expert assessors pointed out that the property was susceptible to urban development given its suitability for that purpose, the consolidation of the land, and many other physical, topographic, and landscaping conditions that made it an ideal location for urban development. They also noted that two high voltage transmission lines ran through the property, affecting its use for urban construction. Another expert noted that the property did not have infrastructure services and was merely located opposite other urban subdivisions developed in the area.

A number of assessors argued that the property was located in an urban area, and it was a sure assumption that the park would end up being close to the city, however, from our point of view, this did not alter the fact that it was a rural area at the time when eminent domain was decreed.

As for the legal status of the property, the Court considered that

> one of the factors that augments a property value relates to its possible use, vocation and potential for construction; thus, for the effects of valuation in the present case, the legal limitations imposed on the use of the expropriated property, prior to the declaration of public interest should be acknowledged" (Paragraph 69 of the ruling).

The various valuations recognize the legal restrictions applied to the use of this property, prior to the declaration of public utility; one of the assessors in particular, as mentioned previously, emphasized that the land had never been considered by the municipal plans as an urban area or future urban area, a fact confirmed by the Court, when reviewing the municipal regulations on land use and also recorded in the land registry, which also recognized the limitations in terms of its use, enjoyment, and construction possibilities; all of which affected its commercial value.

The Court concluded that given the essential characteristics of the property and the evidence presented, this was undeveloped land, as it was devoid of construction, and that although it had certain features consistent with an urban location, its use and enjoyment had been restricted, in order to attain environmental, ecological, and recreational benefits, all of which should contribute to determining its fair price. The Court also observed that the state had continued assessing taxes on the expropriated property as undeveloped land, even though it had already imposed restrictions on the land, ruling that this circumstance would have to be analyzed separately. It also ruled that the eucalyptus forest constituted a land improvement.

The Court reiterated, as it had in its substantive ruling, that a legitimate reason existed for an eminent domain action for public utility causes, such as the protection of the environment, as evidenced by the social benefit engendered by the Metropolitan Park. The expropriated property represented an important contribution, not only in terms of the park, but also generally for all society and the environment. Once more, it also remarked on the failure to pay within a reasonable period of time.

Once all these arguments had been presented, invoking reasonableness, proportionality, and equity, the Court ordered a compensation of US$18,705,000, or US$29/m^2 of land, much higher than the valuation of rural land, despite having recognized it as such. The ruling does not make clear which criteria were ultimately applied, and it is obvious that the Court did not follow its own premise of determining compensation with reference to the status of the land, at the time of the declaration of public utility.

In other words, it recognized other factors such as potential urban development of the land, thus contradicting its own arguments. Already in the ruling elaborating merits, the Court had offered a somewhat confused interpretation, especially if we compare this with Colombian constitutional jurisprudence. This interpretation of the concept of core or essential content of the right to private property, which did not however figure heavily, when defining the amount of compensation stated that any measure that deprives or restricts this right must be for exceptional reasons, meaning that there must be a legitimate objective within a democratic society that complies with the purposes and intentions of the American Convention on Human Rights.

Other Reparations

The payment of interest based on the Libor rate from the date the property was occupied by the municipality, for a total of US$9,435,757 was also ordered by the court as compensation for material damages. Besides this, it ordered the payment of US$43,099 to reimburse taxes and fines unduly charged for undeveloped land, as previously mentioned, together with the corresponding interest. Obviously, the government of Ecuador was ordered to pay the court costs.

Respecting intangible damages, the Court pointed out the state of legal uncertainty created by the delay in the proceedings and the problem of denial of justice implied by failing to issue a final judgment, converting the expropriation into an arbitrary

act. Although, according to the jurisprudence of this Court, a ruling constitutes a form of reparation *per se*, it nevertheless deemed it appropriate to order the payment of an equity compensation of US$10,000 (ten thousand dollars).[10]

As part of the compensation for intangible damages and in order to gratify the victim, the Court accepted the petition of the owners to publish certain extracts from the rulings in the Official Bulletin, referring to merits and reparation, as well as their resolution clauses, as a one-off overture to provide satisfaction, as well as an official summary issued by the Court, in a widely circulated national newspaper.

As for the petition of a public act, recognizing international responsibility, the owner's representatives requested that the Court order the government to issue a public apology to Mrs. Maria Salvador Chiriboga for having violated her rights. This apology had to be offered by the Mayor of Quito's Metropolitan District. However, the Court rejected the petition, correctly observing that these types of acts were normally ordered in order to repair violations involving the right to life, integrity, and freedom.

Finally, as though this were not sufficient, the owners' representatives requested of the Court that, as a guarantee to prevent similar happenings, the Government be ordered to provide human rights training to administrative and court officers involved in eminent domain cases, and the Commission requested that the government be ordered to adopt the necessary measures to "make the legislation on eminent domain effective in practice, in order to regulate and implement the necessary guarantees for eminent domain processes and prevent unjust situations, particularly delays." The Court rejected these petitions, noting that the substantive ruling had determined that the Ecuadorean legislation was compatible with the American Convention and that the violations and circumstantial evidence presented in this case did

[10] The petitioners had asked for a compensation of US$25,000 for this purpose.

not demonstrate a general problem, in relation to these types of legal cases in Ecuador.

Reconsideration of the Dissenting Votes Discourse

The ambiguity of the ruling can be explained by the large number of (partially) dissenting votes and their corresponding statements.[11] As noted by one of the dissenting justices, the ruling on compensation divided the opinion of the judges.

Judge Diego García-Sayán indicated that if the essential criteria for valuing the property referred to its market value prior to the declaration of public utility, while a fair balance between general interest and individual interest had also been observed, the amount of compensation arrived at would have been lower, as would the interest charges. He added that most of the professional valuations were based on criteria linked to possible urban development of the land or on comparisons with neighboring urban parcels, so it was illogical to award an amount of compensation that tripled the only existing valuation, based on rural land use of the property.

If the criteria of fair balance between general interest and individual interest had been applied organically and systematically, the amount of compensation would have been lower. This criterion, in the opinion of the judge, applies "not only to the degree of legitimacy of the declaration of public utility, but also to the determination of the value[12] of the property that is being expropriated." The balance between fair compensation and commercial value is questioned, noting that fair compensation must

[11] Three of the eight judges from the Court formulated substantive objections based on the criteria and the amount of compensation, and another three disagreed with the order to make payment within a period of five years, given the financial situation of the Municipality of Quito, and did not agree on the amount of interest for the expropriated owners, considering the previous delay in payment that they suffered.

[12] The judge confuses improved value with value or valuation.

result from a process that combines several factors and criteria, in order to balance general interest requirements against protection of the fundamental rights of individuals. The discretion of the judge to apply "fair compensation," granted by Article 21.1 of the American Convention, must not only take into account the interests of the property owner, but also those of general interest.

Finally it was pointed out that if the terms "fair compensation" and "payment at commercial value" were synonymous, this would have been made explicit in the American Convention.

As for using the balance between public and private interests as a criterion to determine compensation, reference was made to the jurisprudence of other international courts and other countries. He points out that the European Court allows for margins of flexibility, but that in any case and for various reasons, it maintains a certain distance from attempting to match "commercial value" with "fair balance," citing examples of very special cases, requiring analysis in their particular context, an expropriation is valid or justified even without any compensation, as during German reunification, or demanding compensation below the "total market value" (Cfr. ECHR, *Case of Jahn and Others v. Germany*, Judgment of June 30, 2005, paragraph 11) for reasons related to economic reform measures or those designed to implement social justice.

He also refers to the ruling of the Colombian Constitutional Court, described in detail in the chapter five of this book "Constitutional Change, Judges, and Eminent Domain in Colombia," that mentions the possibility of establishing compensations lower than the total damage caused by the expropriation and, more precisely, that although compensation is generally intended to repair the damage caused by expropriation, when the interests of the community are taken into account, this can be reduced, intending to fulfill only a remedial function.[13]

[13] See argument details in the article cited.

Judge García-Sayán comments that the Supreme Court of the United States tends to rule that just compensation, as established in the Fifth Amendment to the Constitution, is determined by "market value," but it also states that "when market value is too difficult to determine, or when its application may result in a manifest injustice either to the owner or to public interest," it may be possible to disregard this criterion."[14] In particular, in *United States v. Commodities Trading Corp,* the Court ruled that compensation must be "just" both for the owner of the property that is expropriated, as well as for the public (government) obligated to pay the bill.

Judge García-Sayán comments in his dissenting vote that it is also necessary to take into account factors such as the budget capacity of the government agency implementing eminent domain.

In his opinion, the Court rationale was far from analyzing the conflicting interests or the prevalent jurisprudence, and did not even consider its own ruling on the merits, resorting instead to combining valuation amounts with disparate and non-comparable technical criteria and focus, arriving at an inconsistent equilibrium between the highest and lowest valuations. Judges García Ramírez and Leonard A. Franco went even further, indicating that "the esteemed 'fair balance' cannot be determined by carrying out a more or less automatic process aimed at averaging the different amounts, based on divergent criteria and quantities.[15]

For Judge Sergio García Ramírez,

> the amount of compensatory reparation should result from a proven valuation of the material property in question, established by taking into account objective factors, with a reasonable degree of certainty. . . . In this

[14] United States of America Supreme Court, *United States v. Commodities Trading Corp*, 339 U.S. 121, pg. 123 (1950); United States of America Supreme Court, *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10, pg. 14 (1984).

[15] Partially dissenting votes of Judge Sergio García Ramírez and Judge Leonardo A. Franco on the ruling of the Inter-American Court of Human Rights in the *Salvador Chiriboga v. Ecuador* case, March 3, 2011.

> sense, the valuation of an object tends to present lesser problems than those inherent in valuation for compensatory purposes, regarding benefits of another nature, such as life, integrity and freedom.

The valuations carried out, prior to and during the proceedings of the Salvador Chiriboga case before the Inter-American court, exhibit profound discrepances, concerning both the nature and use of property (effecting the compensation amount) and the values obtained by the analyses presented by the various professional assessors. The Court did not have access to analyses that were clear, sufficient, and accepted by the litigants, so that the Court ultimately assumed this responsibility as an "expert among experts," which should not imply a more or less automatic adoption of a sort of "average" between very different amounts, in terms of both their value and their underlying justification. The concept of equity in this litigation requires

> a more detailed interpretation of the set of implicitly or explicitly stipulated concepts presented in Articles 21.1, 21.2, 32.2 and 63.1 of the American Convention, complying with the objective to impose equity, by assessing a wide spectrum of values. Within this spectrum, we need to define what constitutes a reasonable amount, in order to comply with the objectives sought by the Court for this case.

Judge García Ramírez questions in his report how a reasonable compensation amount can be derived from the Convention Articles and the ruling defining merits, as presented by the Court. Likewise, he adds that in this context,

> By majority opinion, the Court has arrived at this amount. I will not present any other alternative here, but I will argue that the amount determined in the ruling on March 3 could have been lower, thus providing a more equitable solution to the problem that without doubt manifests the tension between the right of a person to private property and the social expectations of the community that will benefit from the expropriation. Both objectives are justified. It is important to satisfy both, particularly when we try to judge equitably in the absence of additional conclusive data to guide us. I think that the Court would not have ruled as it did, if it had appreciated the existing tension between rights that must be respected and the difficulty of paying this very high compensation amount in a lump

> sum, or in a short period, or with interest over the course of time (given the circumstances of this case), likely to create a severe burden on the finances of the City of Quito, and, correspondingly probably affecting its ability to fulfill this goal of social interest.
>
> I will not let this pass without mentioning, reaching back into my memory, rather than relying on concrete facts about the Inter-American Court, that this resolution concerning violation of the right to private property is the highest during its thirty year history. Never before has a judgment been handed down that even approximates this amount, either in cases of extrajudicial killings (of one or more persons, or massacres that rob the lives of tens or hundreds of human beings), not even in cases of torture or forced disappearances.

FINAL OBSERVATIONS

In the opinion of one of the officials in charge of eminent domain cases for the government of the Municipality of Quito, the Attorney General of Ecuador, and the Municipality, the ruling of the Inter-American Court favors government interests, if we consider that the lowest compensation amount ordered by an Ecuadorean court exceeded 41 million dollars. His first task was to identify the legal and procedural mechanisms for implementing this payment, as there were no precedents in the country of international rulings of this type.

If we consider other Ecuadorean cases that have been reviewed and the high compensation amounts ordered by the judges, the official is correct: the ruling is favorable to the Ecuadorean government. Nevertheless, the issue remains whether the Inter-American Court of Human Rights can become a supranational authority that could set the value of indemnifications for expropriations.

The ruling, with all its ambiguities and evidence of internal argument among the judges, whose opinions were divided concerning the justification of higher interest payments, with some of them questioning the role of the Court as "expert among experts" as assigned by the Convention, illustrates how problematic these types of controversies can be. The Court, without any real justification, took into account certain assessments

that contradicted its own criteria of trying to balance the interests of the property owners with those of society. An interesting area for discussion emerges concerning compensation cases: the unclear delineation between the professional valuer's report used as evidence and the essence of the discussion concerning relevant legal concepts.

Two areas make evident the justified role of the judge in eminent domain: consideration for the principles and interests of each case filed by citizens, and the possibility of ordering payments from the public treasury, exceeding even that proposed by the legislator. For example this last aspect is central to the protection of social rights. These objectives are limited in the Ecuadorean justice system, by proceedings based on a process of implementation, but not on practical knowledge.

This is why, when discussing the protection of rights in cases of eminent domain, the judge can rule on the institution of property; however in general terms, this is accepted as a universal value not subject to debate. For the Inter-American Court, it was not important that the Salvador Chiriboga family had acquired the land in 1935, together with other properties in the City of Quito, intending to maintain the area as a reserve and not for production. In 1981, the year the municipal government adopted the environmental protection regulations and created the park, the land had no productive use; it was simply an area awaiting urban development. Why are these aspects not even mentioned, when attempting to balance the interests of society with those of private owners? Why was there no discussion about unjustified enrichment or the appropriation of social resources, implicit in property ownership?

Although this is a routine phenomenon, it is strange to witness how a right to patrimony, whose essential condition is its marketability, can be incorporated into procedures designed to protect fundamental human rights: guarantees, reparation, and the assimilation of the laws of a country within international principles. The strength of the right to property invoked other

rights that took center stage: guarantees of due process and to have a competent judge or court address a legal dispute within a reasonable time schedule. In spite of this, the owners filed their case before the Inter-American Court, a little more than a year after the property was occupied and the case, including its consideration by the Inter-American Commission, took twelve years to resolve. Obviously, time was not a problem for the owners, as in reality they were waiting for their land to reach the highest possible price, and the expropriation did not affect their right to housing or income derived from the land; these constituting the factors that make property useful, and probably those that the Declaration of Human Rights intended to protect.

However, this is not a minor problem, and on a daily basis expropriation affects social groups in diverse circumstances. This is why it is important to identify optimum mechanisms for determining compensation: merely a sum of money, a mundane consideration in the context of human rights, but so crucial to defining possiblities for redistribution. In the present context, the judge, or the "expert among experts" as referred to by one of the judges from the Inter-American Court, is far-removed from providing the best answers.

As for the economic content of property rights, we are witnessing how difficult it is for jurists to manage abstract economic concepts, and likewise how economists fail to deal with legal concepts.

At this point, the subject returns to the starting point: the position taken by the Ecuadorean justices regarding eminent domain and property rights, the clash between constitutional principles and one of the strongest civil institutions in history.

While Ecuadorean society attempts to implement a constitution that complies with the practice of open dialogue for change and transformative social ideals, the judges impose the perverse logic of protecting property rights by demanding high compensation amounts, without considering the impact that high land prices have in terms of social exclusion and expenditure of public resources.

If restitution forms an essential element of compensation and nobody modifies the rules of the game for appropriating socially created resources such as the prices of land, the judge can become an active participant in a spiral of price increases, ultimately generating conditions of poverty. Where is the breaking point?

The case of Ecuador leaves several questions open: what is the final balance, from the legal point of view, of applying an instrument that represents such a strong expression of governmental power for mobilizing general interest, but that likewise affects an essential subjective right, in the form of the right to property? What happened to the many property owners in Quito, subjected to expropriation who did not have sufficient resources to pay for lawyers and who could never even reach the international justice system? It is possible that they exchanged their properties without jeopardizing public resources, but it is also possible that the expropriation process exacerbated poverty levels for the most vulnerable. Will society's welfare improve with the recognition of higher compensation values?

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Chapter Eight

Use, Overuse, and Reuse of Eminent Domain in Mexico City

Antonio Azuela and Camilo Saavedra

INTRODUCTION

In this chapter, we intend to analyze the vicissitudes of eminent domain as a tool for urban development in the metropolitan zone of Mexico City or MZMC. As with other chapters in this book, we aim to understand the significance and consequences of the conflicts that emerged at the beginning of this decade concerning the use of eminent domain by the government as a tool for implementing projects. Rather than just an "instrument" for implementing urban policy, eminent domain became a reference point for the relationship between the government and the urban planning process, and for this reason we attempt to study this within the broader context of state transformations.

First, it is important to note the importance of eminent domain in the formation of the post-revolutionary state. Eminent domain has had enormous symbolic value in national culture, at least since 1938, when President Lázaro Cárdenas nationalized the oil industry. It represents an institution that signifies the sovereignty of the Mexican state and its nationalist character. More than seventy years on, oil nationalization is still celebrated every year in the schools, on the streets, and in many public ceremonies.

Despite its symbolic value, in recent times this legal tool has become more complex and sharp edged for the authorities, and less likely to be used for public interest projects. Mentioning only two examples, the failure of sugar industry nationalization, as well as a new airport project for the MZMC, both occurring during the term of the first political party to succeed the PRI in government, are indications that eminent domain is in intensive care.

To illustrate the transformation that eminent domain has under-gone in Mexico City, the first part of this chapter analyzes the fundamental aspects that emerged during the post-revolutionary years and during the decades of the city's greatest expansion. We explain how eminent domain became an essential component of government intervention in urban development and describe the reasons for the crisis of recent years. The second part of this chapter analyzes the transformation that has taken place during the last decades, particularly demonstrating that the crisis of eminent domain is gradually being resolved by Mexico City's government, where things appear to be returning to normal. This process of normalization, if continued, would be unprecedented in the modern history of the country, mainly because it is occurring in the context of a pluralistic democracy that imposes checks and balances, and despite the opposition of several social groups.

It needs to be emphasized that the legal aspects of eminent domain analyzed in the next chapter are only included here if they have direct impact on the use and social significance of eminent domain. Our intention is to analyze eminent domain as an expression of government control over private property, and as a form of social influence.

THE TRIBULATIONS OF THE PHILANTHROPIC OGRE

Octavio Paz characterized the post-revolutionary Mexican state as a philanthropic ogre. This image appears accurate when we consider the way that eminent domain was applied during the

post-revolutionary decades. It represented a strategy for social justice and for consolidating state sovereignty. Besides the nationalization of the oil industry, the greater part of agrarian reform, which extended over seven decades and led to the creation or consolidation of 30 thousand agrarian communities, extending throughout more than half of the country's territory, was achieved by applying eminent domain. However, although the image provided by Paz still applies to the urban context, its relevance is declining.

The rules established by the Mexican Constitution relating to eminent domain are not very different to any other liberal constitution. When this is implemented by government authorities, a public interest cause (*causa de utilidad pública*) must be declared previously, defined in general legal terms and incurring payment of compensation. The only substantial difference concerning the Mexican legal framework is that compensation does not have to be paid in advance,[1] granting post-revolutionary governments great leverage, when dealing with property owners. As explained in the next chapter, it was not until 2009 that a deadline of forty-five business days was established for the payment of compensation.

Even so, the most important difference between the Mexican system and the rest of Latin America is not substantive but procedural. Eminent domain is exclusively implemented by the executive branch, generally by the President of the Republic or the Governor of the respective state.[2] Unless the affected party requests judicial protection, the process can be concluded without the intervention of a judge. As apparent from reading the remaining chapters of this book, most other countries in the region implement the

[1] The 1917 constitution introduced the expression "in exchange for compensation," instead of "prior compensation," as was stipulated in the 1857 constitution.

[2] We have to remember that Mexico is a Federal Republic. However, we say "generally" because as part of this research we have "discovered" that in some states, municipal authorities perform successful expropriations in the urban context.

French model, requiring the intervention of judges to determine the compensation amount.

This distinction seems to elucidate the authoritarian character of the Mexican system. However, it is still true that a person who has access to legal services can succeed in having a judge intervene, not only to determine the compensation amount, but also to dispute the public interest cause invoked by the expropriating authority. Evidently, this has created situations in which property owners have received the same, or at times, even greater legal protection, than that available in many other more liberal systems.

Up to this point, it would appear that the post-revolutionary eminent domain process was simply a reflection of a strong government imposing its will on weak property owners; however the question is rather more complex. As demonstrated by Martín Díaz y Díaz (1997), property regulations in the Mexican Constitution were characterized by a fundamental tension until 1992; first establishing principles and procedures to protect private property as a further "individual guaranteed right," but also simultaneously establishing the basis for a revolutionary program that could mostly only be achieved, at the expense of private property.[3]

It is true that in all modern states, eminent domain creates a tension between certain general interests (defined by the government) and the interests of property owners that are correspondingly sacrificed. However, this tension is much greater when the constitution itself establishes a land redistribution program that not only negates property rights in a large part of the country's territory (in this case of large estates), but also simultaneously grants farmers access to the land, should they require it.[4] Thus, for more than seven decades, the Mexican constitutional system was marked by the tension between a revolutionary program and

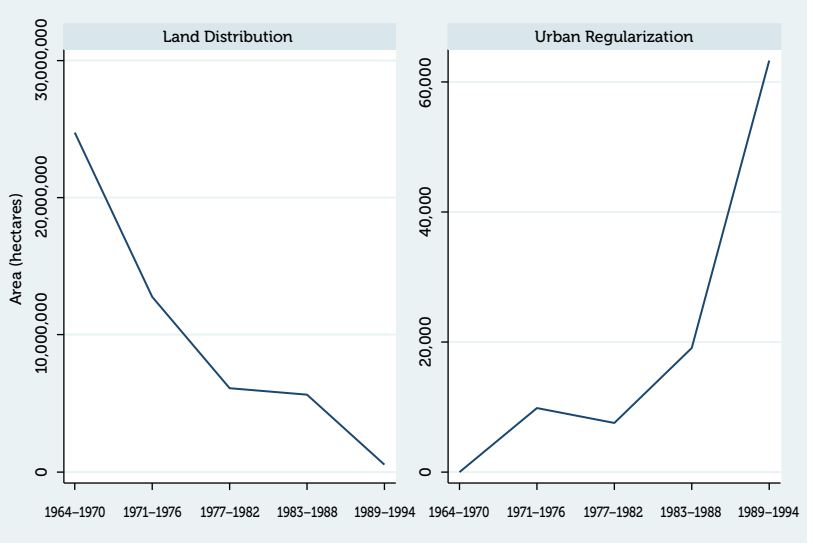
[3] This particularly concerned the rights of peasant groups to access land that exceeded the size for a "small property," i.e., the size recognized by law as "not affectable."

[4] This explicit reference to the *needs* of peasant groups, as the justification of their right to obtain land formed part of the constitutional text, until 1992.

liberal principles, while also creating enormous challenges for the Mexican legal profession.

It is true that the most notable applications of eminent domain on the part of the post-revolutionary government were for agrarian reform and the nationalization of the oil industry. However, the urban development process, which by the 1940s was gathering strength in the country's capital, forced the government to acquire land in a context that could not have been imagined in 1917 and that had never formed part of the original revolutionary program. Before focusing on the MZMC, we provide some background on how the process of urban development changed the way eminent domain was applied throughout the country. Figure 6 compares government interventions in the city with those in the countryside. While the data is not strictly comparable, because it is displayed at different scales, evidently agrarian

FIGURE 6
AGRARIAN REDISTRIBUTION AND EMINENT DOMAIN FOR URBAN REGULARIZATION, PER SIX-YEAR TERMS



Source: Created with data from Saavedra (2006).

redistribution declined in impact during just two decades, from the end of the 1960s to the end of the 1980s; while simultaneously eminent domain was increasingly applied, in order to satisfy the needs of urban development.

There is no doubt that eminent domain played a very important role in the expansion of Mexico City. Several authors in the field of urban studies have shown how it was applied for a wide variety of purposes. Thus, eminent domain was instrumental in the creation of large facilities and infrastructure projects that laid the foundation for metropolitan development, for example schools and universities, hospitals, water systems, and highways. These public works modernized the country, thus legitimizing the use of eminent domain.

However, eminent domain was also used for other purposes. We begin by describing the creation of *colonias proletarias* (working class settlements), which required more than seventy eminent domain decrees between 1940 and 1946, expropriating suburban land, in order to make it available to low income families, thereby creating neighborhoods that over time would become the typical habitat of the city's working class (Azuela and Cruz 1989; Sánchez-Mejorada 2005). We concentrate on this use of eminent domain because, as apparent in the following, it was the only public interest cause related to urban development processes that the courts declared unconstitutional during this entire period.

However, another public interest cause that took root and was used with surprising frequency was the regularization of land tenure in so-called "irregular" settlements. It is already impressive that between 1915 and 1982, a period of 65 years, 41 percent of all the expropriations of *ejidos* and communal lands in the MZMC were destined to this purpose (Varley 1989); however during the period in which urban development was most intense, between 1976 and 1982, 88 percent of the land that the government removed from *ejidos* and communal lands in the MZMC was occupied by "settlements" that the government intended to regularize (Varley 1985).

The extent to which eminent domain was applied as a means for land tenure regularization in Mexico has not been matched by any other large city in Latin America, or probably in the world. Notably, in these cases eminent domain is not applied in order to create a public benefit; a government agency is intervening to mediate in social property relations that form as a result of the process of urban development. In the case of Mexican agrarian settlements, the explanation seems simple and convincing: eminent domain was (until 1992), the only mechanism available for regularizing settlements on *ejido* and communal land, because all dealings related to these areas were considered legally *void*.[5] Therefore, the only way to convey titles to the settlers (who had always had access to the land through the informal market, paying a price that related to an operation not legally recognized) was by expropriating the land from agrarian communities. This obliged the new residents to make a repeat payment, for land that they had acquired "informally."

Surely the most plausible explanation for the regularization surge is that it enabled the governing elite to create political patronage (Varley 1998). However, one of the unforeseen consequences of the expansion of this mechanism has been the weakening of the government in its relationship with landowners. In brief, both the agrarian communities and the private owners were able to convert their land to urban use through the informal market, with the expectation that at some point these subdivisions would be regularized.[6] Contrary to the procedure in other Latin American countries, where many informal settlements are created by invasions against the wishes of the landowner, in Mexico they are part of a sales process that is tolerated by the authorities. To ensure a happy ending to the story and for "those

[5] Property rights for agrarian communities were characterized by the three "i's": *Inalienable, inembargable e imprescribtible* (i.e., inalienable and not subject to seizure or adverse possession, respectively).

[6] This was so, even though since the 1960s the sale of urban parcels without authorization is defined as a crime for both property system

benefitting" from regularization to show gratitude, it is better not to inquire how owners were able to develop their land. Thus the "social function of property" is substituted for the political function of regularization.

Similarly, it is interesting to ask the following question: who tends to be subject to expropriation? A matter that has attracted the attention of urban researchers is the expropriation of agrarian settlements (communities and *ejidos*).[7] The contribution made by these expropriations to the expansion of Mexico City can be portrayed by stating that more than 35,000 acres expropriated by the government from these communities between 1935 and 1975 accounts for 21 percent of the city's expansion during that same period.[8] It is not easy to know precisely what proportion of land has been expropriated from agrarian communities, as compared to private owners, but thanks to research performed by Martha Schteingart, it is clear that the former greatly exceeds the latter (Schteingart 1989, 56). According to our own data, between 1968 and 2004, 90 percent of the area expropriated for urban development at the national level was removed from agrarian communities (Saavedra 2006).[9]

Considering its evolution over time, it is apparent that the use of eminent domain to attend the growth needs of Mexico City was very erratic. During a single presidential term (from 1940 to 1946) 192 expropriation decrees were issued, while during the

[7] *Ejidos* (created by agrarian reform) and *comunidades* (communities that existed *before* the Mexican Revolution) are the two types of legal entities that acquired 52 percent of the country's land as a result of the agrarian reform. Their generic name in the Mexican legal system is "núcleos agrarios" (henceforth, agrarian communities). We will use these terms interchangeably.

[8] Varley (1989). According to a more recent calculation, between 1917 and 2000, a total of 95,984 acres were expropriated from agrarian communities in the MZMC (Colín-Ugalde 2009, 36), of which "58.3 percent were in the State of Mexico, 41.5 percent in the Federal District, and 0.1 percent in Hidalgo." (Idem).

[9] Concerning other aspects related to this subject, see also Cruz (2001), Montaño (1984), and Varley (1985).

following three terms, there was an average of fewer than ten (Schteingart 1989). Nevertheless, beyond any effort at quantification, we can affirm that only by means of eminent domain has Mexico City been able to build its essential infrastructure projects: the largest and most prestigious higher education institution facilities from this period (the University Campus and the National Polytechnic Institute), industrial zones such as Vallejo, numerous housing units, roads, water, and energy projects, together with many others.

Two circumstances that characterized the application of eminent domain during this long period must be assessed. First, the city did not have its own government. In 1928, the municipalities of the capital were suppressed and replaced by a Federal District Department, whose director reported directly to the President of the Republic, who could both nominate and remove him, at his own discretion. For this reason, expropriations in Mexico City were decreed by the President, who occupied the top echelon of the political order. As becomes evident, the crisis of eminent domain deepened during the last decade of the twentieth century, when it became the domain of the Federal District Government, a new body that had to "make its voice heard" in the political order of the country.

Contrarily, eminent domain for urban development frequently affected agrarian communities, which only a few years before had received the land as part of agrarian reform. In a short time, these communities went from being beneficiaries of one expropriation to being victims of another. Despite protests at times engendered by these expropriations, the political subordination of peasants during the first decades of agrarian reform made it possible to use the eminent domain process, without generating the types of conflicts that are common today.

Even though it is true that during the long post-revolutionary period, eminent domain was used successfully to foster urban development, this does not imply that there were no obstacles. The most important limitations and contradictions that restricted

the power of eminent domain should be mentioned, as these were at the root of the crisis suffered by eminent domain, later on in the 1980s. We begin by considering the limitations imposed by the courts, when those affected had the resources to access the legal system.

During the 1960s, a classic book of Mexican sociology entitled *Democracy in México (La democracia en México)* had demonstrated that presidential power was limited by the *juicio de amparo**, which is the principal legal remedy for protecting the rights of those who have been unduly affected by the actions of any branch of government (González Casanova 1966). The likelihood of obtaining protection from the Supreme Court against authoritarian actions far exceeded the common view that presidential powers were "unlimited."[10] In the context of expropriations, federal judges not only resolved many *amparos* in favor of the affected owners, but also declared the unconstitutionality of a number of public interest causes established by the Expropriation Act (1936). One such case occurred in 1951, when the Supreme Court ruled that the formation of "working class colonies" was not a legitimate cause of public interest and upheld an *amparo* in favor of an *ejido* located in the north of the city.[11] By imposing these measures, the judges were obstructing the introduction of a system of land distribution, similar to that of the agrarian reform in the urban context.

However, the courts were not the only ones to impose limitations on eminent domain. In many cases, protests by the affected *ejido* members forced the government to modify the conditions decreed by an expropriation. A good example was the creation of the National University Campus (*Ciudad Universitaria*) in the

* The *juicio de amparo* represents the main legal remedy for protecting the rights of those who have been unduly affected by the action of any branch of government.

[10] This is the subject of debate, even today. For many people, the fact that the executive branch occasionally loses a lawsuit is not significant, as it simply indicates a gracious concession from the seat of power.

[11] AR 1064/1950. Second Chamber of the Supreme Court. Fifth Epoch. See the following chapter.

south of the capital in the late 1940s, perhaps the most representative and least questionable project of "modern Mexico." In addition to the compensation offered by the executive branch, the university itself had to make additional commitments to the peasants, who owned the land destined for the future campus.[12]

Generally, we can say that the power of eminent domain was inadequate for imposing the goals that Mexican officials had set for themselves in the 1930s and 40s. Notably, both the national parks and the archeological areas were created with simple "declarations." In order to convert them into real public benefits, the land for the respective areas had to be expropriated. For decades, many parks and archeological areas were treated as if they were public.[13] Only in recent years, in the context of new political circumstances have we discovered that compensation was never paid or that eminent domain procedures were never even initiated. The ogre had neither the power nor the money needed to expropriate all the land required for these projects.

Even more interesting than the straight forward limitations imposed by eminent domain were the contradictions within the government itself, as we mentioned before. How was it possible that a regime both liberal and revolutionary lasted for so long? Of course, we do not intend to provide a global answer to this type of question, but with regard to eminent domain, we reveal that court systems devised several strategies intended to temper this contradiction.

Three of these strategies were in fact developed by judges themselves and contributed to maintaining the strength of eminent domain, even in cases when it was not exercised according to liberal principles. First, the Court maintained that concerning matters of eminent domain, it was not necessary to observe the

[12] This incident is even referred to in a coffee table book (UNAM 2009, 89).

[13] Lisa Berglia (2006) describes how this was possible in the case of Chichén Itzá.

guarantees of due process established by the Constitution (expropriation decrees were made effective immediately, even if the owner had not been notified); second, it created case law to prevent temporary injunctions, when a case was being legally protected by an *amparo*; and third, even when the case was decided in favor of the owner, the courts took no action, even when the government failed to comply with the ruling. We will analyze each one of these strategies in the following chapter, but suffice it to say that these were creations on the part of the judicial section to "accompany" the executive branch as once stated and in order to make many of these expropriations irreversible, despite the fact that judicial law would consider them illegal.

However, not all court actions were meant to facilitate the power of eminent domain. Aside from cases where monied interests were able to influence administrative actions and/or legal decisions, there also existed a legal strategy to protect private property that did not openly challenge the "revolutionary" dimension of the eminent domain regime. It consisted of granting an injunction to the affected owner that might even contradict the case law we just mentioned, but without recognizing this contradiction and particularly, without creating new jurisprudence. It was as if the owner was advised: "I am going to protect your interests, but I am not going to make this public." The issue would be confined to the parties involved, protecting private property in a given case, but without publicly questioning the actions of the government or the ideology of the Mexican revolution.

The executive branch also evolved strategies to mitigate the worst aspects of eminent domain. The first consisted of granting compensations that exceeded the values stipulated by law, a practice that was difficult to document, but generally understood by government officials from the executive branch.[14] When stricter

[14] The "source" for this and other information concerning Mexican administrative practices was provided by one of the authors (AA) who acted as legal consultant for several federal agencies from 1973.

budget control mechanisms were put in place (from the mid-1980s), these practices became more difficult, however until that time, this was the way the executive power resolved disputes with owners who could afford actions (legal or otherwise), for the purpose of opposing expropriations.

The second strategy was applied to the land tenure regularization programs, dealing with so-called "irregular settlements." Although these land sales were in flagrant violation of urban regulations that restricted these types of development, the administration used eminent domain to ensure that the settlers became property owners. This mechanism was applied (and, in a certain sense is still being applied) both in the case of agrarian communities, as well as for individual owners, but in both instances the goal was the same; it provided a form of amnesty for the owner, who had illegally developed the land. Instead of imposing administrative sanctions (or even criminal sanctions in some cases) as clearly stipulated by the law, the administration rewarded them with an expropriation. There can be no strategy more obvious to protect private property than one that overlooks the offenses and even crimes committed by the owners, while simultaneously recognizing their right to compensation; in other words, in this case, eminent domain is applied for the benefit of the owner.

In the case of agrarian communities, the executive branch initiated a new strategy from the early 1980s. The expropriation of land in the community of Santa María Huatulco to develop tourism on the coast of Oaxaca triggered a violent conflict with the peasants, which caused the government to introduce an administrative requirement that an agreement had to be reached with agrarian communities as a prerequisite, before the President would sign an expropriation decree affecting them. The President of the Republic tried to avoid conflicts with peasants when proposing projects and instructed his collaborators to seek their approval before initiating an expropriation. For orthodox government lawyers, this implied "distorting" the essence of eminent domain, which by definition is a unilateral act of the state, carried out

without regard for the will of the owner. In any case, it is an administrative practice that was used systematically[15] to avoid conflicts generated by expropriations, but ended up being a way of strengthening the hand of the owner, regarding negotiations with the government.

The housing reconstruction program after the 1985 earthquake provides an example of the way this set of strategies undermined the power of eminent domain. The essence of the most important of these programs witnessed the expropriation of more than four thousand buildings in the center of the city, home to poor tenants who were in danger of being displaced to the periphery of the city, after the disaster. However, expropriation redressed this potential displacement, promoting the initiation of a housing renovation program that would win international awards, above all for having maintained the affected population in the city center. This is possibly the last occasion when the post-revolutionary regime applied eminent domain to act as a redistribution mechanism (Azuela 1987).

The problem was that many of the property owners affected by the expropriations filed *amparos* in federal courts and were successful; the federal judges recognized the housing needs of the victims and strictly applied the liberal rules of the Constitution. The expropriation was carried out with such haste that the pertinent technical studies had still not been conducted. However, by the time judges upheld the *amparos* in favor of the owners, the government could not return the property because it had already built houses as part of the reconstruction program, with credit from the World Bank. As a result it was forced to pay larger sums

[15] The only known exceptions were expropriations decreed by President Carlos Salinas in order to regularize land tenure as part of the social program known as "Solidarity." Ten years later, some two hundred *juicios de amparo* were pending, in any case representing an obstacle for the occupiers of homes to become property owners. At least this is the claim made by the General Director of Corett, Fernando Portilla, in the Workshop on Urban Land organized by PUEC/UNAM on January 16, 2006.

than those stipulated by law, violating the standards relating to public expenditure.[16] The fact that a government had to break the law in order to implement expropriation was already an indication of the crisis inherent in the power of eminent domain.

In this context, we stress that it is not our intention to evaluate government or judicial strategies for dealing with these cases. On the contrary, our intention is to indicate how these strategies signified a successful response to the inherently contradictory nature of eminent domain, in post-revolutionary Mexico.

THE CRISIS OF EMINENT DOMAIN EXPOSED IN TWO SCENARIOS

It is thus apparent that the granting of *amparos* to challenge the housing reconstruction program after the earthquake of 1985 was the first indication of a crisis affecting eminent domain in Mexico City. Although this was not made public, this was the first time that the judicial branch had imposed its authority over the executive branch, in a matter of the highest political priority.

When we review eminent domain in the broader context of transformations to the Mexican state, we are immediately aware of the influence of obligations imposed by the North American Free Trade Agreement (1994) and other international treaties that protect foreign investments. In the well-known Metalclad case of 2000, the federal government was forced to compensate an American company that was prevented from operating a hazardous waste site, due to protests on the part of the population in the municipality of Guadalcázar, in the state of San Luis Potosí (Azuela 2006). The Arbitration Panel that resolved the matter clearly sided with the company declaring that certain actions taken by that state government constituted expropriations, thus

[16] This fact was kept secret and only shared among the officials in charge of the operation. Personal communication with one of the officials, who chose not to reveal his identity, April 2007.

issuing a judgment against Mexico and ordering a compensation payment consisting of US$17 million.

Without denying the importance of this case and its corresponding impact, it should be put into perspective. Its relevance is quite reduced, when we consider the internal factors that contributed to the weakening of eminent domain due to transformations that took place in five other contexts, such as the new activism displayed by the judicial branch, the strengthening of agrarian communities as full owners of the land, the reorientation of federal policies on urban development, the creation of the Federal District Government as a new player in the Mexican constitutional order, and the introduction of a set of discourses in the public sphere, which although diverse and contradictory, converged to increasingly discredit the power of eminent domain. These transformations are briefly reviewed here.

As explained in detail in the next chapter, the activism displayed by the judicial branch over the past two decades did not indicate a new definition (doctrinary or not) referring to the legitimacy of property rights or the authority of the state to use eminent domain. However, once the courts decided to exercise their automony without any restriction, they modified the procedural strategies employed during the post-revolutionary era, making government expropriations irreversible. They simply abandoned the jurisprudence created by case law that denied the owners the right to be heard prior to the expropriation and imposed a stay of process, by granting *juicios de amparo*. Likewise, the constitutional reform of 1994[17] created alternatives, complying with the *juicios de amparo*. Thus, if the property could not be returned in the case, for example that construction had already initiated, this would not create a "*fait accompli*," as in former times that offered no other recourse.

These cases might imply the injunction being offset by a compensation payment that owing to the erratic system used for

[17] This is paragraph XVI of Article 107 of the constitution.

property valuations can become exorbitant. In the following, we review a number of celebrated cases. For the moment, it is sufficient to observe that judicial activism for cases of eminent domain has reached such a level that one of the sharpest critics of the abuse of eminent domain in the post-revolutionary era, Carlos Elizondo, declared in 2006 that the implications of this strategy employed by the courts were so serious that they threatened to paralyze public works projects, essential for the common good.[18]

The second important transformation that has hampered eminent domain has been the strengthening of land tenure in agrarian communities, both from the social and political point of view. It is well known that in the post-revolutionary era, *ejidos* and communities were subordinate to state authorities, both legally and politically. However, in the 1970s, one of the most insightful analysts of Mexico's rural society suggested that the *ejido* resembled a tiger that the government was barely "grasping by the tail" (Warman 1976). This finally snapped in 2000, when the PRI lost the presidency to a party that did not have rural representation, although infact the process had initiated much earlier. For one thing, the 1992 reform of the agrarian regime granted agrarian communities greater autonomy to make their own decisions, independently of the agrarian bureaucracy, and created special courts that functioned without having to comply with government policies.

However, more strength was assigned to agrarian communities in the form of the real power they acquired for controlling their territory. Given that in most cases, the municipal authorities have not had the resources to provide needed services to the rural population, which did not stop growing in absolute terms until the beginning of this decade, the agrarian communities had

[18] "[A]lteration to a single aspect of the complex engine that has regulated eminent domain in Mexico may well signal the end of the government power to implement an important project necessitating access to land currently in private hands" (Elizondo 2006).

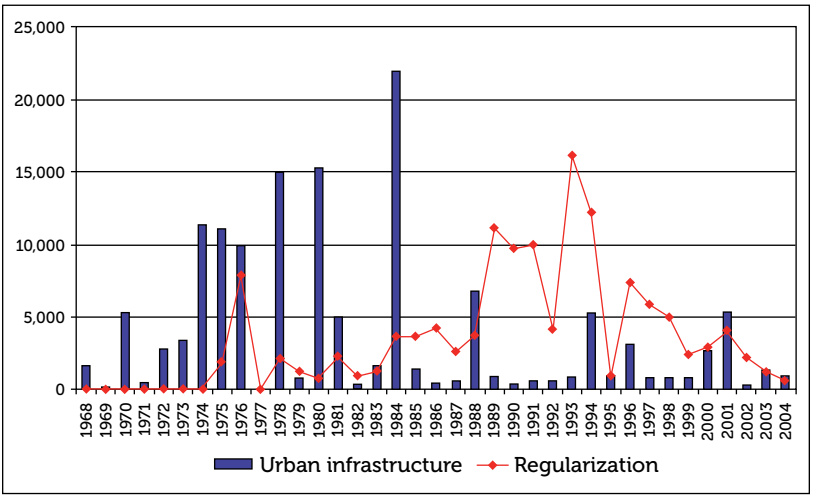
to take responsibility for these services themselves, using a variety of tactics. Over time, they developed good management skills, which enabled them to largely control their territory. Today, it is not an exaggeration to say that they behave as *de facto* local authorities. Although in legal terms, they only represent a type of land owning corporation, formally dependent on land planning and development regulations including eminent domain, as is the case for any other private property owner,[19] in fact it is very difficult for the government to initiate expropriations in *ejidos,* without consulting their "internal" authorities.[20] One of the most important factors in this situation, as we indicated in the preceding chapter, relates to the practice instituted by President De la Madrid to expropriate land from agrarian communities, only with their acquiescence.

A third aspect in terms of the transformation of the power of eminent domain involved the modification (or sometimes abandonment) of eminent domain policies, by the government itself. The most obvious manifestation of these transformations was the termination of the program to create land reserves that had peaked at the beginning of the 1980s. After more than a decade of activist policies for urban development driven by the Federal Government, this culminated in the General Act for Human Settlements (*Ley General de Asentamientos Humanos*) in 1976. One of the instruments that seemed to have a consolidating effect was the creation of land reserves by expropriating *ejidos*, transferring their land to the control of local governments, using the traditional strategy of adding a land reserve program to the overall urban development plan. A large part of the land that was expropriated was destined to low income housing projects. In some cities, such as Aguascalientes, the program had considerable success

[19] Both the legislation on human settlements and environmental law (and even the agrarian legislation) explicitly stipulate that the land of agrarian communities is subject to the land use regulations imposed by the public authorities.

[20] Hernández-Ornelas (1973), Azuela (1995), and Léonard and Velázquez (2003).

FIGURE 7
MEXICO: EXPROPRIATED AREA BY TYPE, 1968–2004 (HECTARES)



(Jiménez-Huerta 2000, 68), whereas in others such as the MZMC, it met with a number of obstacles.[21] In any event, we wish to emphasize that the Carlos Salinas administration (1988–1994) abandoned this program completely, instead opting to use eminent domain to regularize land tenure, as this created immediate and concrete political benefits.[22] Figure 7 illustrates this change, where instead of applying expropriation for the creation of public benefit, it was in order to regularize land tenure.

In the case of Mexico City, a fourth process that complicated the exercise of eminent domain requires consideration. This was the creation of the Federal District Government, with a director

[21] According to the main official responsible for the program, attempts to apply this in the State of Mexico "were unsuccessful [due to] opposition on the part of agrarian communities and their associated cooperative interests, as long as trade in illegal lots was flourishing" (Rébora 2000, 220).

[22] To clarify this subject, one is reminded that the titles handed over to the settlers were inserted in a folder with the national emblem, with below this the name of the President of the Republic. This practice was continued up until the Vicente Fox administration.

elected by direct and universal vote, severing the constitutional link between the President of the Republic and the government of the capital city. Eminent domain was controlled by an authority that despite governing a territory where the seat of the federal power resides is not subject to these powers, as it derives its legitimacy from the electoral process. In other circumstances, this would not have been so important, but because the first elections for head of government were not won by the President of the Republic's party, it became one of the key events in the so-called Mexican democratic transition. In strictly legal terms, the new city authority could make use of eminent domain to the same degree as state governors; but in political terms, power is gained by exercising it and the new conditions were very strict, as evident in the following.

Finally, a fifth element concerns the way eminent domain is viewed in the public arena. In one sense, the enthusiastic adoption of neoliberal ideas by a social group biased it against eminent domain, a tendency that was magnified by the traumatic experience of the nationalization of the banking system in 1982.[23] Even today, this sector of public opinion continues circulating the erroneous idea that the legal imposition of eminent domain in Mexico is particularly authoritarian. The discourse on the rule of law, which has played a central role in Mexican public life, has been dominated by the protection of property rights. Ironically enough and in contrast, there has been a synergy between this point of view and another which appears to be the opposite. We are referring to social resistance to certain projects (airports, dams, and highways), due to their environmental impact. Both these currents of public opinion are expressed globally, and it is possible that the discrediting of eminent domain in the world is associated with this overlap. But in Mexico it is combined with another element, referring to the sympathy that most of the left displays towards agrarian communities, termed as "social

[23] The best analysis of nationalization of the banks is still Elizondo (2001).

property," to distinguish this from private property, when in truth it represents no more than a different type of private property. This is not to say that the entire ideological spectrum opposes all expropriations with the same force.[24] But we could argue that both types of property, individual and communal, are mutually reinforced in the public sphere, despite being supported by different social groups. Given this synergy, the discourse on the "social function of property" seems to lack the strength that it manifests in countries that do not have the type of agrarian communities that exist in Mexico.

We will now analyze how this crisis in eminent domain manifested itself in the MZMC, both from the point of view of the Federal District Government (as government of the capital) and in relation to the Federal Government, which promotes projects and activities in the entire MZMC, including the Federal District.

With the election of Cuauhtémoc Cárdenas in 1997 as Director of the Federal District Government, for the first time there was a local government from a different party than the President who governed the city. This and other factors that we have already discussed introduced barriers to the power of eminent domain. Both the city government and the judges in charge of eminent domain cases continued with their old habits, creating a number of conflicts that were at the center of some of the most complex political processes found in the new order.

Without doubt, the most serious conflict related to an expropriation in principal appeared to be routine. One tenth of the area of "El Encino," a land area of slightly more than 20 acres in the area of Santa Fe[25] was affected by an expropriation decreed by

[24] When it comes to expropriating land from agrarian communities for projects that will attract private investment, the neoliberal public opinion tends to condemn any resistance as characteristic of "enemies of progress," responsible for "corporatist politics," etc.

[25] Santa Fe was created at the beginning of the 1990s as a high-end real estate development of office buildings and residential homes in Mexico City. It therefore constitutes a high value area.

the Federal District Government in the year 2000,[26] for the purpose of extending a street and an avenue, planned years previously, in order to complete the Santa Fe urban development. The owner of the area filed for a *juicio de amparo* and the judge in charge of the case upheld the *amparo*, thus suspending the expropriation process while the matter was being resolved. At some point, the judge felt, or was led to believe, that the Head of the Federal District Government, Andrés Manuel López Obrador (AMLO), had not complied with the injunction, causing a huge scandal: some of the public, i.e., those against AMLO, thought that he had simply been in contempt of court. Despite clear evidence that construction had been suspended, the campaign against AMLO was so intense that he was prosecuted in order to remove him from office.

In May of 2005, AMLO, who at the time was listed in the polls as the strongest candidate to win the Presidency of the Republic in the general elections to be celebrated the following year, was removed from his post of Head of the Mexico City Government by the House of Representatives. This action immediately triggered massive demonstrations, forcing President Fox to demand the resignation of the Attorney General and the withdrawal of the case against AMLO. This is not the place to analyze all the social and political ramifications of this conflict. Suffice it to say that it affected the image of the President of the Republic and that of the Chief of the Mexico City Government; even the Supreme Court was caught up in the scandal when it was revealed that the Chief Justice and President Fox had discussed the case, without revealing the outcome of the conversation.

In reality, the El Encino case represents a simple case of political opportunism; seeking to get rid of an adversary by taking advantage of a lack of clarity in the judicial process, however, the

[26] Expropriation decree dated November 9, 2000, published on the 10th and 14th days of the same month and year.

legal case was also mismanaged by the judge, as it could easily have been resolved before it became a major political crisis.[27]

Another case, involving an area called "Paraje San Juan," surfaced one year prior to the El Encino case and is much more representative of the types of problems that are wholly attributable to deficiencies in legal procedures. This case concerned more than 750 acres, currently populated by more than fifty thousand people in ten different neighborhoods, with urban development initiating at the end of the 1940s, although no legal record of this exists.

In 1989, the government embarked on expropriations to regularize land tenure in these neighborhoods. This process lasted more than a decade due to an *amparo* filed by a property owner, who appeared suddenly with dubious claims relating to the property.[28] The media got word of the conflict and the case became the most important precedent for the El Encino case. The court judgment ordered the Federal District Government to pay some US$150 million in compensation, with no possibility for an appeal. From the little than can be learned from the court records, the valuation took into account the total value of the more than ten thousand homes and infrastructure that existed in the area.

The head of the Federal District Government, AMLO publicly declared that this amount would not be paid, as it was equivalent to one third of the total budget destined to the city's welfare policies. Public opinion was divided between those who stood by strict compliance with the "rule of law," and those who supported

[27] At the time this essay was edited, at the beginning of July of 2011, Judge Álvaro Tovilla, who declared AMLO in contempt of court for the El Encino case, was removed from his post under suspicion of corruption.

[28] According to a former public official that was familiar with the case and requested to remain anonymous, when the eminent domain case was initiated there was no record of this parcel in the Land Registry. The Federal District Department chose to ignore this fact, given that its legal consequence would have transferred responsibility for the expropriation to the Secretary of Agrarian Reform, thus denying the Federal District Government the opportunity to include it in "its" regularization program. The patrimony aspect of eminent domain was given precedent over social need.

AMLO's position of not paying the compensation, ordered by the judge. The Supreme Court must have concluded that this case would have negative impact on its image, and in 2004 took charge of the case and without much explanation reduced the compensation amount to less than one tenth (60 million pesos) of the original amount, signifying the closure of the case.

Apart from these two cases, at least four others made the front pages of the newspapers, leaving the impression that eminent domain as a strategy for urban development was redundant.[29] Even AMLO began to proclaim that he preferred to build roads underground, in order to avoid having to expropriate.

Perhaps the most important lesson from this period is that the enormous difficulty faced by AMLO's government when applying eminent domain was due not only to the political factors that we have mentioned, but also to the fact that both his government and the judges continued to behave in a way characteristic of the authoritarian era. The government continued to implement careless and arbitrary methods used in the past, despite the newfound willingness of the courts to exercise their autonomy, and the judges did not seem to realize the social and political impacts of their actions. In other words, neither group was capable of responding to the challenge presented by the new reality of political pluralism and judicial autonomy. However, this served as a learning experience. In the following, we show how during recent years the government of the Federal District has undertaken numerous urban projects, based on successful expropriations.

However, the crisis that has challenged the ability of the Federal Government to develop urban and infrastructure projects appears to be more serious and prolonged. Not only did the goals set by the Federal Government far exceed its financial capacity to expropriate, as in the case of national parks and archeological areas, but as mentioned previously, land belonging to agrarian

[29] These cases are known as "Ramos Millán," "ENAH," Cooperativa Pascual, and the failed Mexico City airport, whose legal implications are examined in the following chapter.

communities could not be taken as easily as before. Little by little, and employing a number of strategies, *ejidos* had developed a sometimes striking capacity to resist expropriation, using both legal and political methods.

In the case of the MZMC, the strengthening of the agrarian communities and the corresponding weakening of the state manifests itself in specific ways. During previous decades, *ejidos* in the urban periphery stopped being simply "invaded" by the advance of the city, to become protagonists of this process. They not only started to manage their own public services, as in many other regions of the country; they also consolidated their power to the point where people began to refer to their land as their "territory," not just their property. Likewise, as shown by María Soledad Cruz, the *ejidos* that wished to continue with their farming activities have been able to do so and town meetings were held in order to decide whether or not they chose to become part of the city and under what circumstances (Cruz 2001). In Michael Mann's terms, this represented a clear consolidation of the "structural power" related to this type of property (Mann 1993).

Even in strictly legal terms, changes introduced to the agrarian system in 1992, have further strengthened agrarian communities. Not only do they now have the legal authority to make many decisions without the intervention of the federal agrarian agencies; the fact that there are now specialized courts that do not depend on the executive branch has created a huge legal opportunity for resolving controversy, including restitution lawsuits, which they have used to combat expropriations that were not compensated and *de facto* situations such as when the Federal Government occupied their land without even initiating eminent domain procedures. Likewise, they have also have filed opportunistic lawsuits, taking advantage of the weak legal basis of past government practices.[30] Apart from the MZMC, one of the most striking cases

[30] According to a real estate specialist, "the *ejido* members found a better way of negotiating for their own benefit, resorting to the federal judicial branch in order to file *amparos*" (Ramírez-Favela 2009).

involved 22,239 acres that pertained to several *ejidos* south of Tamaulipas, in the Gulf of Mexico, expropriated by the government of President López Portillo in 1981 to create an industrial port, in which it invested more than two and a half billion dollars. In November of 2008, attorney Diego Fernández de Ceballos won a renowned case that annulled the expropriation decree for the simple reason that it lacked a "ministerial endorsement," i.e., it lacked the signature of one of the Federal Government secretaries.[31]

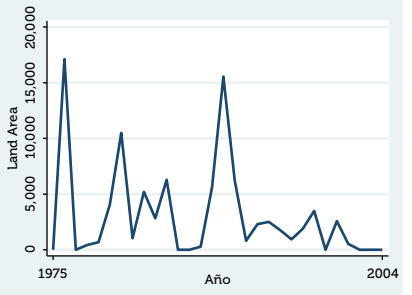
Considering these cases, it is not surprising that the Federal Government has frequently failed in attempts to expropriate rural land from *ejidos* or agrarian communities, even in the case of high priority projects. The most relevant case involved the new Mexico City airport that was announced in 2001 as the most ambitious infrastructure project of the government of Vicente Fox, but which had to be abandoned a year later due to the actions (both political and legal) on the part of a group of communities led by San Salvador Atenco and the Popular Front for the Defense of the Land (*Frente de los Pueblos en Defensa de la Tierra*). Perhaps the most significant aspect of this very serious conflict, which triggered the worst episode of police repression of the decade,[32] was the motto defining the movement: "our land is not for sale, it is to be loved and defended." If this phrase has any significance, it is the plain and simple denial of government power to exercise eminent domain. The landowners not only reject the notion of being deprived of their land; they make it clear that this would only be possible, if they were willing to "sell."

The Atenco case had ample resonance and has become a symbol for an aspect of Government ineptitude and for others of the ability of agrarian communities affected by eminent domain to mobilize in defense of their interests. However, this is not an isolated case, although it manifests its own characteristics that set

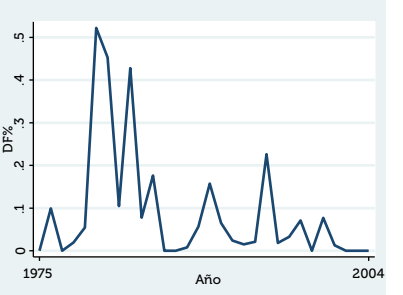
[31] *El Universal*, June 9, 2009.

[32] Among others, see Domínguez (2007), Hernández–Santiago (2004), and Azuela (2011).

FIGURE 8
EXPROPRIATIONS IN FAVOR OF CORETT (AGENCY IN CHARGE OF LAND TENURE REGULARIZATION) IN THE FEDERAL DISTRICT



Area expropriated in favor of CORETT in the Federal District



Area expropriated in favor of CORETT, as a percentage of the Federal District

it apart from almost all the others; however, our intention here is to include it as an indication of a general weakening of the power of eminent domain over agrarian communities.

It is apparent that the expropriation of *ejido* lands at the national level has suffered a drastic reduction in recent years. According to a recent study, more than sixty percent of the expropriations of agrarian communities in the past century took place between the 1970s and 1980s; in contrast, the past decade only accounted for 3.3 percent (Colin-Ugalde 2009).

In this context, figure 8 shows eminent domain activity that affected *ejidos* and agrarian communities in the MZMC, initiated in 1975. Although certain erratic trends are apparent, the overall level of activity has been very low during the past ten years.

In the case of land tenure regularization, there were additional factors at work. On the one hand, after Corett[33] was relocated from the federal division headed by the Agrarian Reform Secretariat to become part of the Social Development Secretariat, the

[33] Comisión para la Regularización de la Tenencia de la Tierra, the institution responsible for regularizing land tenure in agrarian settlements since the mid-1970s.

president of the Republic stopped signing decrees for land tenure regularization.[34] On the other hand, there was no longer a need to expropriate in order to regularize land tenure, owing to the application of notoriously fraudulent mechanisms where agrarian laws make it possible to achieve the same results, but with greater benefits for agrarian communities. Thus the process that for more than three decades issued land titles for urban occupants, as a result of which they had to pay twice for the same lot, is today being replaced by a mechanism that causes an even higher second payment because instead of the mediation services of a federal agency such as Corett, there are now groups of private lawyers working for agrarian communities, whose obvious interest is to increase the price of their land.[35]

A clear indication of the weakening of the Federal Government's power to expropriate land from agrarian communities was the method used by President Calderón to acquire land for a new refinery, no doubt the most important infrastructure project of his government. Instead of attempting an expropriation, inadvisable in the shadow of Atenco, the government announced that technically the refinery would be located, either in the city of Salamanca, in the state of Guanajuato, or in Tula, in the state of Hidalgo. In May of 2009, the CEO of the state-owned oil company PEMEX announced that the refinery would be built, wherever the respective state government would contribute the

[34] There is a palace logic, nonetheless real because of it, that explains this. Expropriations are decrees signed by the president as proposed by a secretary of state, obviously as part of his duties. If the secretary that has to request the signature is not responsible for the matter, as in the case of Corett, which is a part of Sedesol (Social Development Secretariat) and not the Agrarian Reform Secretariat, the head of the latter hardly has any incentive to submit such decrees to the president.

[35] As documented recently by Clara Salazar for Ecatepec, one of the most dynamic urban municipalities, lawyers are pressuring families to accept a new titling method, using agreements with the *ejidos* in which everybody earns less than those who bought land in good faith long ago (Salazar 2012).

land, giving a deadline of one hundred days. The Governor of Hidalgo "won" the competition, purchasing 1,730 acres of *ejido* land, at a record price (US$30,000 per acre). In this case, the project avoided social protests, simply acquiring the land at an exorbitant price, which is no doubt an indication of the general strengthening of agrarian communities as land owners.[36]

It is evident that the difficulties the Federal Government and the Federal District have faced using expropriation have been very different. Certainly, it would appear that the Federal Government faces a greater challenge, in the light of the structural strengthening of agrarian property, also receiving support from certain social groups, which becomes even stronger when expropriations have possible environmental impact.

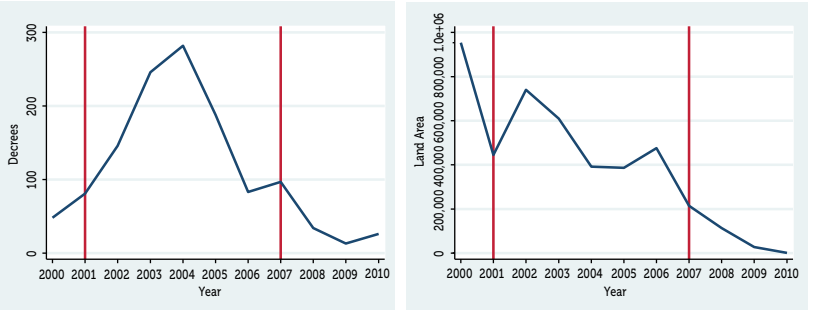
Interestingly, a public debate never emerged concerning the legitimacy of eminent domain. However, a considerable amount of legislative activity resulted. The reforms introduced to the Expropriation Act by the Federal Congress in 2009, the first important ones during its seventy year existence, can be interpreted as a response to the eminent domain crisis. However, it only dealt with matters placed on the agenda by the interaction between the judicial and executive branches: deadlines for compensation payments, guarantee of due process, and the legitimacy of temporary injunctions. However, fundamental issues, such as the responsibility of the property owner in cases of land tenure regularization of poor neighborhoods did not feature in the legislative debate.

RECOVERY OF EMINENT DOMAIN IN THE FEDERAL DISTRICT

We now consider how the Federal District Government has come to exercise the power of eminent domain in this context, in a way similar to other world governments. First, it is interesting to observe that between 2000 and 2010 there were 1272 eminent domain

[36] "Hidalgo Hands Deeds to Pemex for Refinery," *Milenio*, June 17, 2010.

Figure 9
Eminent domain cases initiated
by the Head of the Federal District



proceedings, a large number when compared to 19 expropriations undertaken by the Mexico State Government, in the municipalities of the MZMC.[37]

What does the inverted "V" signify in terms of the number of decrees and the constant decline in land surface? When we consider expropriations for public interest causes, it is apparent that the predominant reason is to regularize land tenure. Specifically, during the government of Andrés Manuel López Obrador, 89.7 percent of the area expropriated was for regularization; this percentage was reduced to 71.8 percent under Marcelo Ebrard. Land regularization still represents by far the main cause of expropriation.

By all accounts, the quantitative trend is still declining. How can we thus opine that the Federal District Government has exercised its power of eminent domain in a normal way? Likewise, as regularization ceased to be the most cited public interest cause, there was a reduction in terms of total expropriated area. When we analyze these public interest causes year by year, it is evident that in the last six-year presidential term, the prevalence of regular-

[37] We thank Ricardo Zamora for his help integrating a database from the Official Bulletin "Gaceta de Gobierno" of the State of Mexico, between 2001 and 2010.

FIGURE 10
EMINENT DOMAIN FOR PUBLIC INTEREST
CAUSES AND LOCAL ADMINISTRATION

ization is gradually replaced by other large infrastructure projects, such as Line 12 of the Metro or the so-called "Supervía Poniente" (Western Superhighway).

During the initial years of the Ebrard term and in spite of the misfortunes of his predecessor, the Federal District Government demonstrated a certain audacity concerning its application of eminent domain. For example, it expropriated several parcels where stolen merchandise or "pirated" videos were sold.[38] Although even the government reported that these were parcels "where criminal activities were going on,"[39] the legal records were written very carefully in order to avoid *juicios de amparo* that disrupted expropriations in earlier times. It is not easy to provide exact

[38] The most celebrated cases consist of one in the Tepito neighborhood, and another known as "La Ford," in Iztapalapa, where stolen car parts were sold.

[39] Consejería Jurídica y de Servicios Legales (2008, 36).

numbers for *amparos* upheld by the courts against the Federal District Government;[40] however, it is clear that despite an intense spirit of litigation exhibited by the owners, during recent years the courts have upheld the great majority of expropriations.[41] Even in cases where projects were opposed by protests and demonstrations together with legal action, as in the controversial "Supervía poniente,"[42] until now the Federal District Government has been able to successfully implement most of these.

FINAL REFLECTIONS

Before presenting the conclusions to this chapter, it should be emphasized that eminent domain is fundamentally ambivalent as are most legal institutions. Its ambivalence derives from the fact that public interest can override the interest of the owner, or vice versa. From the time that Maurice Halbwachs (1928) analyzed expropriations in Paris during the second half of the nineteenth century, it is evident that commonly the owner obtains the greatest profit from expropriation. However, and while recognizing this ambiguity, evidently an overall decline in eminent domain strongly indicates a weakening of government, which is peturbing because it implies that the government is losing the power to assert public interest over private interests.

In this chapter, the way in which the power of eminent domain has been weakened in Mexico is described. Overall, we have attempted to show that, far from being a homogeneous and linear phenomenon, a complexity exists that requires analysis. First, it is necessary to distinguish between the international and domestic dimensions of this phenomenon. There is no doubt that the

[40] This is due to reports concerning the number of cases pending, which is highly unstable.

[41] Consejería Jurídica y de Servicios Legales (2008, 35–39).

[42] The debate about this arterial road is focussed on its environmental impact and particularly the fact that it represents the first toll road in the city, which will also be managed by a foreign capital firm.

international commitments assumed by the Mexican state in this liberal era (in the case of Mexico, influenced by NAFTA) have created an important restriction to the power of eminent domain, particularly when compared to the way it was exercised during the post-revolutionary period. In particular, this has created differential treatment favoring foreign property owners, over Mexican owners.

However, evidently the restrictions to the power of eminent domain have generated a number of processes, specific to the dynamics of the Mexican state and society, demonstrating far more impact than those introduced to protect foreign investments. We do not even have to undertake a complex analytical exercise in order to demonstrate this: these internal restrictions have greater impact, simply because the land needed for urban expropriations is rarely in the hands of foreign nationals. In other words, the amount of land that the government needs to expropriate from foreign owners in order to fulfill urban development processes is insignificant, when compared with the amount of land in the hands of Mexican owners.

Which internal factors have thus reduced the power of eminent domain? It is possible to identify two that are general in nature. The first concerns increasing activism displayed during past decades by judges from various jurisdictions. Without offering a substantive reflection on the relationship between property and eminent domain, and in many cases without showing any deference to the other branches of government, the courts have ceased "accompanying" (to apply the euphemism from the post-revolutionary era) priority projects devised by the executive branch. Independently of whether this activism can be considered excessive or not, it can be generally stated that the judicial branch has restricted the use of eminent domain, in conformity with the principles of the liberal state, and in so doing has exposed some of the inertia of the post-revolutionary state, which used its power arbitrarily, particularly when it paid late and sometimes insufficient compensation.

However, it would be misguided to allege a simple causal relationship between judicial activism and a decline in the power of eminent domain. It is true that there are situations where this causality appears to exist, for example when the government resorts to other forms of land acquisition for the development of projects for fear that a lawsuit may hamper progress. But it is also important to recognize that from the mid-1980s, the change in the use of eminent domain was dominated by the government's own general policies. There is no doubt that the prevalence of neoliberal thinking has excluded eminent domain as conceived in the post–revolutionary era from the agenda. Therefore, the courts have not had to confront the tension between the revolutionary and liberal tendencies inherent in the Mexican constitution for the simple reason that the government (for better or worse) abandoned the first of these many years ago.

In addition to these two general factors, there are other elements that explain the weakening of the power of eminent domain that only become evident when we analyze who is expropriating, who is subject to expropriation, and why. The differences revealed in each case make clear that the power of eminent domain is not homogeneous. For example, in the case of the MZMC, when we analyze the way in which the different government agencies exercise eminent domain, we find enormous differences between the Federal Government and the governments of the two federative entities with jurisdiction over the MZMC: the State of Mexico and the Federal District. Evidently the Federal Government, besides some important legal defeats, has attempted to politically confront the opposition manifested by agrarian communities against large infrastructure and of these the defeat suffered in Atenco concerning the new airport is without a doubt the most important. The power to mobilize sometimes displayed by agrarian communities, together with the sympathy these movements engender among certain social groups, have resulted in the failure of the Federal Government to regain its power to expropriate land for particular projects.

At the state and local level, the situation is very different. In the MZMC, there is a noticeable difference concerning the application of eminent domain on the part of the State of Mexico and the Federal District Government. Although the most important urban development processes of the metropolitan area occur in the State of Mexico, its government has only decreed nineteen expropriations during the past decade. Contrarily, during the same period, the Federal District Government expropriated more than one thousand properties for various purposes. The important thing is that following an apparently insurmountable crisis, the government of the capital has succeeded in "stabilizing" the exercise of eminent domain.

When we ask the question: who are the owners affected by the expropriations, once again the subject turns to agrarian communities. Although in other regions of the country, these communities do not have the means to exercise their rights against expropriations, in the MZMC they have displayed a notable capacity to respond. In addition to the legal means at their disposal, one of the most important being that their property rights are not subject to adverse possession, there is the fact that in the course of the twentieth century they were transformed from subordinated actors in the political system to becoming completely autonomous. The control they have over their land goes beyond the mere exercise of their property rights, to sometimes functioning as a fourth level of government, with enormous capacity to resist regulatory attempts by the government, both in terms of zoning and for environmental reasons. This de facto power is the most important obstacle faced by the Federal Government when trying to expropriate land from agrarian communities. In some cases, certainly isolated but symbolically important, opportunistic lawsuits combine the territorial power of the agrarian communities with the willingness of the courts to protect property owners, when the expropriating agency does not meet certain requirements. From the social and political point of view, therefore, agrarian property imposes a real structural limit to government

power, in the same way that landowners traditionally had recourse to financial resources to aid them in limiting government actions.[43]

The remaining property owners affected by eminent domain constitute a very heterogeneous group, ranging from a large quantity of small owners who do not always have access to legal services, to landowners who have enormous social influence at the local level. Foreign nationals, on the other hand, can present an important obstacle, if they constitute investors from a country to which Mexico is commited to protecting investments. However, their relationship with eminent domain is complex: it is true that when their project's advancement is restricted, they can argue that they have been subjected to expropriation, without being duly compensated. It is also true that the types of conflicts they are involved in tend to implicate the expropriation of land in agrarian communities (as in the new trend for strip mining). Today, it is clear that land ownership does not necessarily coincide with the most important social interests.

When we analyze the purpose of expropriations, we also find interesting contradictions. It is not surprising that in this sense, expropriations for big projects (dams, airports) that imply significant environmental impact generate support for property owners from environmental organizations and a broad spectrum of public opinion. Projects that once engendered general approval in the name of progress during the decades after the revolution, are today thought to symbolize depredation, particularly when the affected owners represent the national identity or an indigenous group.

Expropriations to address land tenure regularization merit a separate comment, as Mexico represents the only example among the six Latin American cities included in this study where eminent domain has been systematically applied for this purpose. Beyond

[43] In fact, we could ask ourselves whether the Federal District Government would have been equally successful in recovering its power of eminent domain as reported here, if they had also been in charge of expropriating land from agrarian communities. This has been the situation that the Federal Government found itself addressing.

the historical reasons that explain this, we should recognize that normally, *in the case of Mexico*, the main beneficiary of these expropriations is the land owner. At least from the point of view of the social function of property, this seems to create an unwarranted prize for the owner, difficult to justify, as he has generally benefitted from the urban development of his land or at least failed to take responsibility for preventing this, protecting it in a way that would prevent its conversion to urban use under irregular conditions.

Beyond legal considerations, the interesting aspect of these expropriations is that the intention is not to create a public benefit, but rather to intervene in the relationship between the new occupants of the land and the original owners. This certainly is not a situation in which a government agency intervenes to regulate a relationship, whose content is defined in advance: in fact the intervention per se contributes to (re)constituting property relations. When it recognizes certain people as in possession of the land, it is laying the foundation to make them future owners; when it recognizes others as "original" owners, it is reaffirming a right, which according to the historical criteria of civil law must be about to become extinct, due to acquisitive prescription. It is not an exaggeration to state that, in these cases, expropriation *creates* property.

Obviously, problems are very different when eminent domain is used to create collective benefit. Classical constitutional agenda indicates to us that the most important aspects constitute justifying the public interest cause and paying adequate compensation. However, practice indicates that this is not what is important. The subject of compensation only appears when there are scandalous discrepancies, with differences of several orders of magnitude, as in the case of Paraje San Juan. But we rarely find a reflection or discussion that explains or questions why compensation was set at one hundred and not two hundred.

On the other hand, the public interest cause has surprising manifestations. In the history of urban expropriations in Mexico in the twentieth century, the subject was only a matter of clear

legal interpretation in the case of expropriations of suburban subdivisions, in order to provide low income families with a place to live. This was the only case that moved the federal courts to declare the unconstitutionality of a public interest cause. It is striking that the courts only restricted the legitimate pursuit of eminent domain when trying to benefit the urban poor.

Likewise, the unpopularity of certain large projects (airports, dams) was not reflected in the legal pronouncements on the part of the courts. Federal judges have managed to arrest many projects, however not as an expression of collective sentiment, which anyway would not have been part of their function. If we are guided by their own arguments, they did so because the "act of authority" was not, in their judgment, sufficiently justified and/or motivated. Legal technicalities, not substantive reasons, seem to have motivated the courts to dismiss, or at least delay, an important number of government projects. It remains to ascertain whether they acted in defense of private property rights or were motivated by a desire to indicate their independence from the executive branch.

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Chapter Nine

Property not under Discussion: The Courts and Eminent Domain in Mexico City

Antonio Azuela and Carlos Herrera

INTRODUCTION

The role of judges in urban expropriations might seem to be an unremarkable area of the law. However, the conflicts caused by this legal issue during the first decade of the twenty-first century in Mexico indicate that this is not a trivial matter. For example, the conflict of "Atenco" resulted in the suspension of the most important infrastructure project promoted by the first government to take power during the post-authoritarian era; in another, "Paraje San Juan," the Supreme Court came close to violating the principle of *res judicata* (or claim preclusion) when attempting to defend itself against a public outcry concerning the actions of federal judges; another, "El Encino," resulted in the impeachment of the Director of the Mexico City Government. All these conflicts independently manifested a crisis in the context of eminent domain, i.e., the power of the government to impose a public interest project, even against the will of the landowner.

Beyond the political dimension that always surfaces when property owners attempt to resist expropriations (should they not suit their interests),[1] these conflicts raise specific legal questions

[1] As revealed in the first urban sociology texts (Halbwachs 2008 [1928]), there are many instances where property owners are the ones who most benefit from an expropriation.

in the context of property rights and in terms of the power of the government to prioritize general interest over the interest of the owners. What circumstances justify an expropriation? How should compensation be calculated and how should payment conditions be defined? These are classic questions, to which we can add others more specific to urban development processes that have been experienced in Latin American society from the middle of the twentieth century: when eminent domain is exercised to regularize land tenure in neighborhoods that were formed illegally, does the owner have a right to compensation, if he tolerated, promoted, and/or benefitted in some way from the occupation of his land? When houses occupied by their owners are expropriated, do these owners have the right to be treated differently from owners who did not make use of the property to satisfy a basic need such as housing? When the price of land increases due to the project that motivated the expropriation, does the owner have the right to benefit from all or part of this additional value? When there is public resistance towards certain large infrastructure projects, such as dams and airports, should this lead to a reconsideration of public interest causes, as established by law?

The following pages reveal how some of these issues have been treated with striking negligence by judges and other legal figures, whereas other cases have not even been addressed by specialized legal literature or by legal practice. Despite all this, the courts have played an important role in terms of defining the power of eminent domain in the urban environment. This chapter is divided into two sections. The first presents the strategies applied by Mexican judges, in particular, the judges from the Supreme Court (National Supreme Court of Justice, NSCJ), in conflicts relating to eminent domain in the urban context during the "classic era" of post-revolutionary Mexico. The second section addresses judicial strategies and other legal conditions in the context of what is considered to be a veritable crisis concerning the power of eminent domain, with most problems manifest after 2001, but stemming from earlier periods.

Besides analyzing the role of the legal system, we are interested in exploring the way in which judges are resolving (or not) the dilemmas created by eminent domain in the urban environment, particularly in Mexico City. This exploration is of paramount importance at this time, when expectations concerning the judicial branch are so high. In this context, we do not only refer to a more or less diffuse social expectation concerning the role of the judges in the post-authoritarian era. We particularly refer to trends in legal opinion concerning the role of judges, and the expectation that their performance could be improved by applying more rigorous forms of argument. In particular, so-called neoconstitutionalism[2] often carries with it an expectation, or even a requirement, that the judge should reach his decision on the basis of his analytical skills, concurring with the positivist tradition, and that he should be capable of formulating solutions in substantive terms based on none other than a clear concept of fundamental rights.

These requirements are sufficiently complex when tackling eminent domain in any part of the world, as they address one of the most controversial rights: the right to property. However, in Mexico, the matter is even more complicated because (at least until 1992) the Constitution created a fundamental tension between two extremes: one is "revolutionary," calling into question property rights in a large part of the country, for example, by granting property rights to "population centers" that did not have them while also formulating an ambitious nationalization plan for certain natural resources considered strategic; the other is "liberal," integrating the usual guarantees that protect property owners in any democratic regime. Of course, all this occurred prior to "the end of history." This tension is (was?) apparent, even in the text of the Constitution, but revealed itself mainly in legal contexts. In other words, while a significant number of legal professionals

[2] Universal consensus concerning the term "neoconstitutionalism" does not appear to exist (in English it is used to identify the conservative bias of a new generation of constitutionalists). In Spanish, it seems to have the opposite connotation. See Carbonell (2003).

were applying the logic of the revolution, others were conforming to liberal principles, requiring that the power of government to impose limits on property owners should only be exercised in exceptional cases.

As the reader can appreciate, it is difficult to unequivocally establish whether post-revolutionary tensions are still discernible in Mexican constitutionalism. This research attempts to clarify this question, exploring the way in which eminent domain conflicts are processed in the legal context.

THE CLASSIC ERA

What can be called the "Classic Era" of the post-revolution, defined in this study as the end of the 1930s to the first half of the 1980s, which coincides with the long process of urban growth in the Mexican capital,[3] obviously not anticipated by the Revolutionary program.[4] The last chapter indicated that when the government set out to expropriate properties in the city for urban development, the outcome was generally successful, albeit not free of conflict. It was considered that during this period the judicial branch was subservient to the executive branch. Without denying that today federal judges act with a much greater degree of autonomy, the truth is that even then they were far from playing a merely passive role, when opposing government imposition of eminent domain. First, they imposed certain limits on expropriations concerning substantive matters (amount of compensation and the public interest cause), limits which had certain impact as they provoked a constitutional reform at the end of the 1950s that restricted the power of certain courts to declare laws unconstitutional. Conversely, they developed a number of pro-

[3] Towards the end of this period, urban growth was no longer in the Federal District but in the neighboring state of Mexico.

[4] The fundamental themes in the 1917 constitution referring to matters of property were the agrarian reform and state control of certain strategic natural resources.

cedural strategies to ensure that many expropriations were irreversible and did not require justification in substantive terms.

COMPENSATION

Despite its undeniable importance, the subject of compensation did not represent an important obstacle in litigation dealing with expropriations. Before signing the North American Free Trade Agreement (1993), which established the guidelines for calculating the commercial value of a property, compensation was determined in relation to the "cadastre value," i.e., the value determined by the fiscal authority for calculating property tax.[5] Predictably, in a context of chronic fiscal weakness, the cadastre value was very often substantially lower than the commercial value. Therefore, in the past, an expropriation represented a calamity for affected property owners, unless they had the "good fortune" to discover beforehand that an expropriation was planned. The only clear relief afforded to owners by the courts concerning matters of compensation, concerned the moment of payment. From 1919 onwards, the courts upheld the criteria that compensation must be paid at the moment of expropriation.[6] Likewise, during the following fifty years, the judicial branch refused to authorize compensation payment in installments.

[5] "[N]o matter whether this value was suggested by the property owner or simply tacitly accepted by him because of having paid his taxes on this basis," as stipulated (even today) by Subsection VI of Article 27 of the constitution. The aforementioned reform to the compensation criteria was introduced by the Expropriation Act (*vid infra*).

[6] Expropriation. Expropriation is equivalent to a forced sale and it is customary in purchase and sales contracts that the price as well as the property that is sold exchange hands in the same act; any modification of this will depend on the mutual consent of the parties to the contract. *Fifth Epoch. Plenary Session. Record No. 810381. Review of administrative amparo. Luján Julio. April 29, 1919*

Expropriation. Expropriations made without prior compensation, except those provided by the Constitution, represent a violation of legal guarantees. *Fifth Epoch. Plenary Session. Record No. 810383. Review of administrative injunctions. Luján Julio. April 29, 1919.*

The only cases in which the courts permitted compensation to be paid later constituted cases of "national interest."[7] The concept of national interest was invented by the courts to validate expropriation related to the oil industry (in 1938) and to avoid contradicting its own resolutions. This illustrates how pressure created by a contradiction in the legal system can result in the creation of new legal concepts.[8] Once this distinction was made, the courts could claim that there was no contradiction with its prior rulings because the cases were not identical.

As early as 1946, the Supreme Court declared the unconstitutionality of Article 20 of the Expropriation Act, with the argument that it did not order compensation to be paid at the time the property was occupied.[9] It was not until 1974 that the Court

[7] Expropriation, Compensation in the event of. With the sole exception of a case that affects the national interest, and when the government cannot provide immediate compensation because the expropriation affects the national interest, expropriations must be made in exchange for compensation, that is to say that the payment must be made within the period required in order to determine its amount. States do not have the authority to impose limitations to property because this would violate the Federal Constitution, and if a particular state were to interpret the constitution in accordance with the activities under its authority, this would create anarchy. Therefore, if an expropriation decree signed by the governor of a state does not order immediate payment according to the terms stipulated in Article 27 of the Constitution, thus leaving the payment of compensation subject to a possible budget surplus, as allowed by the Expropriation Act, that decree would be unconstitutional. *Fifth Epoch. Second Chamber. Record No. 330055. Review of administrative amparo 641/39. Septién de Urueta Guadalupe. August 18, 1939. Unanimous decision with five votes.*

[8] This phenomenon is termed the creative use of paradoxes by Luhmann (1988).

[9] *Expropriation, Federal Act.* Article 20 of the Federal Expropriation Act is contrary to Article 27 of the Constitution, because it does not order the payment of the value of the expropriated property on the date that the owner is deprived of his property, pursuant to case law of the Supreme Court which states: "Expropriation, compensation in the event of. As compensation in the event of expropriation is guaranteed by Article 27 of the Constitution, in or-

reneged concerning its position on the moment of compensation payment.[10] It is interesting to contrast this with the previous case, in which the Court, confronting a possible contradiction, creates new distinctions and generates new concepts, thereby contributing to the increasing complexity of the legal system. The importance of declaring an article of the federal law unconstitutional is evident, if we remember that not until 2006 did this once again occur.

der for it to be effective and perform its task, it must be paid, if not at the time of possession, at least as a result of this, in a manner that permits the owner to benefit from this and therefore any law that concedes a longer term or period for the payment of compensation, violates these guarantees." *Fifth Epoch. Second Chamber. Record No. 321831. Review of administrative amparo 2318/42. Rozada Mijares Pedro. September 19, 1946.*

[10] *Expropriation, Compensation for Expropriation. Act of November 23, 1936 (Federal District legislation).* Article 27 of the Constitution stipulates that expropriation for public interest causes must be made in exchange for compensation, however, this does not definitely imply that compensation has to be paid before the act of possession of the expropriated property, as the term "in exchange for" can only mean that compensation is a condition for the expropriation, in other words that the expropriation is made in exchange for an amount that covers property. Therefore, the payment cannot be interpreted exclusively as prior to the act of possession, as it can be simultaneous to or after the possession; and although the Second Chamber of this Supreme Court has ruled on certain occasions that if a law sets a term or period to pay that compensation, this law would be considered as violating constitutional guarantees, due to the fact that in the case it was analyzing compensation to be paid in a period of no less than twenty years, a situation that is completely different to that contemplated in the law of November 23, 1936, so the previous criteria does not have to be followed in this case, because this law, in its Article 20, does not set a period to pay compensation for an expropriation, but only establishes a maximum limit for that payment, which benefits more than affects the property owner, and although it allows the expropriating authority to set the form of payment, this circumstance does not require this Plenary Court to continue enforcing the aforementioned criteria. *Seventh Epoch. Plenary Session. Record No. 233133. Review of amparo 573/55. Mara Galván viuda de Alcántara and co-plaintiffs.*

In any case, regarding the amount of compensation, federal courts sanctioned the criterion related to the cadastre value (i.e., the tax assessment), as established in the law and the Constitution, and case law did not modify the statutes in this respect. The first legal opinion we encounter referring to this subject dates from 1929, only reiterating the text of the Constitution, which states that compensation must be calculated based on the fiscal value of property and that any increase in this assessment must be verified by a professional assessor.

The next opinion referring to the matter of compensation appears in 1940.[11] In this text for the first time, the courts established that the Constitution does not prohibit setting the compensation for an expropriation by means of an agreement between the government and the individual, to the advantage of property owners. The courts thus determined that the cadastre value stipulated in the Constitution is a base value and that the interpretation of this constitutional provision should favor the property owner. This anticipated the current formula for calculating compensation. Although the Expropriation Act was modified in 1993, in order to base compensation on the commercial value of the property, the Constitutional text has not been modified and still orders compensation to be paid based on the fiscal value. The court opinion was thus designed to bridge the contradiction between the Constitution and the Expropriation Act, establishing the tax assessment as a minimum. This interpretation is still disputed by some. However, the real impact of this interpretation

[11] *Expropriation, basis for compensation in the event of*. The Constitution stipulates the necessary requirements for eminent domain, among them the way compensation paid to the owner is determined. However likewise, it does not prevent agreements between the state and individuals, or by means of legal proceedings, that may favor or generate resources in favor of the property owners. *Fifth Epoch. Second Chamber. Record No. 329632. Review of accumulated administrative amparos 4688/39. Noriega Esperanza G., and Félix, Josefa and Amparo. March 29, 1940. Unanimous decision with four votes. Absent: Fernando López Cárdenas. Author: José María Truchuelo.*

has been limited. As we have already mentioned, the tax assessment was usually substantially lower than the commercial value, so this criteria gave the government a discretional margin for establishing a higher compensation amount, by agreement with the property owner.

Concerning the compensation amount, Martín Díaz y Díaz makes the rather apt observation that urban eminent domain in Mexico is a "process without a theory." To date, neither the courts nor the legal experts seem to recognize a need for great reflection on this subject (Díaz y Díaz 1988).[12] Recent cases, such as Paraje de San Juan or Ramos Millán that we analyze in the following have once again highlighted the consequences of adopting a particular method for calculating compensation.

PUBLIC INTEREST CAUSES

The judicial branch paid much more attention to the public interest causes the government invoked to justify eminent domain. Despite the common belief that during the post-revolutionary era, judges only served the desires of the executive branch with the exception of some high priority projects, the truth is that the courts protected property owners when they believed that the public interest cause invoked by the government was not clearly demonstrated or when it was not clear why one particular property should be expropriated, as opposed to another. When comparing the Mexican case with others in this book, it is evident concerning the latter that the courts do not tend to dispute the validity of public interest causes. To date, many expropriations are invalidated by imposing a *juicio de amparo** because the judge

[12] The fact that at the end of 2010, the Supreme Court gathered a group of experts for the "El Encino" case, may indicate a change in practice, or simply an exception. Only time will tell.

* The *juicio amparo* represents the main legal remedy for protecting the rights of those who have been unduly affected by the action of any branch of government.

or the courts consider that the public interest cause has not been adequately demonstrated. A case in the 1970s impeded the construction of an airport because the judge considered that it was not imperative to build it in that particular place.[13] Despite the fact that "judges are not usually good planners," according to the American constitutionalist Vicky Benn (Benn 2009), Mexican courts during the post-revolutionary era did not have a strong conviction concerning judicial deference, at least when circumstances facilitated contradicting the executive branch.

This did not only occur when judges were ready to dismiss expropriations that, in their estimation, lacked adequate justification. The courts even scrutinized public interest causes in the urban context and legal cases had considerable impact on the urban development process, either weakening or strengthening government power over eminent domain. We review two examples: one

[13] *Expropriation for public interest causes*. The Honorable Supreme Court of the Nation has maintained that the expropriation of private property can only be carried out pursuant to Article 27 of the Constitution, when there is a public interest cause, and in exchange for compensation, and it defines that in order to demonstrate the first of these (public interest) it is not sufficient that the government should just assert this, but rather it is necessary to argue or show evidence that justifies it (opinion published in the Fifth Epoch of the *Semanario Judicial de la Federación*, Book LXXIV, page 840, Corona Cortés Leopoldo; the same opinion appears in the the same series of publications, also from the Fifth Epoch, Books XI, page 685, Blanco y Pastor Concepción and co-plaintiffs, XXVIII, page 2110, Celis Aurelio, and XXIX, page 1592). In this case, as we only have the statements of the government referring to the expropriation decree, claiming that the construction of Manzanillo airport is of public interest, but with no objective or real data to prove it, it turns out that, as correctly pointed out by the District Judge, the expropriation decree violates Article 27 of the Constitution and so that a part of the ruling reviewed in appeal is upheld; moreover, the plaintiffs offered expert valuations and visual inspections asserting that the current airport in Manzanillo is able to provide those services, and that the construction of the new airport is planned for a location with inadequate climatic conditions. *Seventh Epoch. Third District Collegiate Court. Record No. 255335. Review of Amparo 32/74.*

related to urban development projects and another, even more interesting, involving the creation of low income neighborhoods.

At the beginning of the 1940s, there was a need for the government of the capital to implement programs that would affect the existing urban plan, either to improve a certain area or to open new arterial roads. Apparently, federal judges never objected to the constitutionality of these public interest causes. They only assessed the applicability of amparo suits filed by property owners, aimed at suspending the execution of an expropriation decree.[14] When the government intended to open new roads, the

[14] There is an opinion issued in 1940 that argues that expropriation decrees for the purpose of implementing urban plans cannot be suspended. See *Expropriation.* Expropriations to implement city plans cannot be suspended because this would violate the provisions of Subsection II of Article 124 of the Amparo Act.*Fifth Epoch. First Chamber. Record No. 308455 Administrative amparo. Review of suspension incident 7099/40. A. widow of Galnares Josefina. September 29, 1942. Majority opinion with four votes. Dissenting: Fernando de la Fuente. The publication does not mention the name of the author.* However, subsequently two opinions were presented in 1941 resulting in the Supreme Court granting the suspension of the expropriation decree that ordered the embellishment and cleaning of Colonia Buenos Aires. Expropriation *of parcels, applicability of the suspension against*. The cleaning and beautification of a city is, without a doubt, a public interest issue, however, it is not necessary to expropriate all the properties of the landowners and homeowners for this purpose, because this rationale would lead us to absurd conclusions, as both beautification activities and cleaning services must be performed in those places where it is necessary, as perfectly determined according to a plan and study performed by technical experts. Their report should indicate the reasons of convenience or necessity to perform certain tasks; otherwise, doubt concerning the reason for the expropriation would emerge so that *the prudent and legal thing to do would be to suspend the execution of the decree or agreement until the main issue of the amparo case is decided***,** without implying that this can affect the general interest or violate public order provisions because there is no doubt that the general interest lies and operates in direct relation to the benefit received by the community by the expropriation decree or agreement; however, when this is unclear and contrary, there is a justifiable doubt, as in this case, the reason for expropriating an entire neighborhood vaguely mentions that it requires cleaning and beautification, when evidently it was not necessary to expropriate the entire

courts usually ruled in its favor. This occurred in the case of the intersection of two of the most important avenues in the city, Insurgentes and Reforma: one of the most ambitious urban initiatives of the 1940s.[15] Although finally the project was not implemented, the expropriation of the land required for this project triggered a conflict that reached all the way to the Supreme Court. The Court then established jurisprudence to give priority to the urban project over the rights of the property owners: in cases of eminent domain for street projects, the urgency is such that courts claim that suspension of the expropriation process as part of an *amparo* suit is not a valid option. In other words, whereas in other expropriation cases, the judge is able to order an injunction to proceedings until the substantive matter has been resolved, in the case of roads, public interest was considered so important that granting temporary suspension was considered unadvisable (Sánchez-Mejorada 2005, 312).

Of all the public interest causes cited for the purpose of justifying urban expropriations, only one was systematically opposed by the federal judges. This referred to expropriations in the urban periphery in order to provide land for poor families. During the first half of the 1940s, the government carried out more than one hundred expropriations for this purpose in Mexico City.[16] Today, this would obviously be viewed as an example of housing for patronage, typical of single party regimes. But it is also true

neighborhood to achieve these goals, *it is clear that the suspension of the decree is appropriate while its legal basis is decided, and this suspension must be granted without any prerequisite. Fifth Epoch. Second Chamber. Record No. 326495 Administrative amparos. Review of suspension incident 7861/41. Allard Juan José and co-plaintiffs. April 17, 1942. Unanimous decision with four votes. Absent: José M. Ortiz Tirado. The publication does not mention the name of the author.*

[15] The project was headed by no other than architect Mario Pani, who from thereon, and for more than two decades, was considered the "Mexican Le Corbusier."

[16] For a first approximation of this process, see Azuela and Cruz (1989); a more in depth analysis can be found in Sánchez-Mejorada (2005).

that this idea concurred perfectly with the spirit of social justice, promoted by the Mexican revolution. If large estates were expropriated in rural areas in order to distribute them to farmers, why not follow the same pattern in the urban periphery, to benefit the emerging low income population?[17]

It seems that this was too much for conservative Mexican judges. They had to tolerate the agrarian reform, because it was enshrined in the Constitution and received substantial support from public opinion. However they intended to oppose these redistributionist policies, in the urban context. Even though the courts had applied the Expropriation Act for determining compensation and possibly even strengthened the power of eminent domain in cases of road projects as we have just described, the idea of expropriating land to give to the poor appeared too extreme, even if by law it could have been condoned as a public interest cause.

The position of the courts towards these "worker neighborhoods" (or *colonias proletarias*) in Mexico City is linked to the more general attitude towards expropriations for urban development or housing projects. Back in 1934, a case had to be resolved where the Governor of Puebla expropriated a number of parcels in the state capital for an urban neighborhood to be built by a cooperative. Originally, the district judge upheld the *amparo* filed by the property owners, arguing that the government had not proven the need to build more housing and stating that expropriations could not be made in favor of individuals. However, the Supreme Court overturned this decision, ruling that state governments have the power to determine public interest causes, and that in this case, an expropriation to build an urban neighborhood benefited the entire municipality of Puebla.[18] This was

[17] For a more general reflection on the relationship between Mexico City and the Mexican Revolution, see Rodríguez Kuri (2010) and San Juan (2006).

[18] AR 211/1932. Second Chamber of the Mexican Supreme Court. Fifth Epoch.

the same argument used by the United States Supreme Court seventy years later in the famous *Kelo v. New London* (2005) case. This argument was upheld in other cases, where the owners objected to expropriations by the government of Veracruz for the purpose of creating worker's neighborhoods and for city development.[19]

However, this interpretation was short lived because in 1937 the Supreme Court revised its opinion and annulled an expropriation initiated by the government of Veracruz[20] to create worker neighborhoods, although it is interesting to observe how it disguised this ruling, in the report describing this case.[21] The court confirms that an expropriation to create worker colonies is valid, however, likewise in the same ruling, it states that the expropriation decree referring to this case has not proven the public interest cause, as alleged by the government. In effect, the court is changing the criteria used to justify expropriations. The new legal theory states that land can only be expropriated for urban development if it does not already fall within an urban area, and henceforth this is consistently applied by the courts against the

[19] AR 1353/1935. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 10584/1932. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 3988/1935. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 3683/1935. Second Chamber of the Mexican Supreme Court. Fifth Epoch.

[20] AR 48/1936. Second Chamber of the Mexican Supreme Court. Fifth Epoch.

[21] The legal theory is as follows: *Expropriations in Veracruz (Act Number 323).* The Supreme Court has adopted an opinion largely based on the new legal concept of property in matters of eminent domain, which allows an expropriation to proceed not only referring to the old restrictive concept of public interest, but also responding to social interest or national interest. Similarly, it is clear that the urban subdivision for workers declared in Act 323 of Veracruz State is of public interest in terms of social interest causes, because the beneficiaries of the expropriation are not only the applicants, but the city in general, which will be embellished and expanded; business will be promoted and the working class liberated from their homeless plight, thus providing a tangible social benefit.

government.[22] In the case of Veracruz, the Supreme Court recognized the legitimacy of expropriations to create worker colonies; however, it was now explicitly limiting the use of expropriation for this purpose, based on a distinction between land located either outside or inside cities.[23]

In another case, the government of the state of Coahuila expropriated a land parcel, apparently occupied by informal settlements. According to the decree, the expropriation was carried out in order to issue property titles to the occupants. The occupants would be responsible for paying the compensation and in general terms, the expropriation would follow the general guidelines used to regularize land. However, the court considered that this constituted a dispute between private parties and that eminent domain could not be applied to resolve this type of con-

[22] AR 4106/1938. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 8044/1936. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 14651/1932. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 3778/1939. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 4752/1939. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 40/1940. Second Chamber of the Mexican Supreme Court. Fifth Epoch. AR 730/1942. Second Chamber of the Mexican Supreme Court. Fifth Epoch.

[23] *Expropriation (Veracruz legislation).* As Article 2, Subsection III of the Expropriation Act of Veracruz stipulates that urban subdivisions and the construction of houses for workers represent a public interest cause, there is no doubt that this provision can only be applied to expropriate non-urbanized land rather than land lying within the perimeter of the cities, because the legislator's aim was specifically the expropriation of land adjacent to population centers in order to develop and build houses for workers. This was not focused on properties already manifesting urban development, forming part of the city or urban center plan, where the expropriation of parcels that are already developed within the perimeter of Puerto de Veracruz would represent a violatation of legal guarantees. *Fifth Epoch. Second Chamber. Record No. 329602. Review of administrative injunction 4752/39. Pedroza Valeriano Blandino de la. March 13, 1940. Unanimous decision with four votes. Absent: Abenamar Eboli Paniagua.*

flict,[24] without implying that in future decades, regularization would become a generalized strategy that no one would question. As demonstrated in other chapters of this book, governments have been expropriating land with informal settlements precisely in order to mediate conflicts between "private parties:" original land owners and current occupants.

To conclude the issue, we consider the ruling by the Supreme Court on an eminent domain case initiated by the federal government, with the intention of creating worker colonies in Mexico City. In 1945, the Court resolved an eminent domain case in which the Federal District Department in Azcapotzalco expropriated a number of parcels in order to regularize land.[25] The federal government justified these expropriations in terms of Subsection III of the Federal Expropriation Act that accordingly defined this as a public interest cause: the beautification, expansion, and cleanup of towns and ports; the construction of hospitals, schools, parks, gardens, sports fields, or landing strips; office construction for the federal government; as well as any other construction project for the collective benefit.

In this case, the Court considered that this legal provision does not expressly authorize the construction of worker neighborhoods

[24] *Expropriation for urban development in the state of Coahuila.* Subsection IV of Article 2 of the Expropriation Act for the State of Coahuila declares public interest for an expropriation "aimed at urban development, in accordance with an approved plan in each case, of land parcels where people who are not owners have built houses or other buildings, even if they lie within the urban area of the population centers," thus violating Article 27 of the Constitution because this provision pretends to resolve the potential conflicts between the landowners and the owners of the buildings, which is exclusively a matter of private law. *Fifth Epoch. Second Chamber. Record No. 329170. Review of administrative injunction 40/40. Peña Mauro de la, Jr. and co-plaintiffs. May 7, 1940. Unanimous decision with four votes. Justice Fernando López Cárdenas did not participate in the resolution of the case for reasons that are recorded in the minutes. Author: Agustín Gómez Campos.*

[25] AR 10040/1944. Second Chamber of the Mexican Supreme Court. Fifth Epoch.

and reaffirmed this opinion with the resolution of a further case in 1951,[26] in the zone of Gustavo A. Madero, Mexico City.

Interestingly, the government could have used a different argument to analyze the public interest cause for these expropriations. In fact, it could have applied Subsection VIII of the same Article 1 from the Expropriation Act, which declares public interest to consist of "the equitable distribution of wealth that was acquired or monopolized for the exclusive benefit of one or more individuals and to the detriment of the general public or a particular social class." The government may have considered that the language in this Subsection was too strong, when referring to the transfer of land to the poor.[27]

The subject entered public debate, as various newspapers discussed the relevance of this type of expropriation (Sánchez-Mejorada 2005, 234) and although the Court never expressly modified its criteria, the legal literature did not consider it a subject worth mentioning. This case was addressed by only one legal expert, who was openly against the "revolutionary" interpretation of the Constitution. In his book *La propiedad y la expropiación (Property and Eminent Domain)*, aimed at delegitimizing oil expropriation, Germán Fernández del Castillo (1939) argued that expropriations to "satisfy workers' needs for a comfortable and clean housing" were not justified.[28] Even more revealing is the silence on the part of legal experts, associated with the establishment, i.e., those who willingly accepted the revolutionary rhetoric of the government or did not dare to openly defy it. They never made any pronouncements on the case law that declared this type of expropriation unconstitutional, despite being openly against

[26] AR 1064/1950. Second Chamber of the Mexican Supreme Court. Fifth Epoch.

[27] There is also Subsection XI, which refers to "The creation or improvement of population centers and of its sources of life support," which was invoked in several decrees. It remains to be seen what the Court ruling will consist of.

[28] Fernández del Castillo (1987 [1939], 81 and 122).

the ideas of social justice proposed during the post-revolutionary era.[29] It is as if the urban development process, occurring in full view and representing one of the severest transformations in Mexican society, was invisible to the eyes of legal experts.

PROCEDURAL STRATEGIES

Up until this point, we have discussed how the courts have addressed the substance of eminent domain cases: how and when to pay compensation and how to substantiate legitimate public interest causes. Court intervention did not make any relevant contribution to these topics, in terms of defining the legal content of property rights or the limits of eminent domain, with the significant exception of urban development expropriations to benefit low income populations. More important however, were the procedural strategies pursued by the courts to accomplish something more difficult: to empower eminent domain cases initiated by the President of the Republic, without explicitly reaffirming the weakness of property rights in the Mexican constitution. The court implemented two strategies: first, it maintained that in matters of eminent domain, it is not necessary to respect the right of citizens to a hearing, prior to the application of any act of authority, and second, in cases where it actually ruled against an expropriation, it did not take action, when the government failed to comply.

In Mexican law, the right (or guarantee)* to a previous hearing (or *garantía de audiencia previa*) is a form of due process, in the case of all acts of authority by the government. It refers to a citizen's right to be heard by the government, prior to an adverse ruling being implemented. From 1929, the Supreme Court had

[29] In particular, the texts of administrative law by Gabino Fraga and Andrés Serra Rojas, which were undoubtedly the most popular at the time, included ample treatment of eminent domain, without mentioning the public interest cause to which we refer.

* In Mexican Constitutional Law, the term *garantía* is used as a synonym for *derecho* (right). (TN)

found that the right to a previous hearing did not apply to eminent domain, because this was not outlined in the Constitution.[30]

This ruling, which was only reversed seventy-five years later, represents one of the most stable positions taken by the Court during its history. The Court even confirmed this in 1997, arguing that Article 27 of the Constitution establishes that social rights should take precedence over individual rights.[31] This may have been the last legal stand taken by the post-revolutionary regime. This opinion was finally abandoned in 2005, when, in one of the most surprising turn of events, three judges, who did not present lengthy arguments, changed their vote and ruled that certain provisions of the Expropriation Act were unconstitutional, as they did not comply with the guarantee of a previous hearing.

Notably, the Court ruling on this case was upheld by a majority of one vote, so that thereafter, it represented a controversial subject in the legal context. During this period, the Court imposed two limits to its own thesis. First, it determined that in cases where legislation granted the guarantee of a previous hearing, this had to be respected.[32] The other limitation stated that although there was no guarantee of a previous hearing, it was

[30] *Expropriation*. There is no violation of constitutional guarantees if the expropriation is implemented without allowing the owner to be heard beforehand, as Article 27 of the Constitution does not mandate this requirement. *Fifth Epoch. Second Chamber. Record No. 338658. Review of administrative injunction 3517/21. Curbelo Julio F. April 9, 1929. Majority opinion with three votes. Dissenting: Jesús Guzmán Vaca and Daniel V. Valencia.*

[31] *Expropriation, right to previous hearing in matters of*. Regarding expropriation, the guarantee of previous hearing established in Articles 14 of the Federal Constitution does not apply because this requirement is not contemplated in what states Article 27 of the constitution and it is not possible to admit contradiction in what is established by both articles, since it is evident that the first establishes a general rule for subjective rights, while the second support social guarantees that, by their very nature, are above individual rights that are restricted in scope, according to Article 1 of the constitution. *Nineth Epoch. Plenary. Record No. 198404.*

[32] *Expropriation, right to previous hearing in matters of*. Although Article 27 of the Constitution does not establish the guarantee of a preliminary hearing in

necessary to establish a guarantee of a hearing subsequent to the government decree being implemented.[33] Effectively, the Court recognized that statutes failing to respect the right to a hearing could be declared unconstitutional. These decisions helped establish a more general consensus concerning the right to be

cases of eminent domain, if ordinary statutes concede that right to the affected parties, an injury of this provision by the respective authorities implies the violatation of Article 14 of the Constitution. *Fifth Epoch. Second Chamber. Record No. 328836. Review of administrative injunction 7450/39. Jácome Angel Luis. July 12, 1940. Unanimous decision with five votes. Author: Agustín Gómez Campos.*

Expropriation, participation of the affected party in the process of. When claiming that some expropriation laws are unconstitutional because they do not recognize the right of the affected party in the proceeding to be heard, it was decided that given that the Federal Constitution does not stipulate a requirement of preliminary hearing before the property is expropriated, ordinary statutes that do not concede this requirement are not unconstitutional. However, this theory does not apply when the laws in question allow the affected party to be heard during the expropriation proceedings, to present evidence and argue for his defense, because in this case the administrative authorities are required to follow the procedures stipulated in said laws, and if they do not summon the owner of the property in the case, performing all the essential formalities of this procedure, they are violating Article 14 of the Constitution which provides the individual guarantee that no one shall be deprived of his property without observing the essential formalities of the proceeding. *Fifth Epoch. Second Chamber. Record No. 327635. Review of administrative injunction 6895/40. Velasco Ricardo de. October 30, 1941. Unanimous decision with five votes. Author: Franco Carreño.*

Agrarian, expropriation of properties of ejidos *or communes, right to a hearing.* When the statute establishes the guarantee of preliminary hearing before an expropriation, as in Article 344 of the Federal Agrarian Reform Act, this requirement constitutes an essential part of the procedure, and failure to comply with it becomes a violatation of Article 14 of the Federal Constitution. *Seventh Epoch. Second Chamber. Record No. 237654. Review of injunction 5330/80. Agrarian community of Santa Ana Tepetitlán, Municipality of Zapopan, State of Jalisco. November 26, 1981. Unanimous decision with four votes. Author: Jorge Iñárritu. Secretary: José Javier Aguilar Domínguez.*

[33] *Expropriation, right to previous hearing in matters of. Cannot be suppressed totally (Expropriation Act of the state of Michoacán dated March 15 of 1964).* The legal doctrine, according to the Second Chamber of the Federal Supreme

heard, either before or after implementation. The courts thus authorized that in eminent domain cases, the hearing could take place after the land was occupied. This legality resulted in many cases of eminent domain becoming irreversible, postponing a final solution to the problem.

The second strategy, simpler but at the same time more circuitous, consisted of upholding *amparos* that had been filed by property owners, however (the legal interpretation we have just described) meant that so much time had elapsed while the judgment was being issued that the project had already been implemented, so that the court "could do nothing about it." In order to comply with the ruling, the government would have had to do something very difficult or highly improbable: destroy an infra-

Court, in relation to Article 27 of the Constitution, states that such article does not "contemplate the guarantee to previous hearing in matter of expropriation," doctrine number 46, published in page 112 of the Plenary Volume of the jurisprudence published in the Semanario Judicial of 1975. This means that, regarding matters of expropriation, there is no guarantee of previous hearing, but not the entire suppression of previous hearing that would leave the affected parties totally defenseless facing an expropriation decree they consider illegal, leaving them with no opportunity to somehow affirm their rights. This is indeed so, that even the Federal Expropriation Act of 1936 already guarantees such a hearing—though after the declaration of expropriation—thus complying with due process of said law in its Article 5. Nevertheless, reading the Expropriation Act of Michoacán of March 1964, it is evident that the expropriation process is unilaterally followed by the authorities, giving the affected parties a chance to intervene only in case that they do not agree with the compensation value determined by the Executive of the state, as can be seen in the way Articles 15 is written in the amply quoted expropriation law. As the only intervention allowed to the affected parties, and not previous as in matters of civil or criminal law, since in administrative matters such as expropriation, as well as in fiscal law, the guarantee is not of a previous hearing but rather afterwords, but in any case cannot be entirely suppressed and if so it would be declared unconstitutional. *Seveth Epoch. Plenary. Record No. 232748. Amparo in reviw 4473/75. Sofía Sandoval Torres and other aggrieved parties. June 28, 1977. Unanimous decision with sixteen votes. Author: Salvador Mondragón Guerra. Secretary: Francisco M. Ramírez.*

structure project or evict the new occupants who had moved onto the land, aided by this very same government. When owners protested that they had won the case, the judges simply shrugged their shoulders. Compliance with the judgment was not their responsibility. As evident in the following, all this changed in 1994, when a constitutional reform established that *amparos* could have "substitute enforcement," a concept that could have been enforced by the Court, applying the same creativity and inventiveness they had demonstrated in other cases.

In summary, during the "classical" phase of the post-revolutionary period, the Supreme Court was far from being passive towards the eminent domain policies of the executive branch. First, it often ruled in favor of the owners:[34] it not only invalidated the provision of the Expropriation Act that allowed the payment of compensation in installments, but it also restricted public interest causes as defined by law, declaring expropriations for the creation of worker neighborhoods to be unconstitutional, thus preventing the introduction of redistribution policies, which had been at the heart of the agrarian reform in urban areas. However, simultaneously it deployed a series of strategies that made many expropriations irreversible. These strategies were in many cases contrary to the principles of a liberal state such as the principle of due process. And this was undertaken without developing a legal interpretation, concerning the limits of property rights or the power of eminent domain, as exercised by the state.[35]

[34] According to Cristina Sánchez-Mejorada, concerning expropriations for the purpose of creating or regularizing low income neighborhoods in the fourties and fifties, one third of the *amparos* filed by the plaintiffs were granted (Sánchez-Mejorada 2005).

[35] It is interesting to compare the level of argument in this case with that found in the oil industry expropriation in the then Second Chamber, which cites jurisprudence from the U.S. Supreme Court, as well as German legislation regarding expropriation. See AR 2902/39. Compañía Mexicana de Petróleo "El Aguila," S.A. and co-plaintiffs. December 2, 1939 (including citations from U.S. jurisprudence), a case resulting from the expropriation of the oil industry.

In disputes over eminent domain, Mexican judges did not make reference to the theory of "the social function of property," which according to many complies with the "spirit" of the 1917 Constitution, or to the theory that all property originally belonged to the Nation, which is written into the Constitution.[36] In other words, the Supreme Court actively participated in the creation of the "philanthropic ogre," while never openly renouncing its liberal view of private property.

However, this is not the end of the story. Belligerence on the part of the Court must have constituted more than an occasional nuisance for the executive branch. Up until 1958, the Second Chamber at Court had declared an article from the Expropriation Act as unconstitutional and produced several legal theories limiting the power of eminent domain. In an apparent response, the executive branch promoted a constitutional reform, in a move that was only commented on by U.S. authors,[37] preventing individual court chambers from declaring laws as unconstitutional and permitting only the plenary court to take this action. This may explain why, during the 50 years that followed, there were no rulings that declared federal law to be unconstitutional. It was not until 1986 that the judicial branch openly limited the power of eminent domain. This seems to indicate that, although the executive branch was able to prevent the Supreme Court from restricting its power of eminent domain, in order to do this it had to resort to no less than a constitutional reform for this to be implemented.

The Crisis of the Model

The most obvious indications of the crisis of eminent domain, as exercised during the post-revolutionary era, became evident in

[36] Notably, according to the first paragraph of Article 27, "The land and water within the limits of national territory originally belonged to the Nation, that conformed and continues to conform the right to transfer the corresponding title to private persons, creating private property."

[37] See Baker (1971, 73); Staton (2010, 50).

2001 and 2006, in cases that we describe here. However, signs had already started to appear during the first half of the 1980s. The most important referred to a case of expropriations for housing construction, following the earthquakes of 1985. Although the political impact was enormous, as it pacified the protests of tens of thousands of people affected by the tremors and triggered the construction of more than forty thousand housing units, property owners, aided by competent lawyers, obtained favorable judgments by filing *amparo* cases. The federal judges did not have to resort to new ideas, concerning the eminent domain system. They employed the same argument as usual: if the decree does not properly declare (in the judge's opinion) the expropriation motives and, in particular, if it fails to explain why this particular property and not another should be used to satisfy the public interest cause invoked, the expropriation can be overturned. However, as these *amparos* were granted, once the housing units had already been built and assigned to their new occupants (precisely because protective injunctions were unable to suspend the eminent domain process), the government had to acquire the land at values far exceeding cadastre valuations.

Evidently these *amparos* heralded the eminent domain crisis, not only because they revealed a certain degree of audacity on the part of the judges who opposed a program with the highest political priority for the executive branch (a sign of autonomy that had not been common in the past) but likewise it placed the administration officials in a highly compromised position. At that time, watchdog agencies that viewed with suspicion any land purchase made at a higher price than the cadastre value were already in place. None of this, however, attracted the attention of the media, not to mention the legal experts; it appeared that eminent domain continued to be an effective mechanism for guaranteeing what was then known as "social peace," while also reaffirming government power.

The crisis was triggered by the convergence of various factors that combined to create the perfect storm. Each one in itself does

not seem very significant, but taken together they explain the emergence of a series of conflicts that brought the country to the edge of a constitutional crisis. The theoretical tools developed by systems theory (Luhmann 1988 and 2004; Teubner 1993) elucidate the specific role of the law, in this process. The legal system has its own logic, and although "irritated" by politics, it is not controlled by them. It only responds to legal communications, and it does not consider the repercussions that these legal communications will have on other systems. We will now explain two changes that, although strictly legal, had unforeseen consequences in terms of the state's expropriation capacity. These are first, the constitutional reform of 1994, which introduced new rules defining how to comply with *amparo* rulings; and second, changes in the procedural strategies pursued by the Court, in order to enable expropriations.

In 1994, a constitutional reform was approved, strengthening the judicial branch's independence and, in particular, considerably reinforcing the power and legitimacy of the Supreme Court compared to the rest of government (Vargas 1996; Fix-Fierro 1998 and 2003; Domingo 1999 and 2000). However, this reform in itself does not explain the role played by the judicial branch in the eminent domain crisis. Neither did it provoke a dramatic change in terms of the Court's conception of property rights, as it continued to uphold the Constitution's recognition of the "social function" of property.[38]

[38] *Private property. The Right to Property is curtailed by its social function*. The Constitution of the United States of Mexico, in Articles 14, 16 and principally 27 recognizes the right to private property as a fundamental right; however, it limits its content in order to guarantee other constitutional assets or values, such as the common good or respect for rights pertaining to other society members. In this respect, the Federal Constitution establishes social function as a limitation of property rights; the aforementioned Article 27 grants the state power to impose certain limitations on private property for public interest causes, or to undertake expropriation for public interest causes, thus curtailing property rights in order to benefit the collective interest; prop-

One aspect of constitutional reform that did have direct influence on the eminent domain crisis was the "substitute enforcement" of *amparo* orders. At the time, the subject commanded very little attention, considering that these reforms brought about a complete reconfiguration of the entire Supreme Court, granting it the power of a constitutional court. The modification that we are interested in highlighting here refers to the power conferred to the courts to declare *ex officio,* the adequacy of substitute enforcement, in the context of *amparo* rulings. The Constitution had already been reformed in 1984, granting the plaintiff the right to request compensation in order to fulfill an *amparo* ruling. However, this new reform authorized substitute enforcement for cases where the ruling in its original terms implied very high costs to society or to third parties.[39] Previously, when the government did not comply with a ruling, the Court's only option was to remove and criminally charge the official responsible. This type of sanction was seldom applied and was difficult to justify in cases where the official was not responsible for failing to comply with a court order, as land inhabited by thousands of people or occupied by a big infrastructure project could hardly be returned. This constitutional change gave the judicial branch a more effective instrument for enforcing its judgments. The new temporary Article Nine of the 1994 constitutional reform made it contingent on reforming the respective article of the *Amparo* Act (*Ley de Amparo*), in order to incorporate substitute enforcement. A sign of the scant attention paid to this

erty rights are not intended to oppose the interest of the community, instead where necessary, the interest of the community must take precedence over individual private property, as specified in the Constitution. *Ninth Epoch. Plenary Session. Record No. 175498.*

Declaration of unconstitutionality 18/2004. Representatives of the Fifty-Fourth Congress of the State of Colima. November 24, 2005. Majority opinion with nine votes. Dissenting: José Ramón Cossío Díaz and José de Jesús Gudiño Pelayo. Author: Juan N. Silva Meza. Secretary: Laura García Velasco.

[39] Subsection XVI of Article 107 of the Constitution.

clause was that more than six years elapsed before the *Amparo* Act was actually altered.[40] The effects of this reform were unpredictable. Perhaps its authors were not aware of the large number of judgments, particularly those related to eminent domain, still pending enforcement. What we know for sure is that the executive branch did not have access to a suitable methodology for calculating the substitute enforcement relating to eminent domain judgments, issued more than twenty years previously.

Thus, overnight, the city government was faced with paying large sums for unfavorable rulings that had not been resolved. Most of the expropriations in these disputes were designed to regularize land tenure in Mexico City at a time when officials in the city were not elected democratically and the Federal District was governed by an official appointed by the President of the Republic. From 1997 onwards, Mexico City had a democratically elected government, which became a bastion of the political left in Mexico. The practice of substitute enforcement of court judgments was applied for the first time in this political context, which partly explains the intensity of the constant disputes between the federal government, the Mexico City Government, and the federal courts, relating to eminent domain issues.

In parallel, although also in the context of the 1994 reform, the Court modified its interpretation concerning the guarantee of a previous hearing. As pointed out in the previous section, from 1929 onwards the Court had established that this guarantee did not apply to eminent domain conflicts. An interesting discussion emerged in relation to a case in 1997, when this legal interpretation was applied for the last time. The minority opinion made two arguments that deserve some attention. First, some of the judges dared to emphasize protection of property, as constituting a fundamental right. Although one of the most

[40] This occurred in 2001, when the Amparo Act was reformed, enabling the Supreme Court to order ex officio substitute enforcement when the original sentence could not be fulfilled.

influential legal experts of Mexican neo-constitutionalism, Luigi Ferrajoli (1995; 1999), considers that property is not a fundamental right, it is clear that it is for the majority of Mexican Court judges. During the debate, Judge Aguirre Anguiano said:

> Likewise, how many of our states have statutes that mandate previous hearings, but these are not implemented; thus they have developed a convenient and consistent way of respecting private property. This respect may finally imply a principle of substantial social solidarity.

Even those judges who voted in favor of establishing the guarantee of a previous hearing recognized the existence of the social function of property and the power of eminent domain, as exercised by the government. The minority opinion puts forward the idea that the Court, in the form of a Constitutional Tribunal, must be the guarantor of fundamental rights. Finally, the strength of this argument forced three judges to change their vote eight years later, without much explanation. Another argument put forward by those judges in the minority claimed that due to the lack of a previous hearing, even in those cases where the plaintiff won an *amparo*, this could not be enforced because the infrastructure project had already been implemented, so that in practical terms, the owner had no recourse. The words of Judge Aguirre Anguiano are worth transcribing once again:

> I am not exaggerating. Let's imagine that a property owner was subject to an expropriation but was not granted a previous hearing; the judges who argue the opposite position would then argue: "He can petition an *amparo*, the sacred *amparo*, in order to defend himself." Let us not forget that the facts can also validate violations of the law. After the property was taken from him, the owner files for an *amparo*, which 5, 6, 7 or 10 years later is conceded by the federal courts, however, at this point the confiscated property cannot be returned to him because of the serious social consequences of dispossessing hundreds or thousands of current occupants. His victory was thus pointless! Those who argue the opposite refer to remedies; the *amparo* can be satisfied by substitute enforcement. However, in reality, the owner because he had no right to be heard has lost his private property.

At that time, the minority opinion lost by six votes against four, although, as we described in the previous section, eight years later, in 2005, in a ruling on *amparos* filed against the expropriation of twenty sugar cane mills, the Court finally ruled that the previous hearing guarantee must be respected in cases of eminent domain.[41]

Eminent domain had become much more problematic with the constitutional reform of 1994, but when the Supreme Court abandoned the strategy it had followed for decades, resulting in many expropriations becoming irreversible, problems were exacerbated. In this way, and without any new explicit reflection on property rights (or the public interest that justifies its suppression, by applying eminent domain), the Court began to impose new and important restrictions on the power of eminent domain.

Before discussing the impact that these new legal conditions had on specific cases, causing some of the most intense conflicts during the first decade of the 21st century, we must remember that, as explained in the previous chapter, the eminent domain crisis had very different outcomes in the case of agrarian communities, as compared to the impact on individual property owners. These differences are due to some legal aspects that require consideration, such as the favorable treatment towards *ejidos,* expressed in agrarian legislation, compared to the way property owners were treated in matters of compensation,[42] or because of the access these communities had to agrarian courts from 1992.[43] During the 75 years of agrarian reform, a large part of the disputes over eminent domain were resolved in jurisdictional bodies, controlled by the executive branch. The President of the

[41] AR 1565/94 Filed by Inmuebles Pridi S.A. Ruling by Plenary Session of the Supreme Court on February 25, 1997.

[42] From the beginning of the 1970s, compensation is calculated "based on the final use" of expropriated land, as opposed to its value prior to the project.

[43] The Agrarian Act of that year, together with the constitutional reform that preceded it, ended the agrarian redistribution and almost all governmental guardianship over *ejidos* and agrarian communities.

Republic was the highest authority in this matter, and he personally resolved many conflicts involving agrarian communities or their members through the Agrarian Consultative Agency (*Cuerpo Consultivo Agrario*). The creation of the Agrarian Courts in 1992 introduced a jurisdiction that was independent of the executive branch. Therefore hundreds of *ejidos,* whose land had been expropriated to build infrastructure projects without due process or that had been expropriated but without ever receiving corresponding compensation, filed for restitution in the agrarian courts, revealing a large number of irregularities in the purchase of land for public use.

In other words, the constitutional and legislative reforms of 1992 strengthened the property rights of the agrarian communities against the power of eminent domain exercised by the government. However, as explained in the previous chapter, the power of these communities to resist expropriations is more a result of political, as opposed to strictly legal transformations. In spite of this, it is notable that federal judges did not apply different criteria when dealing with eminent domain matters affecting agrarian communities, as opposed to those applied for private owner cases. In fact, they have protected so-called "social property" in the same way as when pertaining to individuals.

A case that was emblematic of the expropriation crisis occurred in relation to land owned by agrarian communities. This was the most ambitious project of the Vicente Fox government (2000–2006) intending to build a new airport for Mexico City in an area once occupied by Lake Texcoco, for which several thousand acres pertaining to thirteen *ejidos* had to be expropriated. Among them was the Atenco *ejido,* which was the most affected. In addition to massive demonstrations that transcended into a global symbol of social resistance to large infrastructure projects, a number of affected *ejido* members filed for an *amparo*. The federal trial judge who first handled the case combined the old criteria (the requirement that the expropriation decree should convince the judge that the project was justified) with a new one (the opportunity to

temporarily suspend the execution of the expropriation with an *amparo* petition). Therefore, while the social protest was gaining popularity in the streets, the project was suspended by a straight forward legal technicality. Apparently, the final decision on this matter was made by the President of the Republic, when rumor alleged that the judge was going to rule against the expropriation. On August 2, 2002, he announced that the expropriation decrees had been dropped and the project was cancelled for good.[44]

As in other cases, it is difficult to determine the "specific weight" of the judicial process, in terms of the ultimate outcome of the conflict. What we can observe is that this conflict has deterred the federal government from using eminent domain for strategic projects. The clearest example occurred in 2009, when President Calderón decided against applying the eminent domain process in order to implement the most important project of his administration: a new refinery in the state of Hidalgo.[45] The ghost of Atenco seems to have affected the "incentive framework" used by the federal government when attempting to acquire property from agrarian communities in order to satisfy a public interest cause.

In order to expose the contrast between the expropriation of land in *ejidos* and privately-owned land, we mention two aspects of the Atenco conflict that transcended in the public debate, but remained outside legal proceedings. First, there is the inalienable character of these lands. Although it is true that, as a result of the 1992 reforms, agrarian communities were acceded the right to transfer their land, should they wish to. The inalienability of this

[44] For the Atenco conflict, see Domínguez (2007), Hernández-Santiago (2004), Kuri-Pineda (2008), and Azuela (2011).

[45] Instead of expropriating the land, as previous PRI presidents had done, the government of Calderón announced that the refinery could be located both in the state of Guanajuato and in the state of Hidalgo, and that it would be constructed in the state that provided the land. The government of Hidalgo won the race, buying 1,700 rural acres with its own resources at a record price: US$32,000 per acre for rural land of standard quality.

type of property, representing one of the distinctive legal aspects of the post-revolutionary era, was at the focus of social protests; "land should not be sold; it should be loved and defended," was the slogan of the organization that successfully opposed the expropriations. This issue could not be considered in the legal process (it was simply "external noise" for the legal system), however, out on the streets, it represented the essence of the conflict, at least for a large part of the public.[46]

Another aspect of the conflict emerged that was not as heroic, but just as relevant; it did not form part of the legal process. It concerned the compensation amount: while in the public debate, almost everybody agreed that the compensations contemplated in the expropriation decrees were ridiculously low, the judges saw no reason to define correct criteria for their determination. Do rural property owners have a legal right to part of the profits generated by a project? We can rest assured that for the Mexican public opinion, the answer would be "yes" referring to agrarian communities, but surely some people would respond negatively, if this land were owned by some lofty business owner. What is more difficult to determine is whether the judges have evolved consistent criteria for addressing this dilemma.

The crisis of the expropriation of *ejido* lands is not taking place exclusively in the legal context. However, this does not imply that what happens in the legal process is trivial. Although it should be regarded as part of a more general process of decline concerning the legitimacy of the government power to impose eminent domain with regard to agrarian communities and for certain projects, the legal process manifest in both *amparo* cases and agrarian courts has made the crisis more intractable.

[46] The concept that the Mexican peasant is linked indefinitely to his land by some kind of "historic obligation" represents one of the social and cultural foundations referring to the property of agrarian communities. While sociological research will determine whether this principle is losing its force, it was evidently very effective in the Atenco case, and in many other cases manifesting community resistance to infrastructure projects.

The crisis had a very different outcome in the case of expropriations of private lands by the Federal District Government (FDG). The first and most evident difference made clear in the following is that the FDG has overcome the crisis. Even so, it is important to remember, as evident in the last chapter, that this crisis formed part of the more general process of consolidation that the FDG was undergoing to become a local autonomous government. Here, we describe some of the most emblematic cases in the eminent domain crisis.

The National School of Anthropology and History (Escuela Nacional de Antropología e Historia, or ENAH)[47]

This case reveals how on one side, the surreptitious strategy used by the courts, combined with the ignorance on the part of the government concerning the importance of fulfilling certain formalities, can disrupt a straight-forward expropriation intended for the construction of a school. This case initiated with an expropriation decree in 1968,[48] aimed at improving the population center in Pedregal de Carrasco. In 1974, one of the owners of the expropriated properties, Angel Veraza, petitioned to annul the expropriation because the project that was used to justify the expropriation decree had not been implemented; at that time the construction of the school had not even begun. The annulment petition was denied by the Federal District Department in 1975, signaling the initiation of a long legal battle in which the property owner succeeded in having the courts reject the resolutions put forward by the Federal District Department to deny the annulment, and ordered a new correctly founded and justified response. The new correctly justified response was consistently negated; however, the property owner would then file another case in court. This is an example of how the courts surreptitiously limited the government's eminent domain power. Finally, a ruling

[47] Case of non-compliance 62/2000 due to Indirect *Amparo* 94/98.
[48] *Diario Oficial de la Federación*, June 29, 1968.

citing lack of enforcement of a judgment issued in 1998, prompted the Court to order the current FDG to recognize the annulment petition filed by the plaintiff.

However, this was now impossible because the ENAH facilities had already been built, so the plaintiff requested substitute enforcement. The result was that the courts ordered the FDG to pay approximately seventeen million dollars in damages. In the new procedure to resolve unenforced judgments, the Court must determine whether lack of enforcement is inexcusable. As the FDG refused to pay the compensation ordered by the judge, a case of lack of enforcement was initiated to be resolved by the Supreme Court. The Court's decision in this case was surprising because it violated the principle of claim preclusion (*res judicata*) when it claimed jurisdiction over all elements relating to the proceedings, including the calculation of compensation. Once the Court assigned to itself the power to review the entire case, it determined that the district judge had incorrectly calculated the compensation amount[49] and that it must be assessed according to the value it had when the parcel should have been returned to the owner, in this case in 1975, with adjustment for inflation. Neither should the compensation assessment take into consideration any constructions that did not exist at the time when the property should have been returned. This new criteria was used by the Court to resolve other similar cases, such as Paraje San Juan, or Ramos Millán. Finally, the compensation amount was reduced to approximately four million dollars. Another interesting aspect in this case referred to media coverage, as the FDG was convinced that the plaintiffs were not the true owners of the property and filed a petition outside the proceedings, requesting the Supreme Court to cancel the compensation hearing. However, this was rejected by the court.

[49] The district judge had calculated the amount of compensation based on the current value of the expropriated property, which included the value of the building of the National School of Anthropology and History.

Ramos Millán[50]

In this case, in 1984 the federal government expropriated a series of land parcels in southern Mexico City in order to regularize land tenure, with the understanding that they all pertained to *ejidos*. Mr. Ramos Millán filed an *amparo* against the expropriation decree, arguing that part of the area was his property. The judge concurred with him and annulled the decree, ordering the government to return the land to the plaintiff. The problem was that the land was already occupied, and the Commission for the Regularization of Land Tenure (*Comisión para la Regularización de la Tenencia de la Tierra*, or Corett) had initiated the process of granting land titles to the occupants. The federal government found itself between a rock and a hard place as it could not return the land, but it was now responsible for paying compensation. This is also an example of the problems faced by the legal system, when acknowledging communications relating to other systems. Although it was clear that the property was occupied prior to issuing the expropriation decree, the judges did not take this into account, or they were unable to find a way of incorporating this fact into their resolution. Given the impossibility of enforcing the ruling, the only option was to apply substitute enforcement, necessitating an assessment of the amount the government was obliged to pay. Initially, the judge granted compensation equivalent to some thirty million dollars, but the federal government and the plaintiff objected to this amount and the appeals court decided that the valuation had not been carried out correctly, ordering the judge to make another valuation. The judge decided on a new amount of approximately forty-five million dollars, taking into account the criteria established by the appeals court. The government and the plaintiff again appealed this new valuation and the appeals court then dismissed the judge's order and ordered a new

[50] Case of non-compliance derived from Indirect *Amparo* case 46/87, decided by the Plenary Session of the Supreme Court on February 21, 2005.

assessment, taking into account only the considerations of the professional assessor provided by the plaintiff. In this third valuation, the judge determined that the compensation amount was approximately one US$110 million. This outrageous sum was arrived at by the judge, taking into account what the plaintiff had failed to earn from mining certain volcanic rock deposits that were present in his land. It is surprising that the judge was capable of considering these rock deposits while failing to take into account the thousands of low income people who had built their houses on top of these rocks, or the role that the landowner might have played in establishing an informal settlement.

Due to the difficulty of paying this amount, the federal government offered the plaintiff five million dollars yearly. However, he rejected this offer and filed for non-compliance with a court order, which was resolved by the Supreme Court applying similar arguments to those used in the ENAH case. However, an important difference is that one of the arguments used by the Supreme Court to reduce the amount of compensation was that the land was occupied by "precarious settlers." It is interesting to note that, as opposed to the judge, the Court reflects on the fairness of granting exorbitant compensation in an eminent domain case that would benefit a large number of informal settlers. The Court acknowledges in this case the substantive dilemmas generated by eminent domain, and at least reflects upon it. This far exceeds any interest dedicated to this subject by legal experts, even subsequent to the closure of this case. Notably, although this case had ample repercussions in the media, the legal experts, and in particular, the constitutionalists, did not reflect on the different types of expropriations or on the implications for property, in the constitutional order.

Paraje de San Juan

This case completes what we might term the trilogy of outrageous compensations. Of the three, this is the one that attracted the most media attention because the FDG took pains to publicly

expose the impact this level of payment would have on the public budget. The head of government pursued a strategy for confrontation, denouncing the compensation amount as unfair and refused to pay. This expropriation was decreed in 1989 for purposes of land tenure regularization. Once more it is evident that there are some subjects or issues that fall outside the capacity of the legal system. In this case, it concerned a discussion to define the real owner of the property. At no time did the plaintiff produce a property title and the only document that gives legitimacy to his request for compensation is a document issued by the FDG itself, recognizing his right to receive compensation. During the trial to dispute the expropriation decree, the FDG raised doubts about the validity of his property claim. However, the Court decided that ownership questions could not be discussed in an amparo case. It is interesting to compare this opinion with the one issued in the previous case, when the federal government was forced to pay an owner because his land formed part of an area subject to expropriation. The position taken by the judicial branch could lead to a case where compensation is paid to someone who does not own the property, followed by compensation being paid to the real owner for the same expropriation decree. In the case of a substitute enforcement ruling, the Federal District was ordered to pay approximately US$170 million, an amount equivalent to one third of all the welfare expenses of the city. Once more, referring to a case of non-compliance to a court order and applying the same arguments as in previous cases, but mainly due to the pressure of public opinion that failed to understand why the compensation was so high, the Supreme Court reduced the amount to approximately six million dollars, without very much explanation.

For the purpose of this analysis, what is striking in this case is not whether the Supreme Court violated the principle of *claim preclusion* in order to extricate itself from a situation that was difficult to explain; it is that at no time during this process did any of the judges question whether the owner "affected" by the expro-

priation may have had some responsibility in bringing this about by promoting the (illegal) urban development of his land.

Pascual Boing

In this case, the Supreme Court had to decide whether the creation or survival of a company represented a public interest cause. In some ways, this resembles the Mexican *Kelo* case. It concerns an expropriation, initiated by the FDG, of a land parcel where the plant of a cooperative that produced fruit juice was located. This had great symbolic value for the Mexican left because it was created following a prolonged strike at the beginning of the 1980s, and involved a very successful cooperative. The land where the plant was located was not owned by the workers, even though they had attempted to buy it, but the owner had refused to sell it—and for good reason: he was the company's former owner. After a long legal conflict, the owner had obtained a court order to evict the cooperative, so the Federal District decided to expropriate the land to support the continued existence of the cooperative. It is interesting to observe the two eras of the judicial branch that we analyze in these two instances. The owner filed for an *amparo* against the expropriation decree, and the judge declared that Subsection 9 of Article 1 of the Federal Expropriation Act was unconstitutional. This paragraph establishes as a public interest cause "the creation, promotion or preservation of a business for the benefit of the community." The judge acknowledges that the expropriation decree is sound, but is based on a provision that is unconstitutional. The judgment refers to the rulings of the Court in the Fifth Constitutional Epoch, during which it openly declared federal laws to be unconstitutional. The government objected to this judgment, and as this case involves investigating the constitutionality of a federal law, it is contingent on the Supreme Court to decide the matter. The Supreme Court decides to modify the judge's order. On one side, it declares that Subsection 9 of Article 1 of the Federal Expropriation Act to be constitutional, but also rules that in this

particular case that the government had not justified a public interest cause. This decision clearly belongs to the era of dissemblance, when the Court refrained from providing general criteria. As opposed to *Kelo*, the Court conducts an exhaustive review of the administration's decision. And despite having a solid case, the Court adopts the role of administrator and decides that in this case the public interest cause is not justified. It is interesting to observe once more how the Court resolves a case without promoting any discussion concerning the scope of property rights or the meaning of public interest.[51]

El Encino

Of all the cases discussed here, this is the one that had greatest political impact. It began with an expropriation decree issued by the FDG in the year 2000, which affected little more than two acres of a vacant twenty acre land area in order to accommodate a few streets and associated infrastructure projects, designed to complete the road system for the Santa Fe area,[52] in principle, not an extraordinary expropriation. While the owner had not made any investments, the land area had increased tremendously in value, due to the real estate boom in one of the most lucrative areas of the city.

Although the expropriation benefitted the owner, connecting his land with two avenues, he filed for an *amparo*, perhaps in order to maximize the amount of compensation. As the judge had determined that the public interest cause had not been sufficiently justified, he ordered the definite suspension of the expropriation decree. However, the ruling was written in such confusing terms that construction continued until it had almost been completed.

[51] At the time, Judge Cossío opined that the Court lost an opportunity to reflect on the definition of property as a fundamental right, as established in the Constitution.

[52] For many years, this road system had formed part of the urban development plan in the region.

The plaintiff alleged that the city government had disregarded the suspension order. In fact, the FDG had at some point interrupted the project, but it was not clear whether immediate action had been taken and, if not, who was responsible. The Attorney General of the Republic concluded that the order had been ignored and that the responsibility lay with the head of the FDG. This resulted in the initiation of a criminal case against him, which would have disqualified him from participating in the 2006 presidential elections, where he was the left wing candidate and leading in the polls. This generated an unprecedented confrontation between the federal government and the FDG, as the criminal case was interpreted as the means for eliminating the main presidential contender from the race.

The conflict reached such magnitude that despite stripping the director of the FDG of his post in the House of Representatives, the federal government had to dismiss the criminal case as a result of the great social protest it generated. Andrés Manuel López Obrador was forced to leave his post prematurely, but at the same time he was strengthened politically, as victim of a conspiracy. There is no doubt that except for the post-electoral conflict of 2006, the El Encino case represented the most serious dispute between the federal and the local government during the first decade of the 21st century.

In the political storm that followed, public opinion forgot that this case was the result of an expropriation, never regarding it in terms of property rights or public interest, but merely as a confrontation between political actors. However, the case followed its course, and in 2011 the Court was preparing to decide the contempt of court case in a very peculiar way: the Court found that the judge's ruling, granting an *amparo* to protect the owner from expropriation had not been obeyed, despite the fact that the streets had remained closed and unused for more than ten years, as a result of this *amparo*.

Among other things, the ruling of the Supreme Court would determine how to apply the mysterious formula of "substitute

enforcement," established in the Constitution for cases where the original order was not obeyed and the social cost of compliance would have implications that necessitated the application of an alternative.[53] The judge who wrote the Court opinion, José Ramón Cossío Díaz, ordered a study to determine the social cost of implementing the ruling, in other words, returning the expropriated parcels envisaged for building of streets to their original owner, compared to the benefits this would bring to the same owner.

Following the recommendations of this study and after a very close vote (6 to 5), the Court decided to impose a "substitute enforcement" of the ruling. In this ruling, the Court obliged the owner to accept compensation (instead of the return of his expropriated land area) and authorized the city government to finish the streets and open them to traffic. The argument of the Court was that the social cost of the indefinite closing of the streets would be considerable as it would affect tens of thousands of people, while the owner would receive significant benefits in either circumstance: whether the streets crossed through his land area or were detained at that point and the value of the property would increase significantly as a result of the government project. Despite the novelty of using an urban analysis to arrive at this decision, the important aspect with reference to this study is that the subject of the scope of property rights was never explicitly discussed.

As apparent from this brief review of the most relevant conflicts resulting from eminent domain in the first years of the twenty-first century, the federal judges and particularly the Supreme Court played an active role in modifying the legal boundaries of eminent domain. As in previous eras, they made their decision

[53] The Constitution states that "When the nature of the case permits, once the non-compliance or repetition of the demand has been verified, the Supreme Court may order a substitute enforcement in relation to the *amparo* orders, if their enforcement would gravely affect society or third parties more than the economic benefits that would be obtained by the plaintiff." Paragraph 2 of Subsection XVI of Article 107.

based on procedural rules and interpretations, not through a substantive analysis of property rights or the scope of eminent domain. This does not imply that jurisdictional procedures have not had substantive impact. One of the issues resolved in these cases refers to nothing less than the determination of compensation for the majority of property owners, no doubt representing a "substantive" issue. However, even concerning that aspect, the judges made a decision without having (or at least expressing) any idea of what was entailed, as they would normally accept the opinion of the professional assessors. As demonstrated by Cacilda dos Santos, in the case of São Paulo, property valuation represents a "black box" in the field of law (Santos 2008).

A PARTIAL RECOVERY

Up until now, everything we have described would indicate that in the new legal, political, and social conditions prevalent in Mexico City, the power of government to impose eminent domain has significantly diminished. However, as the previous chapter made clear, in the past years the current FDG (2006–2012) has successfully implemented expropriations for a number of purposes. One of the first measures taken by the FDG in February of 2007 was to expropriate two parcels in the Tepito neighborhood, arguing that they were the site of criminal activities.[54] This expropriation was legally risky, as the public interest cause mentioned in the decree (the construction of a community center) was not the same as that announced by the government in the media (a strike against organized crime), besides the fact that it did not comply with the guarantee for a previous hearing. Despite all this, the expropriation was not contested. All indications are that the FDG knew that the property owners would not dispute the case because they were liable to be criminally prosecuted and that they calculated the judges would not suspend the expro-

[54] This concerned mostly with the selling of "pirated" video copies.

priation, for fear of appearing to be lenient towards criminals. Thus, despite the legal risk, these expropriations were politically very popular, enabling the Mexico City Government to position itself as tough on crime. This same strategy of expropriating properties where illicit acts were committed was also applied in the case of the property known as "La Ford," constituting a business for the sale of stolen auto parts. The City Government had become aware that even if no justifiable public interest cause for an expropriation existed, it could proceed anyway provided it could prevent the courts from granting the suspension to the plaintiff. Thus while the case proceeded, the government continued with the project knowing that should it lose the case, the worst that could happen was to have to pay compensation as substitute enforcement of the court order. It is evident how one of the causes of the crisis for this model becomes an instrument of stability.

The FDG is also using eminent domain to advance two large infrastructure projects, during this administration: Line 12 of the Metro and the so called Western Highway (*Supervía Poniente*). Based on interviews with several legal operators of the FDG, a change in attitude is revealed on the part of this government, as compared to the previous one. The current government understands that the legal system has its own logic, which must be understood in order to avoid problems; thus it has adopted a strategy of following up an expropriation decree with an offer to pay compensation at the current market value.[55] Likewise, it is taking advantage of the recent reform of the Expropriation Act, prohibiting judges from granting suspension in *amparos* related to road projects. The FDG demonstrates this strategy when it negotiates with the owners, by pointing out that it is not in their interest to dispute the expropriation decree.

By 2008, the FDG reported that more than three quarters of the *amparos* filed against expropriation decrees had been resolved

[55] For this purpose, the FDG created a special fund for the payment of expropriations, from which it can draw without delay.

in its favor, a clear sign that it had successfully overcome the eminent domain crisis. This was the result of a straight-forward process of adaptation and learning. It is important to recognize that the conflicts faced by the previous administration in cases of eminent domain occurred because all levels of government (both the judicial branch and the executive) continued to behave as if the political system were not pluralistic—as if "nothing had happened." After some years, officials learned to act with greater awareness concerning the consequence of their actions. The paradox is that most of the criteria sustained by the courts that precipitated the crisis and led to a limitation on eminent domain are now applied, in order to strengthen the expropriation power of the FDG.

CONCLUSIONS

There is little doubt that the courts have played an important role in shaping the power of eminent domain in Mexico, despite rarely putting forward substantive arguments, and this constitutes their principle weakness. However, it is also true that during the long post-revolutionary period, the courts operated in a decidedly ambivalent constitutional context, manifesting a liberal aspect that was dear to their convictions and a revolutionary aspect that they could not openly negate without running the risk of appearing to be enemies of a regime that derived much of its legitimacy from this ideal. In conflicts relating to eminent domain, the federal courts developed what we could call *dissembling strategies*. For one thing, they created ingenious procedural devices, ensuring that government expropriations were irreversible, upholding for more than seventy years the opinion that the right to a previous hearing did not apply and preventing *amparos* from suspending the expropriation decree without recognizing that by so doing they were weakening property rights in favor of almost any government project.

They were also discrete when attempting to do the opposite, i.e., protect the owner from what they considered illegitimate expropriations, granting *amparos* without acknowledging that this

contradicted their own jurisprudence. The only instance that they truly opposed in the context of urban policies of the executive branch consisted of expropriations to provide land parcels to low income families. The Supreme Court did not hesitate to declare these expropriations unconstitutional, perhaps because they represented an attempt to transplant the agrarian reform model to the urban milieu. The level of contempt (or fear, or indifference) towards the low income population must have been pronounced to have induced such emphatic resolutions without even provoking an explicit defense of private property.

Similarly, although during the long post-revolutionary period there were no eminent domain cases as intense as those that occurred after the year 2000, we cannot maintain that the relationship between the judicial and executive branches was totally harmonious. The fact that the Constitution was reformed in 1958 to prevent individual Court chambers from declaring the unconstitutionality of laws indicated that the activism of the previously described Second Chamber of the Supreme Court became an obstacle for certain eminent domain projects.

Recently, the courts have acted in very different contexts: political pluralism, greater judicial autonomy, etc. Even so, this does not imply that judges were forced to adopt new practices; the courts themselves contributed to this. We do not wish to deny the importance of wider political processes or of certain changes in the general legal framework, such as the creation of the agrarian courts in 1992 and the constitutional reforms of 1994 that reconfigured the Supreme Court.[56] However, we do recognize that this change in strategy, initiated by the Supreme Court, had important impact on difficult eminent domain cases.

Our study reaches the conclusion that together with other factors, the abandonment of procedural strategies established by the Supreme Court to facilitate the eminent domain process con-

[56] With reference to this matter, we can also say that the reforms of 1994 were written by experts who, to a certain extent, represented the views of the judicial branch (Inclán-Oseguera 2009).

tributed to a true crisis in the Mexican urban context during the first years of the new century. Because these cases involved privately owned land, it had particular impact on the recently created FDG, which had to pay the price for all these flawed procedures and practices that had been decades in the making and caused confrontations between the FDG and the federal government. What was routinely and unwittingly implemented during the post-revolutionary era because there were no consequences or because problems could be solved out of court, tended to create a political crisis in the new political context, as evidenced in the case of El Encino.

After a learning process, the FDG has been able to apply the power of eminent domain to implement a great variety of projects. However, the federal government has failed to overcome the crisis in agrarian communities. These communities have developed a large capacity for political resistance and have resorted to opportunistic litigation to prevent the federal government from exercising its power of eminent domain, not only in a way similar to when the agrarian communities were its political subordinates, but even as any normal government in the world does to advance projects, where the interest of the community exceeds the interest of property owners. It is true that, in these circumstances, the strategies of the courts were not the most important factor: rather it was the strength and legitimacy of agrarian communities. In any case, there is no doubt that judicial activism has imposed new limits on eminent domain. One of the clearest indications of this is that reforms introduced to the Expropriation Act in 2009, the first important reforms in seven decades, resulted from this activism.[57]

This elicits many questions. One is whether we have finally reached the end of the post-revolutionary era. Of course, this is not the place to answer this question in general terms, but we can say that one of the most important manifestations of that era, the prestige and strength of *ejidos* (which account for more than half

[57] Evidence lies in the fact that the reform covered precisely the same subjects on which the Court had focussed

the national territory), are still alive and well as the federal courts have granted these the same protection as other private property owners. Perhaps one of the most interesting paradoxes of this neoliberal era is that so-called "social property" ended up enjoying the same legal protection as properties owned by individuals.

If the previous question is interesting, there is another that is more pertinent in the context of this study: what are, if they actually exist, the new procedures for defining property rights in the context of the urban conflicts resulting from expropriations? What we have discovered is that, purely and simply, there have been no substantive arguments that respond to the expectations of neo-constitutionalists, in the sense that any decisions have to be based on the axiological core of the law, i.e., fundamental rights. The much touted theory of the "social function" of property appears in Court rulings more as a rhetorical adornment than as a guideline for orienting the decisions of the federal courts. Not even the principle that the land belongs to the Nation, presented in the mythical Article 27 of the Constitution, is invoked by the courts when making their decisions.

It is true that the dominant tendencies inherent in new constitutional thinking include Luigi Ferrajoli's argument of (1995 and 1999) that property is *not* a fundamental right. However, in what sense would this argument be useful for addressing substantive issues in problematic eminent domain cases? As apparent here and in the previous chapter, we need to know whether the owner of land converted to urban use with his acquiescence has the right to receive compensation; how to determine the amount of compensation for farmers whose land will increase in value thanks to a government project; whether owners who live on their property deserve more compensation than those who do not use it to satisfy their basic needs; or if the growing public dissatisfaction due to the social and environmental impact of large infrastructure projects (dams, airports) will bring reforms to the eminent domain regime. Among many others, these are the real problems, posed by urban expropriations in cities such as Mexico

City, but Mexican constitutionalists have not paid them adequate attention. We may convince ourselves that property is not a fundamental right, but this will not help to resolve the questions we have mentioned. Property does not exist because it is registered in a legal document (such as the Constitution or any other); it exists (as well as forming part of the foundation of society, whose analysis is not part of this study) because it is normally respected and protected by government authorities.

For this reason, we insist that the legal content of property is not found in general texts, but in the practice of the administration and the courts. As revealed in this chapter, the courts played a central role in defining property rights, confirming or modifying with each ruling (and to a varying degree) their scope in relation to the power exercised by public authorities.

Likewise, the judges' decisions cannot be understood independently of their interaction with other branches and levels of government. One very obvious example is that in recent years the courts *were not* obliged to contend with the revolutionary aspect of the Mexican property system simply because the executive branch had ceased to apply this aspect. The last time it conducted an expropriation with a "redistributionist" spirit, consistent with the revolutionary tradition, was after the earthquake of 1985, and the consequences are evident.[58]

Another aspect of the history of urban expropriations that is best appreciated in the context of the interactions between branches of government is the learning process that took place between the FDG and the federal judges, in order to avoid repeating the mistakes that led to conflicts, such as Paraje San Juan or El Encino. If today the FDG practices eminent domain with the same ease as any other big city government in the world (paying timely compensations and attending to the legal soundness of its decisions), it is because its officials learned to exercise their power of

[58] Remember that the conflict referred to a strictly urban claim: to remain in the city center rather than being expelled to the periphery.

eminent domain within the limits of due process while knowing what to expect from the courts.

We think it is important to analyze the role of the courts in eminent domain, as part of a wider context that we term *constitutional life*, referring to all interactions between branches of government aiming at a certain result, which in this case defines the capacity of eminent domain, while simultaneously defining the scope of property rights.

If we study the way that expropriations have been legally dealt with in Mexico City, this reveals an important aspect of our property system in the urban milieu, as the product of a series of *impulsive actions*. This is embarrassing, considering that legal experts proclaim as a matter of national pride that ours is the first "social" Constitution in history, which led to the Weimar Constitution and the entire progressive constitutionalism of the twentieth century. In contrast, the silence of the jurists during recent years concerning the subjects we have addressed here might lead us to conclude that during the post-authoritarian era, we have not known how to apply our constitutional tradition when faced with urban development processes. In reality, the situation is even worse: for eighty years, since the start of process of urban development that would characterize twentieth-century Mexican society, the operators and thinkers in the legal context, independent of their liberal or revolutionary constitutional position, have failed to find a place for this in their doctrines. The city represents a foreign body in the world of constitutional representations, which is why urban property resembles a form of social power awaiting comprehension and definition.

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Eminent domain actions are viewed very negatively these days.

In these times of the concept of *governance*, dominated by the idea that any government action should be the product of social consensus, depriving someone of their property without their consent, even to satisfy a public or social need, might seem audacious. And yet all contemporary states, even those most committed to the liberal tradition, use eminent domain for one purpose or another.

In Latin American cities, eminent domain has given rise to tensions and conflicts that sometimes produce unexpected effects, such as a financial crisis in São Paulo or the destitution of the head of Mexico City's government. For what purposes is eminent domain currently used? Under what conditions do conflicts arise? How do judicial authorities handle these conflicts? This book assembles the answers from a group of researchers who have been discussing this topic for several years, with the support of the Instituto de Investigaciones Sociales and the Lincoln Institute of Land Policy.

The Instituto de Investigaciones Sociales conducts research in the social sciences. Its goal is to promote the development of knowledge in social science fields and to provide solutions to national social problems.

The Lincoln Institute of Land Policy seeks to improve quality of life through the effective use, taxation, and stewardship of land. A nonprofit private operating foundation whose origins date to 1946, the Lincoln Institute researches and recommends creative approaches to land as a solution to economic, social, and environmental challenges.

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