TOWARDS PRECISE NORMS FOR LAND ACQUISITION IN DEVELOPING COUNTRIES

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I. INTRODUCTION

We relate the law and economics discussion of precise legal rules versus broad and information-intensive legal standards to the impact of the law on economic development and to economic and political features of low and middle-income countries in general and to how land acquisition law work in this setting. We review the conceptual differences between rules and standards. Next, we relate our findings to taking law in developing countries, where clear rules often serve the purpose of the law better than standards. We describe how the perspective on eminent domain power has been shifting since the 1950s, when developed economics regard powerful planning by the state as the most important agent of economic development, to present day views, which are dramatically different and in which "land grabbing" by the government has become paradigmatic of misguided economic development. We support clear and precise rules regulating eminent domain power. The rationale for such rules is pervasive as they cut into individual rights. But for many developing countries additional reasons for precise rules exist.

II. RULES VERSUS STANDARDS

Kaplow (1992) introduced the categorization of legal norms as either rules or standards. Rules are crystal clear legal commands. They are blueprints for action and allow for mechanical legal decisions. Standards, by contrast, are complex and often mission-oriented norms with a vagueness resulting from a wide range of possible interpretations. A per se norm in competition law is a rule, a rule of reason in the same field is a standard. A speed limit for motor vehicles is a rule, negligence in tort law is a standard.

(1) The costs of establishing and maintaining a body of law consist of the fixed costs of norm specification, e.g. drafting and issuing a statute, which are independent of the number of legal cases, and the variable costs of adjudication and/or administration. A legal statute consisting

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of imprecise standards clearly economizes on the costs of norm specification at the expense of high costs of norm application and adjudication, whereas a statute consisting of precise rules entails high costs of norm specification but lower costs of adjudication. Rules with high costs of norm specification but low costs of norm adjudication generate lower total costs if the number of cases is high. In areas of the law, in which cases are numerous and repetitive, rules should be preferred over standards.

(2) While the costs of norm specification are paid by the state, i.e. the tax payer, most of the costs of adjudication – court fees and lawyers' fees, costs for witnesses and expertise– are borne by the parties. Thus, the choice between rules and standards determines to what extent either the parties or the taxpayers are burdened with the costs. High costs of adjudication especially deter consumers, employees or citizens from taking action against the state. Administrative acts often cut into the interests and rights of individuals. Precise rules, which reduce the costs of seeking justice, then facilitate access to administrative courts.

(3) A country's average level of expertise of judges and civil servants tends to correlate with its per-capita income. Low income countries will likely have fewer well-trained judges, civil servants and experts with a good understanding of the legal and societal problems to which a body of law is directed. In such countries, a law which requires subtle understanding and reasoning might overtax the capacities of many civil servants and judges. General standards are fact-intensive legal norms that require fact finding, data processing and relating the facts to the teleology of the law. The decision process is lengthy and fraught with potential mistakes, avoiding which will require all the expertise and training of the decision-makers. With poorly trained judges and administrators, legal standards then lead not only to relatively high variable costs of applying the law but also to more mistakes, with adverse effects on society. This gives rise to a tendency to concentrate the scarce human capital at the top of the legal system for the drafting and amending of precise norms whose adjudication or administration is relatively easy.[1]

(4) Poor decisions on the part of judges and regulators can result not only from insufficient training but also from a lack of independence or from corruption. This is another reason to prefer rules over standards in many low-income countries. Decisions which violate rules are more easily observed and criticized than decisions which violate information-intensive standards. A critical press, civil society organizations or internal controllerswill have more trouble criticizing a public decision based on the subtle interpretation of a standard than one which violates a clear rule. If, in violation of a rule forbidding him to do so, a manager sells

[1] H.B. Schäfer,*Rules versus standards in rich and poor countries: Precise legal norms as substitutes for human capital in low-income countries,* 14 Sup. Ct. Econ., 113-134 (2006).

the company's products to himselfand gets away with it,that situation is much more easily observed than if the manager were entitled to such sales but were bound by fiduciary duties.

(5) Rules reduce the power of independent courts. This however does not imply a general interest of the executive and parliament in precise norms. On the contrary, a state whose regulatory laws interfere with individual interests, entitlements and constitutional rights might prefer standards and vague norms to expand the decision power of its administration.The German constitution (Grundgesetz) requires legal clarity (Normenklarheit) and legal definiteness (Bestimmtheit) of any sub-constitutional regulatory law that affects fundamental constitutional rights. State intervention in rights is possible for legitimate policy aims such as public health, consumer protection and the environment if the intensity of the intervention corresponds to the level of precision of the infringing rules (Regelungsdichte).[2] This should precisely delimitate the authority of the administration and enable lower administrative courts to check with little information whether an administrative act affecting individual rights is compatible with the law. If a legal norm does not pass this test, the constitutional court will uplift the norm for being too vague.

III. CHANGING VIEWS ON EMINENT DOMAIN POWER

The coercive taking of private property – mainly of land and mostly of agricultural land – is a legal instrument in all countries. Takings cut into private property, conceptually an absolute right which protects the owner against anyone else including the state. In most countries, property is also a fundamental human right[3] and not a privilege to be given and taken by a ruler, even though the term "eminent domain " (from medieval Latin "dominium eminens" meaning "supreme lordship") in common law countries points to tribal and feudal origins of property rights for land and the prerogative of a duke or king.[4] The economic rationale for takings evolves from hold-up positions, which arise if the government or a private investor requires a large and contiguous piece of land for a project like a railway or a production site, land which is currently owned by

[2] Maunz/Dürig/Grzeszick, *im Wert- und Anspruchssystem des Grundgesetzes,* VI. Rn. 105-106 (2008). This implies a prohibition of delegation from parliament to the administration. Parliament must regulate the essential points in the law and cannot shift the decisions to the administration. See especially the decision by the German Constitutional Court on this matter. BVerfGE 49, 89, 126 ff. (insb. Rn. 12, 68, 70 ff.).

[3] Property is a human right in all 47 member countries of the Council of Europe. India is a counterexample: Private property is not included in the list of fundamental rights stipulated in Part 3 of the Indian constitution.

[4] F.R. Herber, *On the Importance of Expropriation in the Roman Empire and in Modern Europe*, 11(1) European Scientific Journal , 5 (2015): No such origin in tribal land law can be found in classical Roman law, which became formative for civil law countries. In republican and imperial Rome, the taking of land was an "ultima ratio" used only after intensive efforts to buy the land. At the zenith of his power, Emperor Augustus shied away from takings for public buildings in Rome.

many individual parties. In such a situation, a voluntary sale of each lot is often not possible or unreasonably difficult. Therefore, constitutions allow takings for the public welfare or public purposes if fair compensation is paid. In many developing countries, taking may occur without due procedure, with ample discretion for the bureaucracy, by outsourcing the taking decisions to private firms, without temporary relief, without constitutional review and in return for compensation far below a damage award in civil law cases. This is not to mention the cases of outright land grabbing, where individuals whose legal entitlements are ill defined are displaced without any compensation at all – a problem which is beyond the scope of this paper.

An important economic reason for taking laws and practices that gave ample discretion to developing country administrations was the influential theory of state-led economic development, which dominated development economics from the 1950s to the 1980s. From the 1940s onwards, many newly independent African and Asian countries, as well as several Latin American countries, implemented various types of socialism and planning. It was in this political environment that development economics emerged as an academic discipline. In the 1940s-50s, many of its most prominent scholars taught that developing countries needed state leadership of the economy.[5]These theories maintained that a market economy might be good for rich countries but that in poor countries, free markets would create so many deviations from the workable market model that the state should lead the economy. Development theory diagnosed a whole Olympus of market failures in poor countries, ranging from increasing returns to scale and natural monopoly via unbalanced growth to the necessity of a state-led big push. Moreover, such market failures were also attributed to linkages that are positive spill overs between firms not internalized by prices as well as dualistic economies with wages differing from the opportunity costs of labour. These considerations fuelled the demand for a strong government hand to plan the economy. In a planned or mixed economy, the legal protection of private property is inevitably weaker than in a market economy. The state must have planning capacity and the taking of private property by the state must be relatively easy to promote economic development. This view contributed to "property" being removed as a fundamental right from the Indian constitution in 1978.[6]

[5] The economist and Nobel laureate Gunnar Myrdal captured the spirit of development economics in the 1950s as follows: "The most important change in state policies in underdeveloped countries is the common understanding that they should each and all have a national economic development policy… Indeed it is also universally urged that each of them should have an overall, integrated national plan. All underdeveloped countries are now attempting to provide themselves with such a plan, except a few that have not yet been reached by the Great Awakening." G. Myrdal ,*Economic Theory and Underdeveloped Countries*. London: Duckworth (1957).

[6] N. WAHI, THE HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press 2016).

Development economics was also influential before the rise of public choice economics and institutional economics, both of which look at state action with a cold eye. It was a widespread view that government is an agent for salutary change, not motivated by profits or self-interested, and that agencies and offices need ample discretion to handle selfish landowners. While development economics is now no longer the dominant paradigm pertaining to developing countries, the legal structures supporting a planned or mixed economy are still in place in many developing countries.

However, the last three decades have seen a dramatic shift in public opinion. The focus of attention is no longer the "selfish property owner" but rather the individual displaced by the grabbing hand of the state.[7] Cernea (2000) has estimated the number of people who lost their homes in the 1990s at 90 to 100 million. In some countries, large infrastructure projects such as dams, ports and airports have displaced almost 1 per cent of the population, especially in China and Africa.[8] It is estimated that in the four decades after the country's independence, 20 million people were displaced in India (Cernea 2000).[9] This displacement was then followed by the liberalisation of the Indian economy. This signalled a shift from a state-led growth model to one where the market economy was decentralised. India also followed the change in the public opinion, where the mindset shifted from socialist to that of protecting the individual. This required a change in law as well, where the law of eminent domain had to factor in stronger private property protection.

IV. THE CASE FOR RULE-BASED TAKING LAWS IN DEVELOPING COUNTRIES

A) EASIER AND CHEAPER ACCESS TO COURTS

Since taking cuts deeply into a personal and fundamental right, the legal basis for the administration to expropriate land should be as precise as possible without questioning the rationale for takings. This reduces the administration's leeway and scope for arbitrary decisions. It also renders the decisions of administrative courts simpler, less information-intensive and thus cheaper, reducing the obstacles to civic action against the state. While these two rationales for

[7] Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo* ,Sup. Ct. Econ. Rev.183 (2016).

[8] A. Azuela and C. Herrera, *Taking Land Around the World: International Trends in the Expropriation for Urban and Infrastructure Project* 2 Lincoln Institute of Land Policy, Working Paper 2 (2007).

[9] M.M. Cernea, *Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement*, In M.M. Cernea and C. McDowell (eds.) *Risk and Construction: Experiences of Settlers and Refugees*. Washington DC: World Bank, 2 (2000).

precise taking norms apply in all countries, the argument carries even more weight in poor countries. The affected parties are often small farmers with little income. As argued before, the choice between rules and standards influences – in opposite directions – the costs of norm adjudication, which are borne largely by private parties, and the costs of norm specification, which fall on the taxpayer. Taking law in the shape of rules rather than standards gives greater incentives to poor people to fight against wilful government decisions as the legal fees will be relatively low. This argument is further enhanced if we take into account the so-called and much discussed "urban bias" of development politics. In developing countries, the rural population is large and therefore difficult to organize, much like consumer interests. Urban interests are better organized and represented in the political system. Publicly administrated wealth transfers from the traditional sector to the modern sector and from the rural to the urban population are therefore a pervasive feature of the political systems in many developing countries.[10] Farmers are particularly vulnerable in this public choice constellation and require protection against systematic government discrimination.

B) MANY CASES OF TAKING IN DEVELOPING COUNTRIES

We saw above that the economic rationale for rules rather than standards increases with the number of cases. Statistics on takings are almost non-existent because takings are decided locally and the statistics are not aggregated to the national level.[11] Yet we may be certain that developing countries feature a much greater number of expropriation cases than rich countries, for two reasons: Firstly, population growth in rich countries is much slower on average, which means there is less need to adapt the infrastructure – railways, ports, airports, utilities, universities etc. Secondly, many low and middle income countries, notably China and India, have faster per capita income growth, which also leads to more taking decisions for public and private projects. With more instances of taking in developing countries, the fixed costs of norm specification are spread over more cases, so – other things being equal – rule-based taking laws are to be preferred.

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[10] D.J. Bezemer and D. Headey, *Agriculture, Development and Urban Bias* World Development 36(8): 1342-1364 (2008).; M. Lipton *Why poor people stay poor: urban bias in world development*, Cambridge: Harvard UP(1977).; H.B. Schäfer, *LandwirtschaftlicheAkkumulationslasten und industrielleEntwicklung*, Springer (1982). The urban bias against agriculture, which was first criticized by the French physiocrat François Quesnay, has persisted since the times of mercantilism. Paradigmatic examples include communism under Stalin, peronism in Argentina, the government of Nkrumah in Ghana, and many other African countries, which systematically favoured urban life through cheap food prices, export taxes on agricultural products and many other discriminating state interventions at the expense of traditional agriculture. Ruthless takings and land grabbing are widespread contemporary examples of the urban bias.

[11] A. Azuela and C. Herrera, *Taking Land Around the World: International Trends in the Expropriation for Urban and Infrastructure Project* 2 Lincoln Institute of Land Policy, Working Paper 2 (2007).

C) PRECISE RULES REDUCE INCOMPETENT AND CORRUPT TAKING DECISIONS

The advantages of strict rules discussed above apply to many developing countries. Taking decisions based on vague norms like "economic development" require expert knowledge of cost-benefit-analysis or other economic expertise about weighing interests, which judges in developing countries often lack. It is more cost efficient to concentrate this scarce expertise in the design of precise but still reasonably efficient rules than to try to enable all administrative courts to take good decisions on the basis of vague standards. Also, administrative courts are often not fully independent of state influence. While telephone justice as in totalitarian countries, where public officials instruct judges, is in fact rare, we do see more subtle types of influence in many countries.[12] Law enforcement may be in the hands of local governments rather than courts, leading to delayed enforcement if the government does not agree with the court decision. Judges may be removed from a case by a political decision, they may only be appointed for a limited term or their pension may be questioned. A local government might deny low-cost housing to a judge. In such an environment, rules have an obvious advantage over standards because judicial non-compliance with rules is easily observable whereas non-compliance with standards is not. A critical press and organizations of the civil society can react to court decisions that violate precise rules. The use of rules can therefore serve to offset the tendency for governments to capture administrative courts.

Similar arguments in favour of precise norms apply when judges are corrupt. Superior officials and inspectors, the public and civil society organisations can observe violations of a rule more easily than a deviation from the loyal interpretation of a standard, so corrupt judges are more easily named, shamed or punished.

D) SOME PROPOSALS FOR CLEAR AND PRECISE TAKING LAW IN DEVELOPING COUNTRIES

a. Expropriation only after serious attempts to buy the land

If land acquisition was not permitted, public projects would automatically be situated in areas where ownership of land is lower. This is because in places where there is widespread private

[12] World Bank, World Development Report 2002, Building Institutions for Markets, Ch. 6, The Judicial System, 116.

ownership of land, the acquisition of land without resorting to expropriation would have the largest number of roadblocks. Taking laws should still require that serious efforts are made to buy the land at market value and that the coercive transfer of ownership remains the state's last resort. Methods that at least partially preserve the voluntary character of the transaction include a bid for the land that becomes effective if a supermajority of the owners accept.[13]

b. Expropriation only for clearly specified purposes

Following the rationale of choosing rules over standards in the taking laws of developing countries, the law should clearly define the public benefit from takings. This recommendation would entail dramatic changes in many countries. For instance, the Chinese state can easily remove land use rights. The public interest is defined neither in the Chinese constitution nor in statutory or case law, which gives the government "virtually unlimited power for taking farmland for any purpose".[14] In some countries like in South Africa, takings are possible for the purpose of social justice.[15] In the USA, the courts tightly control eminent domain power but accept the widely defined standard of taking for "economic development". The Supreme Court in the much-discussed case "Kelo v. City of New London" held a taking to be constitutional as it was part of a general plan of economic development and raising local tax income. By contrast, the German Constitutional Court demands that the public interest for taking be accurately defined in either federal or state law – a municipal zoning law or any other municipal statute will not suffice in this regard. This norm makes sense from a public choice perspective because it is especially local public choice constellations that tend to drive taking decisions that serve not the public interest but rather the local politicians. The constitutional court has two instruments of control at its disposal. If the rationale of the taking decision cannot be found in either a federal or a state law, the taking is unconstitutional. Any rationale must be clear, specific and exact, and it must describe a severe public interest. Undisputed public interests that justify taking include the construction of power lines, railway tracks, canals, roads, public airports and, with some further specifications, also schools and sports facilities. The creation and preservation of jobs is disputed; its constitutionality as a rationale for taking would largely depend on the scale of the expected

[13] In India a reform of the Land Acquisition Act in 2013 included a consent clause. Takings for private use require a consent of 80 per cent and for private public partnerships of 70 per cent of landowners.

[14] International Review, Center for International Law, Newsletter, New York Law School, 2012, 14(2), Eminent Domain Laws around the World, Taking Property for the Public Good, pp. 7-19, p. 15; Peter Yuan Cai, In the Shadow of Pandora: China's Expropriation Law, East Asia Forum (Feb. 6, 2010),

[15] International Review, ibid. p.16.

benefits. Higher tax income cannot not justify takings from a constitutional point of view,[16] which makes sense since higher tax income per se is not in the public interest.

Sometimes it is difficult if not impossible to formulate the rationale of certain takings in an abstract and yet precise way. German constitutional law then requires that the rationale be provided by a specific law and thus ensures that the taking decision is not based on a mere bureaucratic act but on a majority decision by a democratically elected parliament. An example is a taking law in favour of Airbus Industries in Hamburg, which sought to extend the factory runway to accommodate the future A380 model passenger jet. At the time, there was no legal basis for a taking for a privately rather than publicly used airport. The Hamburg state parliament then passed a specific law for the taking of land for the benefit of the Airbus Corporation, describing in detail the expected positive effects on the economy of the city state. The courts subsequently accepted the taking decision on the basis of this law.[17]

It is worth noting that the constitutional protection of property against taking appears to be stronger in Germany than in the USA. According to its constitution, Germany is a "democratic and social federal state" (Sec. 20, 1 GG), whereas the word "social" does not enjoy that status in the USA. It is therefore noteworthy that taking decisions must be based on precise legal rationales given in statutory laws. This would exclude "economic development", which legitimizes a taking in the USA. It would also exclude "increasing tax income" because this is not per se in the public interest. And it would also exclude takings for "a social purpose" if that purpose is not clearly specified in a sub-constitutional law. Property protection against eminent domain power seems to be more libertarians in Germany than in the USA.

c. Transparent and fixed formula compensation

A large literature shows that compensation for land takings in developing countries often falls short of the fair market value of the land and rarely covers other damages such as the non-financial harm of losing one's home.[18] The formulas for compensation are often not clear, mentioning fair compensation, just compensation or adequate compensation in different legal

[16] Taking for fiscal reasons is unlawful in Germany. W. Leisner, *Eigentum, Handbuch des Staatsrechts*, 4 386 (2010).

[17] Taking law for the expansion of the factory airport in Hamburg-Finkenwerder (Werkflugplatz-Enteignungsgesetz) of February 18, 2004.

[18] Y.-C. Chang, Private Property and Takings Compensation, Theoretical Framework and Empirical Analysis", Edward Elgar; A. Azuela and C. Herrera (2007), op. cit.; International Review, ibid., p. 15; Peter Yuan Cai, op. cit.; R. Singh (2012) "Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward" Economic and Political Weekly 47(19): 46-53.

texts.[19] The term "fair market value", which is related to the Hull formula in international law, is a muddy standard, leaving open whether it denotes the market price, the discounted future income stream or the book value. It also leaves open the time of valuation, especially before versus after the announcement of the taking. In developing countries, the observed market price is often lower than the actual market price as side payments to save taxes are common.

Some developing countries have introduced flat rate compensation without proof of damage in parts of tort law. Given the specific problems with the law in many low and middle-income countries, this seems a step in the right direction. In India, section 140 of the Motor Vehicles Act of 1998 grants flat rates in case of death and permanent disablement. The Act also includes fixed formulas for funeral expenses, loss of consortium, medical expenses, pain and suffering and loss of income. This was explicitly introduced to avoid drawn-out litigation and delay in payment for victims and their heirs who are in need for quick relief. Fixed formula compensation is also granted for instance in Brazil, where a set solatium for grief is paid.

In taking law, too precise formulas for damage compensation can offset poor judicial expertise and make the procedure less information-intensive and costly. For instance, the non-pecuniary damage of a displaced homeowner could be fixed by a formula that considers wage rates and the number of years the person has lived in the neighbourhood, similarly to golden handshakes for dismissed employees. Fixed formulas could also be used to evaluate the land. Notwithstanding their unreliability, they would allow speedy decisions and could do no harm if courts used them as a default rule, leaving the affected party free to accept them or insist on a lengthy and information-intensive decision procedure to determine the damage award.

d. Specific taking rules for private and profit-oriented investors

The hold-up problem necessitates takings even in favour of private and profit-oriented firms. This applies especially in and around the rapidly growing cities and megacities in developing countries. Yet the specific features of such takings for private beneficiaries call for specific legal norms.

- A private entity that benefits from an act of taking is fundamentally free to utilize the property received in any way it pleases – which is not the case if the 'taker' is a public body bound by administrative law and by the stated purpose of the taking in the public interest. Therefore,

[19] H.B. Schäfer (2017) "Taking Law from an Economic Perspective with Reference to German Law"in I. Kim, H. Lee, & I. Somin (eds.), Eminent Domain: A Comparative Perspective (pp. 8-37). Cambridge: Cambridge University Press; N. Birch (2010) "Comparative Compensation" in W. Schill, International Investment Law and Comparative Public Law, Oxford Scholarship Online, 2-31.

expropriation laws which enable an involuntary transfer of property to a private investor should include safeguards that the specific public purpose that justifies the taking is indeed met.

- For the taking to be lawful, the state should be obliged to show (and convince a court) that the private investor can be trusted to use the land in pursuance of the specified purpose. The required commitment could be achieved by a contract between the investor and the state with penalties to be imposed if the investor fails to use the land in the specified manner. Such rules would probably have prevented the much debated Kelo taking in the USA, where homeowners were evicted but the development company subsequently lacked the financial resources for the planned investment.[20] The author has visited sites in India which the government took for the benefit of private investors but which then lay idle for years. A few simple rules of eminent domain law would suffice to avoid such wasteful outcomes.

Also, as I have argued in a paper with Ram Singh, there are strong economic arguments that compensation for takings in favour of private profit-oriented investors should exceed the usual "fair market value" of the real estate. The fair market value covers neither the non-financial damages, nor the damages from interference with any ongoing or future contractual arrangements pertaining to the property, nor any number of other damages. Only full damage compensation will prevent economically inefficient takings, i.e. ensure that the new owner values the land more highly than the old owner.[21] Only then will the new owner be interested in the investment, as Calabresi and Melamed have shown in their well-known proposition. This beneficial effect of full compensation is neither guaranteed nor probable if the new owner is not a private investor but the state. The state pursues its own interest, much like any actor. Yet the state maximises not wealth but other metrics, for instance votes. Consequently, the level of compensation cannot incentivize the state in the same way as a private investor. For a simple bright line rule, one might envision that the compensation payable by a private acquirer must exceed that to be paid in case of public use by a certain factor greater than one.

[20] Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo* ,Sup. Ct. Econ. Rev.183 (2016).

[21] For an analytical exposition, see H.B. Schäfer and R. Singh (2017) "Takings of Land by Self-interested Governments, Economic Analysis of Eminent Domain Law" forthcoming in the Journal of Law and Economics. See also H.B. Schäfer (2017) "Taking Law from an Economic Perspective with Reference to German Law" in I. Kim, H. Lee, & I. Somin (eds.), Eminent Domain: A Comparative Perspective (pp. 8-37). Cambridge: Cambridge University Press.

e. A brief note on the proportionality principle and substitutes

Whenever the state infringes a personal or a fundamental human right, the questions arise as to what the limits of state power should be, when its exercise is legitimate and which role courts should play to check it. The gold standard of a legal principle enabling courts to check state power is the so-called proportionality principle. Originally invented by German administrative courts to check police power and further developed by the German Constitutional Court, the principle has enjoyed an incredible international career. Among other countries, the Supreme Courts of Canada, Israel and South Africa and all constitutional courts in Europe rely on it, while the USA do not. The principle is also routinely applied by the European Court of Justice, The European Court of Human Rights and the appellate body of the World Trade Organization.[22] If a state acts in pursuit of a legitimate policy target for which land taking is necessary, for instance building a slip road to the highway, and if all the legal requirements discussed so far are met, the proportionality principle can still enable a court to declare the decision illegal and void. The principle comprises 3 tests.[23]

First, if the administrative act which infringes a right has no positive effect whatsoever on the statutory policy target it is unlawful. Taking land for expanding a grocery store in a subway station into a large shopping mall would be illegal if the legal rationale of grocery stores in public stations is to give travellers easy access to provisions and thus to improve public transportation services. A second test is the necessity test. A taking of land for a university campus would be illegal if the campus can be erected at less interference with personal rights, e.g. if the government already owns enough land nearby or if the campus could be built on half as much land. A third test is a cost-benefit-test. A taking decision for constructing a slip road can be unlawful even if it contributes to the policy target of improving transportation and if it constitutes the mildest possible intervention to realize the project. A second slip road in a small city with trivial benefits for car drivers would not justify large infringements to many landowners.

The proportionality principle has proved to be a powerful legal tool to check the ruthless exercise of government power worldwide. Yet it has a major shortcoming in the context of our discussion: It is almost a textbook example of a legal standard, rather than a legal rule. Its application requires extensive information in the court room and subtle understanding and expertise on the part of the judges, who must be independent and loyal. Like a luxury car that will not run well on poor roads, applying the proportionality principle if the conditions are not right

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[22] Bernard Schlink, *Proportionality In Constitutional Law: Why Everywhere But Here*?, 22 Duke L.J. 291-302 (2012).

[23] Maunz/Dürig/Grzeszick, *Die Eigentumsgarantie des,* XIV. Rn. 105-106 (2008).

may lead to unwanted effects. Therefore, we hesitate to recommend the application of the principle in its present form to developing countries across the board. However, the rationale of the principle can certainly be exploited for takings decisions in developing countries. Expert commissions could establish how much land is necessary to realize a school, college or university and how the compensation has to be fixed. Such expertise could be made binding for takings decisions. Travelling in developing countries, one cannot help but notice the oversized campuses populated by all kinds of private shops, private houses and even private hotels. The proportionality test would have avoided this outcome. Yet other, more rule-based methods of achieving proportionality may also be available.