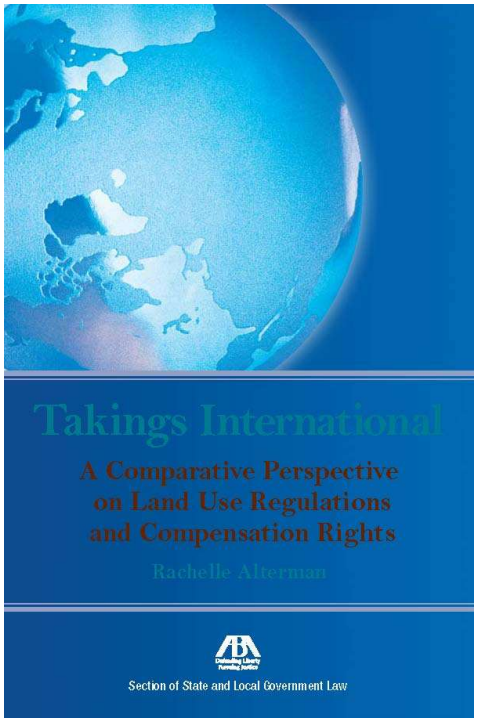

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 1
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Chapter 1

Regulatory Takings and the Role of Comparative Research

Rachelle Alterman

No land-use law in the world can evade the need to address the relationship between land use regulation and property values. The issue is universal, yet the solutions have been insular. In the absence of comparative research, each country has had to develop its own legal and public policy approach. Despite the importance of this subject for cross-national knowledge exchange, it has not drawn much attention from researchers. Legislators, judges and legal professionals in each country have been denied the opportunity to learn from each other's experiences. The purpose of this book is to provide a platform of basic comparative knowledge on regulatory takings in order to enable cross-national learning.

H1 Land use regulation and property values

The vast majority of countries across the globe today have laws for regulating land use (though not all countries apply and enforce these laws). These laws vary greatly, but do share one universal dilemma: How to deal with the shifts in land values inevitably caused by land use regulation? At times the effects are upwards, leading to increase in property values, at other times the effects are downwards, causing a reduction in current or future values. Understandably, the upwards effect is usually less controversial than the downwards effect. The latter is one of the "raw nerves" of planning law and practice. This issue can have extensive economic and social-justice implications and is at times a major impediment to the implementation of land-use planning and environmental policies. Yet despite its universality, there has been surprisingly little cross-national knowledge exchange on how laws and policies in different countries come to grips with the value-reduction issue. This book seeks to fill some of this gap.

Government regulation applies to many areas of life, so why do the negative impacts on land values often draw special attention? Probably because real property usually holds high economic and social value and represents most households' major investments. This holds not only in advanced-economy countries and in the post-socialist states, but increasingly also in developing countries[1]. Individuals and firms base important decisions on the value of real property. Any significant decline in property values is likely to be seen as a major threat to individuals or groups in society.

Britain led the way in the world discussion of the land-value nexus of planning regulations. The terms that the British coined for the issue - "betterment and compensation" or "betterment and

[1] Awareness of the important role of property ownership in developing countries was reinforced by De Soto's seminal book. Although his thesis is controversial, it has influenced the work of the World Bank and similar development agencies. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

worsement[2]" – date back to the 19th century[3]. Because capturing the upwards side of the properly-values effect has not been a mainstream focus of American law or policy, American English does not have a similar established terminology for the two-directional effect. The closest term is "windfalls and wipeouts". Originally intended by its authors[4] as a teaser, this phrase has caught on as a quasi-professional term[5]. Another, less established term sometimes used in the USA as a takeoff on "takings" is "givings and takings[6]".

Many readers will assume that "windfalls and wipeouts" are a closely knit couple. The logic would seem to be that if there are compensation rights for "takings" then there should also be a mechanism for capturing "givings". However, in fact the "windfalls for wipeouts" equation is more of a theoretical construct than a reality. A thorough explanation is beyond the scope of this book, but it deserves a few remarks on how the betterment and compensation concepts became decoupled in their motherland – Britain.

Unlike the USA, Britain has had a long tradition of legislative responses to both sides of the property value effects. As early as 1909, Britain enacted its first national planning law – arguably the oldest such law in the world. It established, in rudimentary form, both compensation rights and taxation of the betterment value. Subsequent legislation until the 1930s tried various formulae, however, both sides never worked satisfactorily[7]. These ideas were also exported to many of the colonies. [8] However, the ostensible match between betterment and compensation did not last for long.

Since World War II the betterment and compensation sides have been decoupled in Britain. During the height of the war, the British government appointed the Expert Committee on Compensation and Betterment to guide the government in the laws and policies it should adopt for post-war reconstruction. The famous *Uthwatt Committee Report*[9] introduced two important

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[2] Instead of "worsement" some say "worsenment". Both usages are frequently found. *See, e.g.*: ANDREW COX, ADVERSARY POLITICS AND LAND: THE CONFLICT OVER LAND AND PROPERTY POLICY IN POST-WAR BRITAIN 28 (2002); in the book title, PAUL LOWENBERG, WINDFALLS FOR WIPEOUTS? AN ANNOTATED BIBLIOGRAPHY ON BETTERMENT RECAPTURE AND WORSENMENT AVOIDANCE TECHNIQUES IN THE UNITED STATES, AUSTRALIA, CANADA, ENGLAND, AND NEW ZEALAND 618-620 (1974); and BARRIE NEEDHAM, DUTCH LAND USE PLANNING: PLANNING AND MANAGING LAND USE IN THE NETHERLANDS, THE PRINCIPLES AND THE PRACTICE 175 (2007).

[3] Arthur A. Baumann (1894). *Betterment, Worsement and Recoupment*. London: Edward Stanford.

[4] WINDFALLS FOR WIPEOUTS: LAND VALUE RECAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Misczynski eds., 1978).

[5] *See, e.g.,* WIPEOUTS AND THEIR MITIGATION: THE CHANGING CONTEXT FOR LAND USE AND ENVIRONMENTAL LAW (Joseph DiMentro ed., 1990).

[6] See for example, in the book title: Rick Pruetz (2003). *Beyond Takings and Givings: Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*. Marina Del Ray, Ca Arje Press.

[7] Malcolm Grant, *Compensation and Betterment, in* BRITISH PLANNING 62-76 (Barry Cullingworth ed., 1999).

[8] Patrick McAuslan (2003), *Bringing the Law Back In: Essays in land, law and development.* Aldershot, UK: Ashgate. See for example pp. 155-158; 188; Robert Home *(1997). Of Planting and Planning: The making of British colonial cities.* London: E & FN Spon.

[9] The British Expert Committee on Compensation and Betterment, Cmd 6386, 1942. This report is known by the name of its chair, as the *Uthwatt Report*. Its importance in shaping British recovery is recognized not only by planners and lawyers, but also by historians of British history. *See, e.g.,* Michael Tichelar, *The Conflict over Property Rights during the Second World War,* 14 TWENTIETH CENTURY BRITISH HISTORY 165 (2003). Note: the issue number is unnecessary; this journal is paginated consecutively throughout the year. So did you remove it? is the citation okay now?

concepts - "shifting value" and "floating value". These concepts influenced much of the subsequent discussions on the relationship between land use regulation and property values. The concept of "shifting value" is based on the idea that the demand for any given type of land use in a particular region is finite; land use restrictions in one municipality may causes downward value changes there, but at the same time may increase the value of land in another municipality where the regulations do permit development. "Floating value" refers to the speculative nature of potential land values. Landowners assume that if only planning regulations did not stand in the way, a particular lucrative land use would "land" on their own plot of land. However, that may remain a wishful thought[10]. These concepts challenged the rationale for the traditional notion that planning should grant development rights. The underpinnings of the idea of entitlement to compensation for reduction in development rights were thus shaken. After the war, the entire planning-law system in the UK was reformed and compensation rights subsequently abolished, except for special circumstances (see the UK chapter)[11]. However, the betterment tax was not abolished at that time. For several decades to follow, the betterment side oscillated with changes of governing party – abolished and reinstituted in various forms several times[12]. Since the late 1980s a betterment capture tax has not been resumed.

The absence of a strong linkage between the two sides of the property values effect holds not only for Britain. Among most of the countries in this book there is no correlation between compensation rights for "wipeouts" and mechanisms to capture "windfalls". Each side deserves its own in-depth focus, as does the degree of linkage among them. This book focuses only on the downwards effects of regulation on land values and on the laws and policies adopted in each country to deal with this effect. .

H1 The property rights debate in the United States

Unlike most other countries, in the United States the "takings issue" (more precisely, "regulatory takings" or "partial takings") is a contentious, hotly debated topic, and is the heart of what has been called the "property rights debate". The takings issue has produced several decades of jurisprudence, hundreds[13] of scholarly papers and scores of books. Regulatory takings in the USA are probably the most-analyzed topic in land-use law anywhere in the world. Yet the line separating takings and non-compensable regulations remains elusive and highly contentious[14].

The interest of American legal scholars in regulatory takings is not new. Important scholarly work was published by American scholars with opposing views, such as Epstein[15] and Bromley,[16] before the "property rights movement" gained wide popularity. Once the regulatory

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[10] *See* VICTORE MOORE, A PRACTICAL APPROACH TO PLANNING LAW, 3 (2005)

[11] For more on the reform and its implications for the very concept of development rights and compensation, see Chapter 2 *infra*.

[12] Grant, *supra* note 7; Alterman, Rachelle. Land value recapture: Design and evaluation of alternative policies. Occasional Paper No. 26, Center for Human Settlements, University of British Columbia (1982).

[13] A less conservative estimate is thousands of scholarly papers. A Lexis Nexis search with both the terms "regulatory takings" and "land use" yields over a thousand items – beyond the engine's tolerance.

[14] JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW ch. 10 (2d ed 2007).

[15] Epstein's seminal book is regarded as an important intellectual foundation of the "property rights movement". Epstein takes the extreme position that all land use regulation is a taking: Richard Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard University Press, 1985).

[16] On the pro-government side, an important contribution is: Daniel J. Bromley, Environment and Economy:Property Rights and Public Policy (Blackwell,1991).

takings issue became a major target for the conservative property rights movement in the early 1990s,[17] the debate over the takings issue received a strong boost both among civil-society organization and among scholars. The intensity of the debate is reflected in the poignant titles of some of the books published: On the conservative side - Land Rights: The 1990s' Property Rights Rebellion[18]; on the pro-government side - Let the People Judge: Wise Use and the Private Property Rights Movement,[19]; Who Owns America? and State Property Rights Laws: The Impacts of Those Laws on My Land.[20]

Propelled by the property rights movement, many US states enacted "property rights laws". The advocates' hope was that such statutes would grant compensation rights even for minor decreases in the value of property caused by regulation. However, the outcomes did not fulfill the movement's objectives. Most of the state statutes only required government agencies to conduct a takings assessment prior to adopting a regulation, or to institute conflict resolution measures[21]. Florida did adopt legislation in the 1990s that obliged government to compensate landowners for partial takings, but the preconditions are such that few claims have been successful[22]. Thus, the state legislative initiatives did not satisfy either side in the property rights debate and did not contribute much towards a resolution.

Another surge in public attention on the takings issue came in 2004, with the enactment of Oregon's controversial citizen initiative - "Measure 37".[23] This was a rather extreme initiative on compensation rights that drew highly polarized views[24]. It generated claims amounting to fourteen billion dollars[25]. Significantly, this initiative arose in the state of Oregon – regarded as

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[17] JEROLD S. KAYDEN "Charting the Constitutional Course of Private Property: Learning from the 20th Century," in PRIVATE PROPERTY IN THE 21ST CENTURY, 31-49 (Harvey. M. Jacobs, Ed. Northampton, MA: Edward Elgar, 2004; Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 Yale L.J. 1518 (2007).

[18] LAND AND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION (Yandle, Bruce ed.,Rowman & Littlefield, 1995). On the property protection side see also: William Fischel's important book: WILLIAM FISCHEL, REGULATORY TAKINGS : LAW ECONOMICS AND POLITICS (Harvard University Press 1995; and E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WM. & MARY L. REV. 1177, 1178 (1997).

[19]JOHN D. ECHEVERRIA & RAYMOND B. EBY, LET THE PEOPLE JUDGE : WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT (1995).

[20]HARVEY M. JACOBS STATE PROPERTY LAWS: THE IMPACT OF THOSE LAWS ON MY LAND (Lincoln Institute of Land Policy, ed. 1999);HARVEY M. JACOBS, WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS,(University of Wisconsin Press.ed. 1998). Many other scholars have criticized the legislative initiatives of the property rights movement. See also Glenn Sugameli, *Takings Bills Threaten Private Property, People, and the Environment,* 8 FORDHAM ENVTL. L.J. 521 567-80 (1997).

[21] Stacy M. White State Property Rights Laws: Recent Impacts and Future Implications, LAND Use LAW AND ZONING DIGEST (2000).; Jacobs, *supra* note 17; and John D. Echeverria and Thekla Hansen-Young *,The Track Record on Takings Legislation: Lessons from Democracy's Laboratories.* Georgetown Environmental Law & Policy Institute, Georgetown University Law Center 1-2.(2008).

[22] Joni Armstrong Coffey , High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings. 39(3) *THE URBAN LAWYER* 619-632 (2007).

[23] Ballot Measure 37, codified at OR. REV. STAT. § 197.352 (2005).

[24]Measure 37 triggered a vivid debate among legal scholars and many academic publications. Examples: On the anti-Measure 37 side see: Rebekah, R.Cook *Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20. JOURNAL OF ENVIRONMENTAL LAW & LITIGATION 245, 256-260 (2005).; Edward J. Sullivan,, *Year Zero: The Aftermath of Measure 37*, 38 URBAN LAWYER 237 (The American Bar Association 2006). On the pro-Measure 37 side see: Sara C. Galvan. *Gone Too Far: Oregon's Measure 37 and The Perils Of Over-Regulating. Land Use*. YALE LAW AND POLICY REVIEW, (Spring:2005)

[25]See Chapter 12 *infra*. For an analysis of the claims see: Sheila A. Martin,, Meg, Merrick, Erik Rundell, and Katie Shriver, *What is Driving Measure 37 Claims in Oregon?* INSTITUTE OF PORTLAND METROPOLITAN STUDIES (2007),

America's flagship of strong planning controls and enviably good "growth management"[26]. It was precisely this success that created the dramatic backlash that culminated in the adoption of Measure 37[27]. However, in Nov. 2007 Measure 49[28] was enacted, partially reversing Measure 37, and tempering many of the grounds for claiming compensation.

Perhaps the strongest boost towards making the "takings issue" a broad public topic came in the aftermath of the Supreme Court decision in *Kelo*[29]. This decision pertains to eminent domain and not to regulatory takings, but it kindled the interest of the general public in property issues. Following *Kelo* came a new wave of initiatives for state property-rights statutes, some of which also contained proposals for granting compensation for partial takings, but most were not passed[30]. The "takings issue" is likely to continue to engage American legislators, civil society actors, planners, and lawyers.

Compared to the high-flame controversy in the USA, in most other countries the takings issue is quite tame. Although downzoning decisions are obviously not popular anywhere, and disputes and controversies do arise at the local level, in no other country covered in this book has the takings issue become such a major public issue at the national level. This fact does not detract from the importance of cross-national learning; on the contrary – countries where the law on regulatory takings (regardless of its stand) does not draw much public controversy may harbor lessons for other countries.

H1 The current state of comparative research on property rights

One might have thought that the law of regulatory takings would be a prime topic for cross-national research. Yet there has been little comparative research on this topic and few opportunities for knowledge exchange. This research project is, to the best of our knowledge[31], the first large-scale comparative research devoted entirely to regulatory takings.

Yet this research project is by no means alone in taking a comparative view on topics concerning property. The seminal theoretical and comparative contribution that focuses directly on regulatory takings is Hagman and Misczynski's 1978 book titled "Windfalls for Wipeouts"[32] (this book should also be credited with introducing this term into American English). The book covers five English-speaking countries with advanced economies (the UK, Canada, Australia, New Zealand and the USA) and addresses both the upwards and the downwards effects of regulations on land values. The introductory chapter provides a now-classic framing of the issue, and the rest of the book analyzes selected instruments designed either to tame the negative impact of planning regulation or to capture the windfalls and redistribute them. A more recent important comparative work is Alexander's 2006 book[33]. It presents an in-depth study of constitutional property rights in three countries: the USA, Germany and South Africa, with some discussion

[26] On some of Oregon's pacesetting policies see: CONNIE OZAWA THE PORTLAND EDGE: CHALLENGES AND SUCCESSES IN GROWING COMMUNITIES (Island Press, ed. 2004)..
[27] *See, e.g.,* GALVAN, *supra* note 24.
[28] 2007 Or. Laws ch. 424, § 4, codified at OR. REV. STAT. § 195.305 (2007). Note: It makes more sense to me to cite the session law rather than the house bill here. OK with you? Check with Putters? OK with me RA
[29] *Kelo v. City of New London*, 545 U.S. 469 (2005)
[30] ECHEVERRIA & HANSEN-YOUNG, *supra* note 21.
[31] The survey of literature covers publications in the English language and partially in French as well.
[32] WINDFALLS FOR WIPEOUTS, *supra* note 4.
[33] GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006).

also devoted to Canada[34]. Another important comparative study is Kotaka and Callies' edited volume (2002)[35] covering ten Asian-Pacific countries. This book reports on expropriation (eminent domain) law and, in some of the countries, also on regulatory-takings law. Another contribution to comparative regulatory takings is a law-review paper by Christie (2007) which analyzes three English-speaking countries: the USA, Canada and Australia[36]. Finally, Kushner's 2003 ¸book [37] is a collection of excerpts from previously-published papers on a wide variety of planning-law topics, among them two brief items on regulatory takings outside the US - one on Germany and one comparing US and Swiss law.[38].

All these contributions were published in the USA. Considering Europe's quest for a "single market" and the importance of the free movement of capital – including real estate investments - one would have expected that European scholars would study the similarities and differences in regulatory takings and compensation laws across Europe. Yet, as surprising as this may seem, there has been very little comparative research on regulatory takings in Europe[39]. The major comparative project on planning law and institutions commissioned by the European Commission (1997-2000) does not cover regulatory takings law at any depth[40].

H1 A note on terminology

In carrying out comparative analysis, one should be aware of differences in terminology. Because this book is written with American readers in mind and due to the vast dominance of American-based scholarly writing, I have largely used American terms in this chapter and in the following two chapters where the comparative analysis and its conclusions are presented. However, most of the authors of the country chapters used their own legal terminology, as translated into English[41].

There are many differences in terms; only a few will be noted here (some more are discussed in the comparative analysis in Chapter 2). The term "regulatory takings" is based on the language

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[34] Alexander's book focuses only on constitutional law, while in most countries regulatory takings law is largely governed by statutory law. This probably explains why Alexander's book does not focus on the law of regulatory takings, except in the discussion of the USA. See also Chapter 2 *infra.*

[35] TSUYOSHI KOTAKA & DAVID L. CALLIES (EDS.). TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES. (University of Hawai'i Press, 2002)

[36] Donna R. Christie *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada. 32 (2)* BROOKLYN JOURNAL OF INTERNATIONAL LAW , 345-403. (2007).

[37], JAMES A. KUSHNER, COMPARATIVE URBAN PLANNING LAW (Carolina Academic Press, ed., 2003).
The countries covered differ widely from topic to topic, according to the availability of published papers.

[38] *Id.* Chapter 7 pp. 163-196 is devoted to regulatory takings, but this chapter, as the other chapters, is not a pre-planned systematic comparative analysis. The papers compare some aspect of American takings law with Italian, Swiss, German, or international law.

[39] This assessment is supported by the 13 European authors who participated in this project, who cover a variety of languages. The French author, Vincent Renard, brought my attention to a French language edited collection of short papers on "servitudes d'urbanisme" which, in French, also refers to regulatory takings. See: special issue of *Droit et ville* no. 48/1999 titled: "L'indemnisation des servitudes d'urbanisme en Europe".

[40] European Union, European Commission (1997, 2000), The EU Compendium of Spatial Planning Systems and Policies, Luxembourg, Office for Official Publications of the European Commission. Schmidt-Eischstaed's 1995 book is another important comparative analysis of planning laws, but it too does not cover regulatory takings. See: GERD SCHMIDT-EICHSTAEDT, LAND USE PLANNING AND BUILDING PERMISSION IN THE EUROPEAN UNION (Deutscher Gemeindeverlag Verlag W.Kohlhammer, 1995) (in English and German) .

[41] A few authors who are acquainted with American legal literature have used American terms on occasion

of US constitutional law and is not used elsewhere. There is no internationally agreed term[42]. Likely, the most widely used term in English outside the USA is "planning compensation rights"[43]. The American terms "eminent domain", "condemnation" or "physical taking" are also unknown outside the USA; the internationally used terms are "expropriation" or (in British-influenced countries), "compulsory purchase".

Terminology can also be misleading, unless one understands the broader legal context. The most striking example is the usage of the term "compensation", as translated into English by practitioners and scholars from countries with Germanic languages. They often use "compensation" in almost the opposite sense from its use in the context of regulatory takings: they refer to what *landowners* are obliged to give to the municipality (such as dedication of roads or allocation of open space for environmental mitigation), rather than what the municipality is required to grant to the landowners[44].

Another important difference in terminology reflects deeper-lying differences in land-use regulatory instruments. In most countries included in this book (and worldwide), zoning by-laws are not the regulatory tools for controlling land use. Instead, land use regulation is carried out primarily by means of legally-binding plans and building permits authorized by a national (or, in some federal countries, sub-national) statute[45]. Unlike American comprehensive or master plans, but like zoning, statutory plans have the force of law. In addition, planning statutes usually also establish various "bypass" or flexibility instruments similar to variances and exceptions in the USA. The national statutes usually differentiate between levels of plans, based on area scope or degree of detail. "Detailed plans" (or equivalent names) are usually the ones that allow the issuing of development permits. Similarly to zoning, statutory plans set the permitted land uses and densities and they may be either less or more detailed than zoning. In addition, statutory plans often contain rules that in the USA are included under other regulatory instruments such as subdivision regulations, design guidelines, or Planned Unit Development[46]. Statutory plans do not necessarily cover the entire municipality or region; like zoning, they are often amended piecemeal, for a particular area within a city or region, or even at a "spot zoning" scale. A "rezoning" would be called a "plan amendment" or "change in land use designation", or "redesignation". In most countries, the major type of regulatory decision recognized as compensable are injurious amendments to statutory detailed plans. These may apply to any geographic scale. Amendments to plans basically have the same legal status as the original plan.

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[42] In French the term is "indemnisation des servitudes d'urbanisme" (*servitudes* in this context has a different connotation than in English). See the special issue of *Droit et ville* no. 48/1999 titled: "L'indemnisation des servitudes d'urbanisme en Europe".

[43] Any book on "land policy" outside the USA will likely use these terms. See for example: JOHN RATCLIFF, LAND POLICY: AN EXPLORATION OF THE NATURE OF LAND IN SOCIETY . 17-22 (1976),; GRAHAM HALLETT. LAND AND HOUSING POLICIES IN EUROPE AND THE USA: A COMPARATIVE ANALYSIS , 13 (ed. 1988); (and throughout;?? I don't see another reference to him in this chapter. Leslie, is that what you meant?) NATHANIEL LICHFIELD AND HAIM DARIN-DRABKIN, LAND POLICY IN PLANNING (George Alen & Unwin, 1980).; Grant, *supra* note 7.

[44] See for example, the usage in: Kristina Rundcrantz &Erik Skärbäck, *Environmental compensation in planning: a review of five different countries with major emphasis on the German system,* 13 (4) EUROPEAN ENVIRONMENT 204-226 (2003).

[45] For a comparative analysis of national planning statutes and institutions in ten countries see: RACHELLE ALTERMAN, NATIONAL-LEVEL PLANNING IN DEMOCRATIC COUNTRIES: AN INTERNATIONAL COMPARISON OF CITY AND REGIONAL POLICY-MAKING. (Liverpool: Liverpool University Press, ed. 2001). .

[46] See also: Alterman, Rachelle *A view from the outside: the role of cross-national learning*. . Chapter 19, pp. 304-320, IN DANIEL R. MANDELKER., PLANNING REFORM IN THE NEW CENTURY, (AMERICAN PLANNING ASSOCIATION, ed. 2006)..

Some laws also recognize other types of decisions as compensable – either more specific decisions (such as exceptions) or more general decisions (such as amendments to strategic plans).

H1 The purpose of the book

American legal and planning scholars continue to be divided on the regulatory takings issue. In some other countries as well, scholars and decision makers are interested in this issue, even though it usually carries a less obtrusive public profile. In the absence of an overriding normative theory or consensual solution, legislators, judges and researchers everywhere are immersed in their own country's laws and policies and lack an external vantage point from which to take a fresh look at one own country's law and policies[47].

The purpose of this book is to tap the universality of the regulatory takings issue and reduce some of the insularity and compartmentalization that has characterized the issue so far. The book offer readers from various parts of the world an initial systematic cross-national vantage point from which to view their own county's debate. Such a perspective may be able to provide a sense of scale not available when one is imbued in a single country's laws, policies, and debates. Because nine of the thirteen countries covered in this research are members of the European Union, an ancillary objective is to stimulate broader cross-national debate within the EU.

It is also important to say what this book does not aim to do. It is not a manual of laws from which to pick and choose and transplant from one country to another. Transplantation of laws is, of course, neither possible nor desirable. Laws are grounded in legal systems and institutions and reflect public policies. The latter are grounded in socio-political and cultural milieus that cannot – and should not - be replicated[48].

H1 Scope of the research

I asked each contributing authors to address the following main question:

Under your country's laws, do landowners have the right to claim compensation when a government decision related to planning, zoning or development control causes a reduction in property values? If so, what are the legal and factual conditions that a landowner must meet to claim compensation? And how extensive are such claims in practice?

Injuries to property values caused by land-use regulations may fall along a continuum – from no injury at all to a reduction of all or most of the property's value. This entire range is within the scope of this research. However this book does not encompass every possible topic related to regulatory takings. The focus is on regulations related to land use planning, not on all types of regulations that may affect property values. The limitation accords with the core subject of regulatory takings law as historically viewed in most countries. Thus, some types of environmental regulations that are not part of land use planning are not systematically covered.

It is important to distinguish the right to compensation for injurious land use regulations from the right to compensation for land taken through eminent domain ("*expropriation"* or *"compulsory purchase").* In such cases, the ownership rights are compulsorily transferred to an authorized

[47] For an example of an "outsider's view" of US law, see Alterman (2006) *supra* note 46.
[48] See: V. Mamadouh & M. de Jong, K. Lalenis, *An Introduction to Institutional Transplantation,* In LESSONS IN INSTITUTIONAL TRANSPLANTATION: HOW ADOPTION OF FOREIGN POLICY INSTITUTIONS ACTUALLY WORKS. 1-19,(M. de Jong, K. Lalenis, V. Mamadouh eds, 2002)

body. Eminent domain does not fall within the direct scope of this research project. However, because expropriation law and regulatory takings law are related to some extent in many countries, the authors of most of the country chapters present a brief introduction to expropriation law in order to link into regulatory takings law[49].

Another topic not covered in this book is exactions of land or other amenities through regulation. The reason is that unlike in the USA, in some of the countries in this book this topic is not regarded as part of regulatory takings law. It is the subject of special regulations on topics such as compulsory dedications of land for roads, public buildings, public passage, and – increasingly – environmental mitigation. This topic too undoubtedly merits comparative research[50].

H1 The jurisdictions selected for study

Thirteen countries were chosen for comparative analysis. This is a large number and makes the analysis quite challenging. At this stage of knowledge-buildup, a large sample of countries was necessary in order to dispel assumptions that there is a single dominant approach outside the USA or that there is a "European approach" versus an "American approach" (more on this in the conclusions in Chapter 3). My objective was also to open the cross-national discussion to participants in many countries around the world.

In selecting the set of countries, I did not have the privilege of relying on prior theory from which to derive a typology of regulatory takings laws. The countries chosen should of course not be regarded as a random sample that represents all the world's countries. Recognizing the pioneering character of this research, I sought to span a wide spectrum of countries based on several variables that could reasonably be hypothesized as related to differences in approaches to regulatory takings.[51] The set of countries chosen for analysis therefore includes jurisdictions from the two major Western legal traditions – common law and civil law[52] -, both unitary and federal jurisdictions, and a broad geographic spread. In view of the important legal and ideological changes occurring in the post-socialist countries, I wanted to include at least one such jurisdiction in the sample. The common denominator is that all countries chosen share a democratic system of government and have an advanced (or fast-emerging) economy. In most countries that do not meet these two criteria, planning laws are often irrelevant (due to corruption or widespread noncompliance), and regulatory takings law is either dormant (no claims filed) or nonexistent. Because Europe encompasses a large portion of the world's democratic, advanced-economy countries, the sample selected includes many European countries. My assumption is that the set of countries chosen does represent the majority of legal approaches among the world's democratic countries with advanced economies.

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[49] In many countries represented here, including the USA, the distinction between regulation and de-facto expropriation is not always "a bright line". Situations of "near-expropriation" do occur. Called by various terms in various countries, including "inverse condemnation" and "planning blight", and types of takings *are* included in the scope of this project. See my analysis in Chapter 2 *infra*.

[50] A comparative analysis of exactions in a few countries is included in my book PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES (1988).

[51] I of course limited my search to countries where I had located suitable scholars in the planning law field. See "Research Method" below.

[52] For a general discussion of legal tradition in comparative research see: MARY ANN GLENDON, PAOLO G. CAROZZA AND COLIN B. PICKER , COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES OF WESTERN LAW , 23-49 (Thomson-West – American Casebook Series. 2007)..

The thirteen countries chosen for research are (from west to east and south): the USA, Canada, the UK, France, the Netherlands, Sweden, Finland, Germany, Austria, Poland, Greece, Israel and Australia. These countries are located on four continents. Nine are members of the European Union. The set includes five federal countries – the USA, Canada, Germany, Austria and Australia. There are variations among the federal jurisdictions in the degree of importance of the sub-federal law on regulatory takings. In the USA, Canada, and Germany, the federal level is the most important for regulatory takings law. Therefore, the focus of the chapters on the USA, Canada and Germany is on the federal level. In the case of the USA, the state of Oregon is awarded an additional chapter – the fourteenth jurisdiction - because the Oregon story is unique and encapsulates the volatility of the property rights debate in the USA. Austria does not have any overarching federal law on regulatory takings – neither a significant body of constitutional case law nor statutory law. Because each of the nine states in this small country has its own statutory law and they differ significantly from each other, after reporting on the shared constitutional framework, the Austrian chapter reports on each of the states and compares among them. Finally, in Australia, in addition to federal-level constitutional law, state statutes are very important in takings law. The Australian chapter therefore reports on both the federal-level law and on one or two states selected by the author as generally representative.

The set of countries chosen represent the two major legal "families". Five share the common-law tradition: the UK, Canada, Australia, the USA, and Israel[53]. The remaining eight countries – all located on the European continent – are civil-law countries. My assumption was that in the field of planning law the two families of countries have enough in common to enable comparative analysis. The findings corroborate this assumption (see Chapters 2 and 3) and show that the differences within these families of laws are not lesser than between the two groups.

H1 The challenge of comparative research

There is no single, agreed-upon approach for conducting comparative legal research. The authors of a leading textbook on comparative law note that comparative research is:

"…a variety of methods for looking at law … The range and eclecticism of its methods is matched by the wide variety of its aims and uses. Cross-national studies have yielded important contributions to the understanding, practice, and reform of law in the last century. … In a world where national and cultural "difference" is often seen as posing a formidable challenge, comparatists hold up a view of diversity as neither an impenetrable barrier to comparison nor an aberration to be ignored or reduced, but instead as an invitation, an opportunity, and a crucible of creativity and dynamism".[54]

Much comparative research to date has been devoted to private law[55]. The state of research and method-building on public law related to property is especially rudimentary. The present study has a modest goal: to create a fundamental layer of knowledge that describes the various laws on regulatory takings and points out some similarities and differences. This basic level of comparative analysis has been called a "juxtaposition", where the different countries are placed

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[53] Israel is regarded by comparative-law scholars as a mixed system, but with strong attributes of the common law tradition. On the one hand, precedence is a major source of the law and common law is still prominent in a few areas, on the other hand, statutory law is dominant in most fields of law today. *See* GLENDON, CAROZZA & PICKER, *supra* note 52, at 948 (about mixed jurisdictions in general) and 976-982 (about Israel). In the field of planning law, the British influence dates back to the British Mandate on Palestine from 1921 to 1948. The planning law is a direct derivative of legislation enacted during that time.

[54] *Id.* at 13.

[55] Alexander (2006) also makes this point. See at p. 17.

side by side. This level is suited to the present state of knowledge. No "explanations" will be sought as to "why" specific countries have adopted a particular approach to regulatory takings whereas others have adopted other approaches. While such conjectures are tempting, they must await the time when more factual and theoretical knowledge will be built up. I will share some thoughts on the issue of "explanation" in the conclusions in Chapter 3.

This book espouses a descriptive-analytical approach and does not promote a particular normative point of what of *should be* the law about regulatory takings. This approach contrasts with the position taken by many scholarly contributions to the property rights debate in the USA. A normative approach is appropriate, even desirable, for critical analysis of the law of a specific country. However, when conducting comparative research – certainly at the current state of knowledge - a normative stand may be more problematic, as some legal scholars have noted[56]. Therefore, this book does not argue for an ideological position either in favor of extensive compensation rights for regulatory takings, or against any such rights[57].

H1 The research method

Analysis of the laws of thirteen countries in many languages is beyond the capacity of a single researcher. To carry out this research project, for each of the candidate countries, it was necessary to build a team. I sought out a leading expert (or experts) on planning law who are well versed in English. All seventeen contributing authors are highly regarded scholars in their country. The contributing authors were asked to provide an in-depth analysis in English of their country's laws and practices on regulatory takings according to a set of guidelines that I developed (described below).

The challenge of bringing the parallel analysis of all the countries onto a common platform was not easy. The details of the takings law in each country are complex and nuanced, and require in-depth knowledge of each country's law, jurisprudence and practices. Often, what a particular author assumed to be similar in other countries and therefore easily understandable to readers from other countries was in fact quite opaque. I worked with the authors to provide enough contextual information so that readers from other countries would understand the implications of a particular law or institution. There were also language barriers: in every country in the set, court decisions on land use law are delivered in the local language only. No non-English speaking country in our sample offers translations into English of court decisions in the planning area. In some countries even the statutes have not been translated.

To enable comparative analysis, I developed a common framework and a set of guidelines for the entire team (see this chapter's Appendix). Prior to developing the guidelines, I read the literature available (in English) on land use law and practice in each of the countries. Next, I conducted a set of preliminary interviews with each of the prospective authors. To ensure that each of the

[56] Dagan notes the limitations of comparative research for drawing normative conclusions- Hanoch Dagan, *The social responsibility of ownership*, *92 CORNELL L. REV.* 1255-1272 (2007),

[57] In Israel, my own country, compensation rights for regulatory takings are very broad, so I have relied on the *factual* findings of the comparative research in arguing that the law in Israel has gone to an extreme – from a cross-national perspective – and that compensation rights should be significantly tapered down. The findings of this research serve as the knowledge base for a government bill to be submitted to parliament in 2009. On the other hand, I do not have an ideological position that totally negates compensation rights and have not proposed to eliminate them entirely (such a proposal would probably not be regarded as constitutional in any case).

participating authors would understand the guidelines in a similar way, I prepared a preliminary set of scenarios composed of types of regulations, types of potential injuries to property values, and types of contextual conditions. Through a "rolling" strategy I expanded or refined the scenarios and guidelines until we were satisfied that these would encompass all the laws and practices in the sample countries. The effort of coordinating and editing the set of papers nevertheless proved to be a major challenge. In most cases, the papers underwent several rounds of editing by me and rewriting by the authors, supplemented by clarifications through personal meetings, phone or email communication.

The comparative analysis was carried out by me in consultation with the contributing authors. To digest all thirteen reports, I first "dissected" them back according to the topics of the guidelines, appropriately revised to reflect the findings and supplemented by new "variables" that emerged from the analysis. From among these, I selected four major topics to serve as the main anchors for the comparative analysis. These are: constitutional law, major ("categorical") takings, direct partial takings, and indirect partial takings. These topics are explained in Chapter 2. These four headings were selected because they could capture the main similarities and differences, but they by no means cover all aspects of regulatory takings law. There are many minor topics that remain for the readers to review in each country chapter. Once the comparative analysis was finished, I sent each contributed author the relevant parts for his or her comments.

H1 A preview of the comparative findings

The findings show that there is no universally consensual approach, nor even a dominant approach. Different countries at different times have adopted varying approaches to dealing with the property-values dilemmas. The diversity is great: no two countries have the same law on regulatory takings – not even countries with ostensibly similar legal and administrative traditions. The differences among the countries are significant, and often unpredictable on the basis of other attributes known about these countries.

If one imagines a hypothetical scale of degrees of compensation rights, the counties in the sample seem to represent as full a spectrum of compensation rights as one can conceive (of course, there may be more variations among other countries not represented here). At one extreme are two countries whose laws and practices have said a clear "yes" to compensation rights for a broad range of "downzoning" situations, in many ways rivaling Oregon's Measure 37. At the other extreme are a few countries whose legal doctrine does not grant compensation rights for any types of regulatory takings (except some extreme situations). In between are several countries whose laws grant compensation rights for regulatory takings, but these are limited in time or in subject. The matrix of specific grounds and conditions is rather complex. On the whole, each country's set of laws and policies differs significantly from every other's equivalent set. There are striking differences even among the nine countries that are members of the EU, despite the fact that they all also fall under the jurisprudence of the European Court of Human Rights (analyzed in Chapter 2).

Perhaps the most interesting finding – one that is difficult to accept - is that any attempt to guess a given country's position on regulatory takings law based on some other attributes that characterize it, is likely to fail. Careful reading of the full set of papers shows that presumptions or hypotheses based on legal "family", legal-institutional structure, geographic proximity, shared language and cultural backgrounds, or planning needs (such as density, size or resources

scarcity), do not hold in the face of the comparative findings. (More on this counterintuitive conclusion in Chapter 3,)

It is our hope that the wide variety of laws and practices identified in this team project on comparative research will enable the readers to learn from other countries' experiences and thus to gain a new perspective on their own country's laws and policies.

H1 The book structure

The seventeen chapters in this book are divided into four parts: In the first part I present the framework, the comparative analysis and the conclusions. The other three parts, written by the contributing authors, are devoted to the various countries. The grouping of these chapters in three parts is based on the findings of the comparative analysis. These showed that the countries in the set could be placed along a rough "scale" representing the breadth of compensation rights that each country's laws grant in cases where regulatory decisions cause a decline in property values. The countries fall into three clusters along this scale, and these constitute the three parts of the book. The order of the countries or jurisdictions within each cluster (part) roughly reflects their rank-order.

The heart of the comparative analysis is presented in Chapter 2. There, I introduce each of the four major topics for comparison. For each topic, I analyze the laws of all fourteen jurisdictions in the three clusters, and point out both the shared aspects and the differences. Chapter 2 is longer than usual because it seeks to fulfill its mission of presenting a platform of knowledge that is not overly schematic and provides enough detail to be useful for mutual learning. Chapter 3 draws some conclusions from the comparative research, with a special focus on what may be informative for American readers engaged in the property rights debate.

The book ends with an afterword by Professor Daniel Mandelker, whose ongoing support for this project has been so important.

APPENDIX TO CHAPTER 1

The headings of the set of guidelines to the contributing authors

1. **Constitutional law:** Is there constitutional protection of property rights (or its absence) – in each of the countries' constitutional law? For the European countries – how has the property-rights clause (or related clauses) of the European Convention of Human Rights and ECHR jurisprudence impacted on that nation's law and practice?
2. **Statutory law:** How do statutory planning or related laws relate to the right to compensation for injury?

3. **Types of government land-use decisions** that may give grounds to compensation claims.

4. **Who is eligible to submit a compensation claim? (**type of property right, time relative to injury etc.)

5. **Who is liable for a compensation claim?** (What government bodies, other agencies or private entities)

6. **Types of injuries** that may give grounds to compensation claims

   I - Direct injuries due to a regulatory decision that applies directly to a plot of land

   a. Situations of "no economic value left" or "near-expropriation"
   b. Situations that eliminate or greatly reduce the chance for any future development rights
   c. Situation of partial decline in value of the property due to rezoning to a less valuable type of use or reduced intensity of permitted development
   d. Situations of partial decline in value due to loss of otherwise expected *income* from the property
   e. Situations of temporary freeze or interim conditions

   II - Indirect injuries due to a regulatory decision that applies to other land in the vicinity

   a. Designation for expropriation (or actual expropriation) of part of a plot causes reduction in value of the remaining part of the plot ("severance" or "injurious affection")
   b. Reduction in property value caused by the designation of land in the vicinity for a public utility or service (sometimes also called "injurious affection")
   c. Reduction in property value cased by the designation of land in the vicinity for any use (including private use)

7. **How is a compensable injury determined?** (Pre-conditions, are there minimum or maximum levels, conditions regarding period of time vacant, must the claimant prove concrete loss (investments), is "injury" relative to the surrounding development? Are distributive-justice criteria relevant?

8. **Procedures** (administrative and judicial) – key differences in time limits, administrative or judicial recourse, degree of "friendliness" to claimants.

9. **Practice:** Extent of claims in practice, degree of use of mitigating tools such as negotiations; effect on land-use planning policy and implementation

10. **Evaluation:** Is there public or scholarly criticism of current law and practice? Are future directions discernable? How fair, efficient, or just is the law in your opinion?