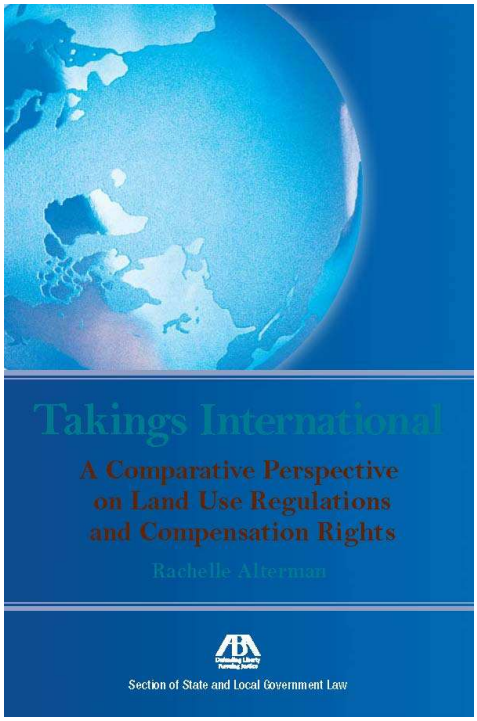

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 3

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Chapter 3

Conclusions:
The US property rights debate viewed through cross-national lenses

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A cross-national comparative perspective on law and public policy can help to create a sense of scale and proportionality that conventional domestic legal analysis cannot offer. In Chapter Two I presented a comparative analysis of several key aspects of regulatory takings law in a sample of thirteen democratic countries with advanced-economies[1], located in various parts of the world. This is the first comparative research of this expanse on regulatory takings, intended to enable readers everywhere to find new perspectives for viewing their own country's laws and policies. Here are some thoughts about what American readers may be able to take away from the comparative research.

H1 A view of US regulatory takings law through comparative lenses

When viewed from a cross-national perspective, the most striking finding about US regulatory takings law is the glaring disparity between the intensity of the US "property rights debate" and the factual positioning of US takings law midway along the "scale" of degree of compensation rights for regulatory takings. The comparative perspective can offer both sides in the debate a way of thinking "out of the box". Both the proponents and the opponents of "property rights" may gain by looking at US takings law from the outside. Both sides can also look to other countries, either for alternative models to support their own position (with appropriate adjustments) or for middle-of-the road approaches that may contribute to a rapprochement in this long-raging contest.

Alongside its moderate degree of protection of property rights, US law on regulatory takings exhibits some unique characteristics that place the US apart from other countries.

Perhaps the most prominent feature is the intensity of the property-rights debate itself.[2] In no other country in the sample, and at no time in recent decades, has the issue of regulatory takings occupied a similarly prominent position in public opinion and action as in the USA. In no other country has the issue of regulatory takings become a major topic in national (or state) elections. In no other country has public opinion led to a legislative saga such as Oregon's extremist

[1] Poland's economy is still regarded as "emerging", but on a fast track compared with other post-communist countries.

[2] For a discussion of the debate and literature sources see Chapter 1.

Measure 37 and its quick demise within only three years. Interestingly, the relatively docile status of the takings issue in most other countries exists regardless of the position occupied by that country's takings laws on the compensation rights scale: whether on the very restrictive side regarding compensation rights (Canada, Australia, the UK, France or Greece); or on the side that offers broad rights (Poland, Germany, Sweden, the Netherland, and Israel).

Another key difference between the US and the other countries is the extremely prominent role played by constitutional law. In most other jurisdictions in this study, statutory law (whether on the national or sub-national levels) is a key "player" in takings law. Only in the USA is takings law decided largely by direct application of the Constitution (in most states where there are "regulatory takings statutes", these laws do not add substantive causes of action beyond constitutional law)[3].

In interpreting the constitution, the US Supreme Court has refrained from making "bright line" rules, leaving many legal issues to be decided through case-by-case determination[4]. The result is that US takings law is characterized by a high degree of uncertainty that both landowners and government agencies face whenever regulatory takings are challenged in the courts[5]. In two more countries in the sample - Finland and Austria – a high degree of legal uncertainty still prevails. However, in these two countries, the reason for the uncertainty is that there have been few claims and no jurisprudence to interpret the language of the statute. American society is much more litigious. The unique feature of US takings law is that high legal uncertainty persists despite a large body of Supreme Court jurisprudence extending over almost nine decades, alongside many decisions by the lower courts.

The combination of intensive public debate, a constitutional focus and considerable legal uncertainty has produced what is by far the largest body of scholarly research and publications on regulatory takings anywhere in the world. As noted in Chapter one, the Lexis Nexis search I conducted using the terms "regulatory takings" together with "land use" yielded a number of items beyond what the display would carry. Likely, Thousands of scholarly papers and hundreds of books discuss the "takings issue". Every new Supreme Court decision generates scores, sometimes hundreds of scholarly publications. Yet this huge body of knowledge – which I hypothesize, is several times larger than all the scholarly writing on the topic in all other

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[3]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. The only exceptions are Florida and Oregon – and the record there too is disappointing for the proponents of property rights. See: Stacy M. White, State Property Rights Laws: Recent Impacts and Future Implications, LAND USE LAW AND ZONING DIGEST (July: 3-9, 2000).; Hannah Jacobs (2007); and JOHN D. ECHEVERRIA AND THEKLA HANSEN-YOUNG. THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY'S LABORATORIES. 1-2 (Georgetown Environmental Law & Policy Institute, 2008) . Regarding Florida see: Joni Armstrong Coffey *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Taking,* 39(3). THE URBAN LAWYER 619-632 (2007).

[4] See the US chapter by Roberts.

[5] Many American authors make a similar point regarding insufficient clarity and inconsistencies. See for example: DAVID L. CALLIES, ROBERT H. FREILICH AND THOMAS E ROBERTS. CASES AND MATERIALS ON LAND USE 380 (Fourth Edition; 2004) (henceforth "Callies, Freilich and Roberts"). See also: Edward J. Sullivan and Kelly D. Connor, *Making the Continent Safe for Investors – NAFTA and the Takings Clause of the Fifth Amendment*, Chapter 4, pp. 47-83 in CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING (Patricia E. Salkin, ed., American Bar Association, 2004). At p. 67 the authors argue that the degree of certainty and uniformity intended by the Federal Constitution has not been accomplished in the field of takings law.

countries and languages combined – has not produced greater convergence on the property rights debate. The Oregon turbulence of 2004-2007, which left no side satisfied, is unlikely to be the last time legislative initiatives are brought up.

H1 Placing US regulatory takings law on the comparative "scale"

In academic or professional discussions – and even in some academic publications – one sometimes encounters Americans who refer to the "European approach" to regulatory takings, as contrasted with the "American approach". The image is that Europe has a unitary approach that offers less protection of property rights than the USA. There seems to be an image that European countries as a group do not recognize the concept of regulatory takings or do not regard these as entailing compensation by the public purse. On the opposite side, one encounters non-American practitioners and scholars – even from English-speaking countries – whose image of US takings law is that it offers landowners extensive protection from downzoning and generous compensation rights[6]. This view is part of a broader image of the USA as offering extensive protection of property in general.

The evidence from the thirteen-country study shows that both images are far from correct. There is no "European approach" to regulatory takings. The nine European countries in this book exhibit the full scale of legal (and public-policy) approaches to regulatory takings, almost to the very extremes. This is so even though all European countries are bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 1 of the First Protocol of ECHR provides for property protection, but qualifies it "with the general interest"[7]. Furthermore, all European countries in this book are also members of the EU. Yet the laws and practices of the nine European countries differ so greatly from each other that a "Euro-blind" reader may not have guessed their joint affiliation.

The canopy of the ECHR has to date shown high tolerance for the variety of interpretations of both property rights and the public interest. The effect of ECHR jurisprudence so far has been modest: It has pared down only the extremities on the non-compensation side, but has not influenced the countries whose laws fall on the other side of the scale with extensive compensation rights. The European countries at the very extreme edges of the scale are France and the Netherlands. On the one extreme one finds France where the planning statute says explicitly that land use regulation is not to be compensated, and at the other extreme is the Netherlands, whose law grants compensation even for regulatory takings of minute degree and of indirect effect. The other seven European countries – each with a different set of laws on

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[6] Thomas Roberts, the author of the US chapter, is well aware of this false image, and points it out.

[7] See also the discussion in Chapter 2. Protocol 1, Article 1 says: *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
The preceding provisions shall not, in any way, impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Europe. T.S. No. 9, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/009.htm.

regulatory takings – fall in-between on the scale: some are closer to France (the UK and Greece), others are closer to the Netherlands (Poland, Germany and Sweden), and two have unclear positions (Finland and Austria). In total, four of the nine European states offer landowners higher degrees of protection of property than US law (though not uniformly in all factual situations); two offer lesser rights; and regarding the last two, there is not enough jurisprudence to know.

The comparative findings also show that there is no unitary "British approach" to contrast with the US approach. The four countries with British law in their background in the past century – the UK, Canada, Australia and Israel – span the two extremes on takings law: Canada on one side (extremely restrictive) and Israel on the other (excessive compensation rights). Today, there are not many similarities among these countries' laws on takings.

US takings law holds a middle seat both on major takings (called "categorical" in the USA) and on partial takings. On major takings, US law is in line with the majority of counties in this book (with a few exceptions to be noted below): it recognizes a taking when the economic value of a property has been totally or almost totally extinguished. But to win a categorical-taking challenge, US jurisprudence has set a number of conditions that are difficult to satisfy. On partial takings too, US law is mid-scale. It joins half of the set of countries where partial injuries are compensable. But unlike its image overseas, US law (except for some state-law exceptions) places a rather high quantitative threshold as well as various preconditions that make it difficult for American landowner to win challenges for partial takings. The third type of taking – indirect injuries – are not recognized in US law, thus placing US law among the majority of countries; only a few countries grant extensive compensation rights for such injuries.

At the same time, the comparative analysis also indicates that on several important counts, US regulatory takings law is more generous to landowners than the laws of most other countries in the set. First, in all the other countries in our set, takings claims can only be made when a government body *changes* an existing regulation to a *more restrictive* category. Owners of farmland or even vacant land that generates no income usually do not have the right to expect a rezoning. The US is the only country among the set where *refusals to upzone* or to grant development permission can conceivably serve as grounds for a taking challenge[8]. Although a challenge on these grounds is difficult to win, the threat of facing one lurks in the background when US policymakers decide on farmland and other environmental protection regulations. Second, in most countries (with few exceptions), regulatory takings – especially partial takings - are not an open-ended concept; a statute usually defines a limited set of government decisions that may entail compensation. The historic as well as the current core of compensable decisions in most countries revolves around "classic" land-use planning and zoning (not even all types of potentially injurious decisions are necessarily included). For example, some environmental regulations may not be compensable.

[8] See Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

H1 Oregon's Measure 37 viewed from the outside

The hyperactive rise and demise of Oregon's Measure 37 is a tale with no counterparts anywhere else. It is indicative of the volatility of the property rights debate in the USA and thus deserves a closer look from a cross-national perspective. This rather strange piece of legislation was enacted in 2004 as a citizen-ballot initiative[9]. It soon turned out to be so unworkable that it was replaced in 2007 by Measure 49. The latter too has no international counterparts in takings law – neither in length nor in complexity. The assortment of remedies enabled by Measure 49 - many of them in kind rather than financial – has no visible connecting rationale except for the desire to patch the wounds created by Measure 37.

From an international perspective, the unworkable aspects of Measure 37 were not simply the notion that landowners have the right to compensation for partial takings. The comparative analysis shows that there can be legal regimes where some types of partial takings are compensable. These regimes do seem to "work" reasonably and are sustainable for decades, so long as there is a reasonable rationale, appropriate boundaries and logical sieves. In three of the countries (Germany, the Netherlands and Israel) there was at one point a need for some legislative revision to cool down excessive claims, but nowhere does one encounter a dramatic turnabout such as in Oregon.

Measure 37 lacked appropriate rationale, boundaries, or sieves. Seven attributes of Measure 37 are out of line with all or most of the other jurisdictions. First, Measure 37 was deeply retroactive, unlike any other legislation in this study. Oregonians had the right to claim compensation for regulations approved all the way back to 1950, as a one-time opportunity that lasted for two years. This meant that more than a half-century-worth of claims would be piled onto a population of "innocent" taxpayers who happened to be residents of Oregon in 2004. One does not need to be a prophet to know that this is neither workable nor just. Second, the statute did not set any threshold for the level of injury that would be compensable. By comparison, even in those countries with the most generous compensation rights, there is either a quantitative threshold of at least a *de minimis* percentage points, or a qualitative threshold to represent "reasonableness", "social contribution" or "justice". Third, the legislators went out of their way to remove most legal-administrative burdens and costs from the landowners. Thus, even transaction costs – effective in some jurisdictions in cooling down claims fever - were ineffective in Measure 37, placing the costs of processing claims largely on the taxpayers. In contrast, the other countries where the number of claims became burdensome – Israel and the Netherlands – both imposed a fee on claimants. Fourth, the statute defined any regulatory decision, on any land use subject, up to the state level, as compensable. There is no precedent for this degree of breadth among the sample of countries. Fifth, the statute limited the right to claim compensation to property that has "stayed in the family". This condition too has no kin among the laws of the other jurisdictions. It was intended to narrow down the circle of potential claimants, but left the statute lacking a reliable across-the-board criterion. Instead, each case history had to become clan history and planners and land appraisers had to become amateur genealogist[10]. Sixth:

[9] None of the other statutes were born of direct citizen ballot initiatives, but this is because in most countries there is no such procedure.

[10] The point about genealogists is credited to Edward J. Sullivan *Year Zero: The Aftermath of Measure 37*, 36 ENVIRONMENTAL LAW: 131-163 (2006).

Measure 37 did not require that landowners take responsibility to minimize the damage, not even in the form of the "investment backed expectations" criterion of US constitutional takings jurisprudence. This meant that Oregonians could "sit" on their development rights for decades, but when these rights were restricted, the landowners could ask the taxpayers to compensate them for their loss. This open-check policy is out of line even with three among the four countries with the most generous compensation rights - Germany, Sweden, and the Netherlands – where landowners are expected to share the risks. Only Israeli law is similar to Oregon's on this point, and it has proven to be unworkable. Finally, the fatal difference between Measure 37 and all other countries' laws was Measure 37's "about turn" clause. It enabled the authorities to grant an exception to those who submit a claim, instead of paying compensation[11]. No other statute authorizes a government agency that encounters a compensation claim to pull back from the regulation. On the contrary: in many jurisdictions, such juggling would be regarded as legally dubious since it would shed doubt on the substantive merit of the initial decision. The effect of this clause was that almost no claims were actually paid out, while a large number of development proposals previously restrained, were allowed to proceed.

To an outsider looking at the saga of Measure 37, it is not surprising that this statute didn't survive infancy and had to be followed by a spare-parts sibling.

H1 Possible statutory models for further study

Few believe that Measure 37 was the last time that proponents of property rights in the USA would propose takings statutes. At the same time, opponents of the property rights movement may wish to consider state-level statutory initiatives of their own with the purpose of helping to reduce some of the high degree of uncertainty that characterizes current American takings jurisprudence, so long as constitutional law is unmediated by statutory law. In the USA there is much more room for "experimentation" among fifty states than in unitary countries.[12]

Both sides in the debate may find useful models among the countries surveyed in this study. The advantage of such models over start-up constructs such as Measure 37 is that the country models have operated in "real life" – for better or for worse - and can be studied and evaluated. Of course, transplantations of laws or policies into other legal-administrative and socio-cultural contexts are highly unsuitable. The survey of a large variety of laws could, however, help to stimulate new ideas that may be worth of more in-depth scrutiny.

Proponents of the no-compensation doctrine can find an assortment of approaches among the countries surveyed. The cluster of countries on the no-compensation side of the spectrum includes Canada, Australia, the UK, France, and Greece. France and Greece, however, would probably not be suitable models. Greece is unsuitable because its law on regulatory takings lacks internal consistency, and poor administrative practices have made them dysfunctional. France may be unsuitable because its no-compensation ideology is too extreme to withstand US

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[11] See Jaeger's interesting analysis of the property-values implications of this clause. William K. Jaeger *The effects of land-use regulations on property values,* 36 ENVIRONMENTAL LAW ,105-130 (2006)..

[12] Although Germany too is federal, the basics of planning law are a national-level competence.

constitutional challenges (the French planning statue disallows payment of compensation for any land use regulation).

Canada, next door, presents at the federal level, another extreme no-compensation doctrine that is much at odds with US constitutional protection of property. However, some of the Canadian provinces have enacted more moderate statutes or administrative practices (not directly discussed in this book). These may well merit further evaluation. Australia is somewhat less extreme in its no-compensation doctrine. Unlike Canada's provinces, the Australian state statutes are more consistent in granting compensation rights for major ("categorical") takings. Especially interesting would be to look at the differences among the states and evaluate their legal and public impacts. In 2007-8 some Australian states[13] began a reassessment of their regulatory takings laws and the outcomes are worthy of follow-up.

In my view, on the no-compensation side, the UK is the most interesting model (see also Mandelker's Afterword). UK law is the most coherent on the no-compensation side, where the pieces fit together into a consistent whole. The UK system is well worth further study by those who seek a legal system where there would be minimal companion rights, yet where landowners would have a reasonable degree of protection in extreme situations. In the UK this balance is achieved with a greater degree of legal certainty than offered by US law.

UK law is able to strike this balance between private and public interests by bypassing the very notion of development rights. Thus UK law avoids most situations in which land-use decisions can cause a partial regulatory taking. A dramatic 1947 reform of the planning law removed all then-existing, unbuilt development rights. A one-time compensation fund was set up to cover claims.[14] From then on, statutory plans – equivalent to US zoning - would no longer grant development rights and thus there could not be a "downzoning". Land-use plans retained their importance – but would have an advisory role. The right to develop (called "planning permission") would be granted case by case on a discretionary basis and would be valid for five years only[15]. If planning permission is withdrawn before the five years are up, the landowner has the right to full compensation for the depreciation in property value as well as to indemnification for specific out-of-pockets costs. In practice, revocations are made only when there is an overwhelming public consideration for a policy change. This is extremely rare because under the UK system, the timing of the development permission is very close to the development initiative and government has little uncertainty about its future policies. Decades of practice show that the UK system "works" without over-burdening the public purse.

Where major ("categorical") takings are concerned, UK law provides more certainty for landowner than US law. Recognizing that property values might be diminished when land use plans – though advisory - designate land for some types of uses, UK law gives landowners two

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[13] See for example: *Compensation for Injurious Affection*: Discussion paper. (Government of Western Australia - Land Reform Commission of Western Australia October, 2007). The state of Victoria also commenced on a reform track in 2008-9. Communication with Rebecca Leshinsky, Manager, Planning legislation review, Office of Planning, Heritage & Urban Design, Department of Planning and Community Development, Government of Victoria, Australia. Nov. 2008.

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

[15] PHILP BOOTH PLANNING BY CONSENT: THE ORIGINS AND NATURE OF BRITISH DEVELOPMENT CONTROL (2003) ; Victore Moore, A PRACTICAL APPROACH TO PLANNING LAW. (Blackstone Press, 2005).

optional causes of action for making inverse-condemnation claims. One procedure, called "planning blight" is available when a local plan designates private land for a public use. The plan does not have to be officially approved and may even be diagrammatic. The property may still retain some beneficial use. The landowner only needs to prove that if sold, the property would obtain a price significantly below what it would have obtained without the designation for public use. The second procedure, called "purchase notice", is available for any land use designation, not necessarily a public use. The threshold condition, however, is more difficult to prove than for planning blight. The landowner must show that the property has no beneficial use at all and that the owners' request for "planning permission" had been refused. Planning authorities try to avoid blighting property, so the number of claims for major takings is very small.

Now to the other side of the debate. What can proponents of property rights take from this study? They should first heed the lessons from the Measure 37 experience, as detailed above. If new statutes are proposed, they must contain adequate internal checks and balances. Proponents of such statutes have much to learn from the international experience. The survey showed that seven countries other than the USA have statutes that grant compensation rights for some types of partial takings, not only major ones (Finland, several of Austria's states, Poland, Germany Sweden, and Israel). American proponents of property rights should, however, note that none of these countries recognize takings claims where there were no prior development rights. The underlying notion of all compensation laws is *reliance* on government decisions, not reliance on private wishful thinking.

Which among the seven countries can serve as useful models? The experiences of Finland and Austria leave too much legal uncertainty to be useful (although the great assortment of laws offered by the nine Austrian states may stimulate some ideas). Among the five remaining countries, the Netherlands and Israel are models that can help to foresee what mistakes to avoid. These countries too – though to a lesser extent than Measure 37 – have over-burdened the public purse with a disproportionate number of claims. Poland's law is still embryonic in practice. The most interesting models, in my view, are the remaining two countries - Germany and Sweden.

German and Swedish laws on regulatory takings are of the same vintage, with minor but interesting differences. Both laws draw a clear distinction between major and partial takings and provide high certainty on both. When property is designated for a public-type use (one that falls among a long pre-defined list), the landowner has a statutory right to full compensation by means of a 'transfer of title" claim that can be made at any time. There are no preconditions.

In cases of partial takings too there are rights to full compensation (beyond a *de minimis* level) but there is a set of preconditions. Unlike US law on partial takings, where the precondition of showing "investment backed expectations" has no preset criteria and is to be determined case by case, the German-Swedish preconditions are predefined and easy to determine. The pivotal concept is a time frame (aptly called "implementation time" in Sweden). Compensation rights last for seven years in Germany and for five to fifteen years in Sweden (usually closer to fifteen). These time frames are counted from the time the development rights were initially granted, not from the date of approval of the injurious amendment (so this should not be confused with a regular statute of termination, which is additional. The idea behind the implementation time is to create a sharing of risk between landowners and the government body. The Dutch model too is

based on the idea of a shared risk, but it has no preset time frame, thereby leaving considerable uncertainty for both sides and more need for litigation.

By means of the implementation period, the concept of reliance on government decisions – a notion that underlies the regulatory takings laws of most countries, including the US - becomes transparent to both sides. Unlike UK planning law, the German and Swedish laws do recognize development rights and do grant compensation rights when government changes its mind and downzones. However, the German and Swedish models are based on the rationale that the public purse is not a timelessly open-ended insurance policy against a change in public decision. If landowners wish to be ensured that the development rights will not be restricted without compensation, the landowners should apply for a development permit before the preset time frame is over. The development rights do not self-terminate – but if the landowners procrastinate they take the risk of a downzoning without compensation.

The concept of time-limited compensation rights has a potential ancillary benefit as a growth-management tool in high growth areas. "Normal" planning regulations across the world are notoriously bad at controlling the timing of private development decisions and planners everywhere seek ways to either regulate or to incentivize developers. In high-growth areas in the USA the implementation time frame can serve as a growth-management tool to encourage landowners to channel their development decisions into a specified time frame. The public authorities can thus better manage infrastructure investments, school thresholds, housing mix, or versatile employment opportunities. As a growth management instrument, the Swedish model has an advantage over the German model in that the time period is flexible and must be determined at the time of each plan-approval decision that grants development rights. Indeed, while in Germany the implementation period is generally not used as a growth management instrument, in Sweden there is an increasing (though still small scale) use to incentivize commercial developers in urban redevelopment projects[16].

H1 Can the differences be explained?

The findings show major differences among the regulatory takings laws of most of the countries in the "sample". There are also no signs of transfer of legal knowledge between countries, except between Germany and Sweden whose laws do share some distinct concepts. Based on the set of countries analysed here, one cannot point out either trends of divergence or of convergence; each country's law on regulatory takings seems to follow its own track. The only trend of convergence is the greater propensity observed in all the countries in this book, for government authorities to rely on negotiated solutions to solve or mitigate some of the adverse effects of regulations on land values. However, this trend is part of a broader tendency towards more private-public partnerships, and is not specifically related to regulatory takings law.

[16] In Sweden too, the implementation period is not viewed as primarily a growth management instrument, but in recent years the time frame is being increasingly used for this purpose. The limited and relatively new use of this tool – mostly vis a vis commercial developers in major urban redevelopment projects - reflects the character of the development process in Sweden, where commercial developers are not yet as important a sector as in many other countries. Imposition of a time limit on private, non-commercial developers is not customary (based on a conversation with Thomas Kalbro, the author of the Swedish chapter, December 2008).

The only modest trend of legal convergence, discernable with a magnifying glass, is found among European countries and is due to their legal connection with the EHCR and their affiliation EU (though this latter affiliation is not of direct legal relevance). But this convergence is not toward the middle of the "scale" of compensation rights but affects only one side of the scale – the extreme non-compensation doctrine. In other words, the mild convergence in Europe works to some degree to enhance property protection.

The intuitive question to ask is: how can one explain these differences? In chapter 1 I described the rationale for choosing the thirteen countries in the sample. I noted that, in the absence of enough prior comparative research on regulatory takings or a relevant theory from which to derive criteria or hypotheses to guide the selection of countries, I relied on common-knowledge variables: affiliation with one of the two major Western legal families, institutional structure (federal or unitary states), geographic proximity and language-cultural affinity. The findings show, that the differences among the countries cannot be "explained" according to any of these variables because there are significant differences within each grouping.

Belonging to the same legal family has not led to a convergence of the law on regulatory takings. Eight of the nine Europeans countries – all but the UK – are civil-law countries. As I have shown, this group of countries exhibits both extremes on the property-rights scale. The modest push towards convergence noted above is due not to the fact that the eight countries are of the civil-law family, but to the impact of the jurisprudence of the ECHR – a supra-national institution that "belongs" to neither family. The same picture holds for the five countries in the common-law group - the UK, the USA, Canada, Australia and Israel[17]. These countries had links with British law at some point back in their legal history. The comparative findings show that there is no "British approach". These five countries also span the two extremes on the scale: Canada on one side (extremely restrictive) and Israel on the other (unworkably excessive). The USA is somewhere in the middle. Whatever was these countries' history, today there are few legal similarities.

Nor will knowing whether a specific country is unitary or federal be of much help in predicting the country's stand on regulatory takings law. The eight unitary states exhibit almost the full range of degrees of compensation rights for regulatory takings: France on the one extreme and the Netherlands and Israel on the other extreme. The five federal jurisdictions also encompass a broad range: Canada takes the most extreme no-compensation stand among the countries in this book with Australia a close next, whereas Germany is among the group of countries with generous compensation rights (though not as extreme as Israel or the Netherlands), The two remaining federal countries – the USA and Austria – take midway positions.

What about geographic proximity? One would have assumed that knowledge transfer would occur at least among closely located countries, particularly those with similar languages or

[17] 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 and Picker (2007). p. 948 (about mixed jurisdictions in general) and pp. 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.

culture. This assumption too, is not supported by the findings of this study. Germany and Sweden are the only case where there was a transfer of a legal approach (from Germany to Sweden). These pair of countries does have a language affiliation and they are not too distant geographically, but they are the only such pair. There are countries closer to Germany with no signs of knowledge transfer. Most striking are Germany and Austria which are not only geographically close, they also share the same language and many cultural elements; yet their laws on regulatory takings bear little similarity. There are also major differences between other pair of neighbors: Netherlands and Germany, Netherlands and Flemish Belgium (the latter is not covered here, but I can comment that their laws on regulatory takings bear no resemblance[18]), Netherlands and France (geographically quite close), the UK and France or the Netherlands across the Channel, Sweden and Finland, or Canada and the USA. Ironically, another couple of countries with strong similarities on takings law are the Netherlands and Israel, despite the absence geographic proximity, language or cultural affinity, shared legal history, of any evidence of knowledge transfer. The similarities are due to pure chance.

Could there by some other explanatory variables outside the legal system, such as population density, urban patterns, or pulse of development? Based on the present set of countries, I do not see evidence for such conjectures, but perhaps further research may prove otherwise.

So, as counterintuitive as this may seem, there is no escape from concluding that, based on the current state of knowledge, there are no apparent explanations based on the usual assumptions about legal families, institutional structure or transfer of knowledge among proximate or culturally-similar countries. This conclusion brings me back to the starting point for this book: The problem at hand may be universally shared by all countries with land use regulations, yet each country has adopted a legal solution largely insulated from the experiences of other countries. The explanation for why a particular legal approach on regulatory takings emerged in a particular country at a particular time is a question for historians or political scientists. This may reflect the views held by an individual who was a decision maker (legislator or judge) at a particular point in time when there was an opportunity to mold the law (whether through legislation or through an important court decision). Alternatively the emergence of a particular legal approach may reflect the influence of an effective political lobby. These questions may be worthy of further research, but its contribution will be more in the realm of political science than law.

More than external factors, the availability of comparative knowledge may in itself contribute to legal changes. The publication of this book and further comparative research may become a factor in the exchange of legal knowledge and thus, may affect the future evolution of regulatory takings law in various parts of the world.

[18] The Flemish planning law recognizes compensation rights only in rare circumstances, whereas Dutch law grants the broadest compensation rights among all the countries in this book (as explained in Chapter 2). For Flemish Belgium law see (title unofficially translated by me: Articles 84-86 of the Decree of 18 May 1999 *Providing for the Organisation of Town and Country Planning. M*oniteur Belge — 08.06.1999 — Belgisch Staatsblad

H1 An example of how comparative research has brought about legislative revision

The nexus between land use decisions and property values is inherent to planning regulation everywhere in the world where such regulations operate. At times, government decisions must impact property values negatively. In the final analysis, the question is how such impact should be shared. This is a normative or ideological question that this book does not aim to answer. Its modest purpose is to provide a platform for enriched discussion through cross-national exchange.

The comparative study on which this book is based has helped me to contribute to policymaking in my own country – Israel. By looking at Israeli law from the cross-national lenses I have learned that the broad extent of compensation rights under Israeli law on regulatory takings had gone "off the chart" compared with most other countries. In the absence of prior systematic comparative research in the international state of the art, Israeli legislators and judges reached their decisions insulated from knowledge of what range of laws and practices exists internationally. Like their counterparts elsewhere in the world, they did not have the opportunity of gaining a sense of what is proportionate compared with the international spectrum of laws and practices. Through incremental interpretation of the language of the statute and the constitutional property protection clause, compensation rights were expanded gradually. Because landowners' awareness of the opportunities to submit claims lagged somewhat in time, the practical consequences of the court decisions were not apparent in "real time". Once claims accumulated, they become a huge budgetary burden and, to some extent (not as significant as resulted from Oregon's Measure 37) they also began to affect land use planning policy.

The findings of the comparative research are now the foundation for a government-initiated bill to be placed before the Knesset (parliament) during 2009. The bill will continue to recognize compensation rights for partial takings, but will pare down the more extreme expressions of these rights. Because Israel currently has constitutional protection of property, the mission of the research findings will be to convince the legislators and the courts that the more moderate degree of compensation rights fulfils the "proportionality" criterion in the constitutional law because the degree of compensation rights that will be ensured under the new bill will still be well within the international scale, and on the more property-friendly side. The legal rationale I propose is that because the question of what are the appropriate compensation rights is a universal one, the assessment of proportionality according to Israel's constitutional law can well be informed by the international scale of compensation rights, and thus the proposals in the new bill accord with the property protection clause.

My hope is that both sides to the property rights debate in the USA – and similar groups in other countries - may be able to gain new perspectives from the wide assortment of legal structures and doctrines offered by the thirteen countries. Some will seek support for the views they currently hold. Others who seek a way of reaching convergence and will look for legal models that create an acceptable balance between property rights and unencumbered planning and environmental policies. With the help of the initial platform of comparative knowledge provided by the current study, scholars who are interested in either side in the debate may wish to pursue further research in order to go into greater depth on selected topics or in order to expand the range of countries investigated. Hopefully, the comparative analysis presented here will stimulate new thinking both for policymakers and for further research.