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## Introduction

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In 1795, United States Supreme Court Justice William Paterson famously called eminent domain “a despotic power,” but also one that necessarily “exists in every government.”<sup>1</sup> The use and abuse of eminent domain has caused conflict and controversy in nations around the world. Condemnation is sometimes a useful tool for acquiring property for important development projects. But this potentially valuable institution also has flaws. Coercive acquisition of property can undermine private property rights, which themselves play a vital role in development. Moreover, condemning authorities in many countries often abuse their power by taking property for the benefit of politically influential interest groups at the expense of the politically weak and the general public.

While there have been many works that describe and assess the use of eminent domain in the United States and other individual nations,<sup>2</sup> this volume is the first that uses a common framework to analyze the law and economics of eminent domain in many countries at once.

Debates over the use and abuse of eminent domain have arisen in both advanced and developing countries in recent years. The United States Supreme Court’s controversial ruling in the 2005 case of *Kelo v. City of New London*,<sup>3</sup> upholding the use of eminent domain for private “economic development,” led to a massive political backlash in that country which has resonated elsewhere around the world.<sup>4</sup> The need for a comparative analysis of eminent domain policy has never been

<sup>1</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795).

<sup>2</sup> For recent surveys of eminent domain law and policy in the United States, see, e.g., Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* (University of Chicago Press, 2015); and Thomas Miceli, *The Economic Theory of Eminent Domain; Private Property, Public Use* (Cambridge University Press, 2011).

<sup>3</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>4</sup> For an overview of the political reaction to *Kelo*, see Somin, *Grasping Hand*, chs. 5–6, and Chapter 2 of the present volume.

greater. Yet, few attempts have been made to fill this crucial gap in the literature.<sup>5</sup>

This volume provides a comparative perspective on the law of eminent domain in various countries around the world. Each author assesses the law and economics of the use of eminent domain in their respective nations, from the standpoint of six common issues that arise in any legal system that gives the state the power to condemn private property.

The chapters in this volume build upon the papers originally presented at an international conference on “Shifting the Paradigm for Sustainable Development: Eminent Domain and Property Rights,” hosted by the Korea Development Institute (KDI) in Seoul on March 4, 2015

### The Six Pillars of Eminent Domain

Given the varied histories and legal cultures that give rise to the eminent domain systems of each country, it is often hard to make meaningful comparisons. To make the task more tractable, we have sought to apply a unified analytical framework to all of the nations covered in the book. That will make it easier to identify important differences and commonalities, and to begin to make useful generalizations.

Consequently, a key distinctive feature of this volume is that all the contributors focus on six common institutional aspects of eminent domain law and policy, which we refer to as the “Six Pillars” of takings law: (1) public interest criteria for takings; (2) subjects of takings (the entities authorized to use the power to condemn); (3) just compensation; (4) due process in takings; (5) the distribution of the development surplus; and (6) the dispute resolution system.

<sup>5</sup> The previous work most similar to this one is probably Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, 2006). Alexander considers constitutional property rights jurisprudence in several countries and attempts to extract lessons for American takings jurisprudence. However, Alexander only focuses on eminent domain relatively briefly, devoting most of his analysis to other takings issues. Moreover, his comparative analysis focuses mostly on Germany and South Africa. He does not give significant attention to the many other countries covered in this book, including EU nations other than Germany, South Korea, Taiwan, and a variety of developing countries. Perhaps most importantly, Alexander’s book was published in 2006, only about a year after the US Supreme Court’s controversial decision in *Kelo v. City of New London* (2005). He thus was not able to give much consideration to the massive debate over takings that the decision sparked not only in the United States but in other countries.

Public interest criteria for takings (known as “public use” in the United States) limit the range of purposes for which the government may condemn private property. Such restrictions are needed to prevent abusive and economically harmful takings that undermine property rights and potentially destroy more economic value than they create. Public interest constraints on takings exist in many countries, but there is considerable variation in how restrictive they are. In many nations, there are fierce controversies over whether such restrictions should be tightened or loosened.

Eminent domain systems also vary as to which public and private entities are authorized to use the power to condemn, thereby becoming “subjects of takings,” in our terminology. Eminent domain is often conceptualized as a power exclusively held by the state. Yet, many governments have, at times, delegated its use to private firms, such as railroads and public utilities.

Virtually all eminent domain systems offer “just compensation” to owners of condemned property. But there is considerable disagreement and controversy over the question of how much compensation is enough. While many countries use the “fair market value” standard, critics argue that it fails to account for a variety of important losses suffered by displaced property owners. This has led some jurisdictions to require additional compensation of various kinds.

The use of eminent domain typically requires some form of procedural due process. Most nations, at the very least, require some form of advance notice to owners, and some form of legal process by which owners can challenge the legality of the condemnation, or the amount of the compensation award. But there is considerable variation beyond this bare minimum.

There is also variation over how different jurisdictions deal with the “development surplus” created by takings: the extra economic value that officials hope will be created by the condemnation. It is often argued that some of this value should be given to the former owners of the condemned land, though few jurisdictions assign them more than a very modest share of this surplus.

Finally, it is almost inevitable that the use of eminent domain generates disputes over the legality of the various aspects of the process. Different legal systems provide a variety of approaches to resolving such disputes.

### Overview of the Book

The book is organized into two parts. Part I analyzes the use of eminent domain in a variety of legal systems around the world, assessing each from the standpoint of the Six Pillars framework.

In Chapter 1, Hans-Bernd Schäfer considers the use of eminent domain in Germany. He argues that Germany's relatively stringent public interest criteria effectively constrain most potential abuses, but suggests that the nation's procedural structure for takings has a number of shortcomings.

Chapter 2, written by Ilya Somin, focuses on eminent domain in the United States. Somin emphasizes that it is difficult to generalize about takings in that country, because most condemnations are initiated by state and local governments, and there is wide variation between the 50 states on many key aspects of eminent domain law and policy. Nonetheless, he explains that, during the twentieth century, both the federal Supreme Court and many state courts loosened "public use" constraints on takings, which has resulted in numerous questionable practices, including the forcible displacement of many hundreds of thousands of people and businesses. In recent years, there has been a strong public and judicial reaction against such abuses, particularly in the wake of the Supreme Court's unpopular decision in the *Kelo* case.

In Chapter 3, Anne van Aaken assesses eminent domain in the European Union, particularly the role of the European Convention on Human Rights, which provides a backstop to the varied protections offered by the laws of the individual member nations. She concludes that this multilevel system of constitutional rights provides useful protection for property owners against potentially dubious takings.

Yun-chien Chang's Chapter 4 focuses on Taiwan. Recent reforms in that country, enacted in 2012, have tightened public interest criteria for takings, increased compensation for property owners, and provided new procedural protections. Nonetheless, Chang suggests that these reforms have done little to curb abuses or restrict the use of eminent domain on the ground, in part because judges have continued to defer to the decisions of condemning authorities. He suggests that future reform efforts might usefully take a different approach from that enacted in 2012.

In Chapter 5, Jonathan Lindsay, Klaus Deininger, and Thea Hilhorst provide an overview of the use of eminent domain in developing countries. Many such nations have resorted to extensive takings for the

purpose of promoting economic growth. These practices have sometimes led to abuses, which are extremely difficult to forestall.

Compulsory acquisition in developing economies poses enormous challenges. While a number of countries have adopted remarkably bold and innovative approaches to eminent domain reform, the authors emphasize the need for further research, so as to minimize the risks created by takings and implement policies that contribute to enhanced social welfare in the long term.

Part II provides a comprehensive analysis of the Korean eminent domain system. Each of its six chapters is devoted to in-depth examination of one of the Six Pillars in South Korea. Korea is a nation that has condemned vast amounts of land over several decades. The KDI conference was originally inspired by the two Korean co-editors' ongoing observation of the use of eminent domain in their country, which have begun to cause serious conflict between condemners and condemnees in recent years.

Korea is one of the several East Asian nations, including China, Taiwan, and others where there has been extensive controversy over takings in recent years. Because of the cultural and political similarities between these countries, the Korean case is likely to be of special interest to audiences in those countries, and scholars who study their legal systems. The in-depth examination of the Korean case in Part II will be of interest to scholars and other interested readers around the world as well as those in Korea itself.

Moreover, Korea has interesting features because it is one of the many countries that has experienced conflict between development-oriented institutions that made extensive use of eminent domain and an increasing awareness of the importance of property rights. Until the late 1980s, Korea was an authoritarian state, and government-led development was a high priority. Citizens, at the time, rarely resisted development policy, even when their rights were severely infringed. Since the late 1980s, Korea has rapidly democratized, and people have begun to take a more skeptical view of government policies. Consequently, public awareness of property rights issues has reached a much higher level, while the legal system of the past persisted.

In order to continue to promote sustainable development, Korea may need a paradigm shift in its eminent domain system. Similar issues have arisen, and likely will continue to arise, in other nations that have experienced rapid economic growth. In the current environment where many types of social media have become available, people in these countries are more exposed to contending opinions on property rights

originating from the West and elsewhere. For these and other reasons, we believe that the Korean experience has important relevance for other countries, particularly developing nations.

In Chapter 6, Hojun Lee reviews the state of public interest limits on takings in Korea. He contends that such limits are often insufficiently enforced, and argues that Korea should adopt reforms that limit abuses more effectively.

Iljoong Kim's Chapter 7 focuses on the subjects of eminent domain in Korea, particularly the extensive delegation of condemnation authority to private entities. He concludes that this policy has led to serious problems and abuses, and advocates tightening restrictions on the use of eminent domain by private parties.

In Chapter 8, Byungkoo Cho provides an overview of takings compensation in Korea. He suggests that the present system often fails to adequately compensate for important losses, and thereby exacerbates the social costs of eminent domain, particularly "demoralization costs."

Chapter 9, authored by Kisang Jung, assesses Korean eminent domain procedure, and concludes that procedural restrictions on takings are often inadequate, especially in assessing the "public necessity" of proposed takings.

In Chapter 10, Sungkyu Park explains how and why Korean law – like that of many other countries – forbids giving displaced property owners a share of the development surplus created by takings. He contends that this rule is ill-advised, because it incentivizes abusive and inefficient practices by developers.

Finally, Chapter 11, authored by Duol Kim, examines the Central Land Tribunal of Korea (CLT), the leading dispute resolution body adjudicating eminent domain cases. He suggests that the CLT's current practices have significant flaws. Many cases receive only cursory examination, and often little is done to prevent abusive practices. Kim concludes reforms are urgently needed to ensure thorough and just consideration of takings cases.

We hope that readers of this volume will be able to use it to compare the key characteristics of eminent domain systems across countries and assess their implications. For example, there is much to be learned from the variation in the strictness of public interest constraints on takings. In his chapter on the German system, Hans-Bernd Schäfer argues that its relatively tight restrictions on condemnations have effectively curbed many potential abuses. In the United States, the federal Supreme Court's broad interpretation of public use allows more discretion to

governments, but that has begun to be questioned by many people since the controversial *Kelo* decision. Some state courts have taken a tougher line.

In both Korea and Taiwan, in spite of an otherwise strong legal framework, very broad discretion is often given to government officials, leading to numerous questionable condemnations. The developing nations covered in Chapter 5 often face even more severe challenges in regulating the use of eminent domain.

We hope and expect that this book will be a useful resource for economists, legal scholars, jurists, public officials, and others interested in the use of eminent domain around the world.