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Regulatory Governance and the Right to a Fair Expropriation Procedure

Abstract

Constitutions around the world provide for a right to a fair administrative procedure. In expropriation procedures this right particularly entails that the expropriatee can express their view on the subject-matter. The opportunity to express one's view, however, proved to be insufficient in practice to guarantee a fair expropriation procedure. Participants are often not informed by the competent authority about the procedure or the subject-matter, intimidated by the authority or other participants or not capable of effectively expressing their view. Furthermore, studies show that deliberations among citizens should precede the making of representations. The realisation of the Right to a Fair Expropriation Procedure thus requires more than the opportunity to express one's view. The Voluntary Guidelines on the Responsible Governance of Tenure contain good governance standards on the design of participatory and transparent expropriation procedures. Against the background of philosophical and sociological findings on effective participation this presentation discusses the content of the Guidelines and their implications for the implementation of the Right to a Fair Expropriation Procedure.

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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II.</td>
<td>Procedural Fairness</td>
<td>3</td>
</tr>
<tr>
<td>III.</td>
<td>Benefits of Participatory Expropriation Procedures</td>
<td>6</td>
</tr>
<tr>
<td>IV.</td>
<td>The Empowerment of People to Participate Effectively</td>
<td>8</td>
</tr>
<tr>
<td>V.</td>
<td>The Provision of Information</td>
<td>8</td>
</tr>
<tr>
<td>VI.</td>
<td>The Access to the Procedure</td>
<td>10</td>
</tr>
<tr>
<td>VII.</td>
<td>The Form of Participation</td>
<td>11</td>
</tr>
<tr>
<td>VIII.</td>
<td>The Obligation to Balance Interests and the Obligation to Give Reasons</td>
<td>14</td>
</tr>
<tr>
<td>IX.</td>
<td>Conclusion</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Bibliography</td>
<td>18</td>
</tr>
</tbody>
</table>
I. Introduction

The regulation of the use of land in the widest sense means determining who can use which piece of land under what conditions. A narrower understanding of the regulation of the use of land in property theory refers to the specification of the content of private law rights on land by the legislator and public law restrictions imposed upon specific or an abstract group of holders of land rights by the legislator, the government or an administrative authority.¹ In other fields than land use management, the term regulation may have various meanings and may refer to State or non-state actors setting norms that are not of a (re)distributing nature or to the monitoring and enforcement thereof.²

Constitutions around the world provide for the power of the State to expropriate property rights on land. Mostly, expropriation must be based upon statutory authorisation, must serve a public purpose, and is subject to the payment of compensation.³ Expropriation entails that the State takes away land rights from their holders and that these land rights are transferred to a State or private entity for further use. Expropriation thus has certain redistributing characteristics and, moreover, does not fall under the narrow definition of regulation in property theory. Yet, expropriation remains an instrument to determine who can use which land under what conditions. Hence, expropriation is land regulation in the widest sense.

In this paper, I only deal with administrative expropriation.⁴ This means that in an administrative procedure, an authority upon which the power to expropriate has been conferred by an Act of Parliament decides whether or not to expropriate. The expropriation authority hears affected persons, gathers information on the expropriation as well as on its impact and determines whether or not the constitutional requirements have been met, in particular whether there is a public purpose for which the State can take property rights away from their holders. The freedom of the expropriation authority is restricted by the right to a fair administrative procedure. This fundamental right thus forms part of the governance system of the regulation of land use through expropriation. It is postulated in constitutions around the world. Section 33(1) of the South African Constitution⁵ stipulates that everyone has the right to administrative action that is procedurally fair. Section 47(1) of the 2010 Kenyan Constitution also provides for this right. Section 18 of the Namibian Constitution of 1990 obliges administrative bodies and officials to act fairly.

¹ Van der Walt 2011, p. 335; and K Gray & SF Gray 2008, pp. 1387 et seq.
² Levi-Faur 2012, pp. 3 et seq.
³ See, for instance, Art. 14(3) of the German Basic Law and Section 25(2) of the South African Constitution.
⁴ See on other types of expropriation: Van der Walt 2011, pp. 456 et seq.
⁵ Act 108 of 1996.
The question that arises is which standards this expropriation procedure has to meet in order to be procedurally fair. In practice, unfair expropriation procedures not only violate constitutional norms and good governance standards. They also stand in the way of secure tenure and cause distrust, thereby inhibiting sustainable economic development and entrenching poverty.\textsuperscript{6} The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as: Guidelines), which the Committee on World Food Security (CFS) adopted on May 11\textsuperscript{th}, 2012, are a soft law instrument and contain good governance standards for the governance of tenure in general, and for expropriation procedures in particular.\textsuperscript{7} The Food and Agriculture Organization of the United Nations (FAO) has since been promoting the implementation of the Guidelines. The FAO is being supported by the G8, the G20, the Rio 20+, the UN General Assembly, the Francophone Assembly of Parliamentarians, the Berlin Agriculture Ministers’ Summit, the World Bank and some big private sector corporations, such as the Coca-Cola Corp. These Guidelines are the result of a long bottom-up consultation process.\textsuperscript{8} In that process the latest insights were shared as to how unfair expropriation procedures and arbitrary expropriation can be avoided, which fosters the hope that compliance with these standards will ensure a fair procedure. States, both in the Global South and the Global North, and other relevant actors\textsuperscript{9} are called upon to use the Guidelines when planning strategies, policies, laws, programmes and activities.\textsuperscript{10}

In this contribution I argue that the constitutional norms that require expropriation procedures to be fair should be construed so as to comply with the Guidelines. National courts could then ensure through constitution conform interpretation of the norms governing expropriation procedures that the expropriation procedure is fair. To that end, I discuss the definition of “procedural fairness” from a philosophical and legal perspective and why the Guidelines can be used to concretise this constitutional requirement. Subsequently, against the background of sociological and philosophical findings on administrative procedures, I analyse the content of the Guidelines to give guidance as to how the constitutional norms would have to be interpreted. The following aspects are considered: the empowerment of the people to

\textsuperscript{6} Azuela & Herrera-Martin 2009, p. 341, and Guidelines, p. V.
\textsuperscript{7} The Guidelines can be retrieved from: http://www.fao.org/docrep/016/i2801e/i2801e.pdf (last accessed: 18 May 2014).
\textsuperscript{8} A summary of the outcome of the consultations that were held in 2009 and 2010 can be retrieved from: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_outcome_document_English_corrected.pdf (last accessed on 18 May 2014). In 2011 e-consultations followed. See also: Guidelines, p. VI.
\textsuperscript{9} Guideline 2.3.
\textsuperscript{10} Guidelines, p. V; see also Guideline 2.3; on the implementation of the Guidelines: Arial et al. 2012, pp. 67 et seq.
participate effectively; the access to information; the access to the procedure; the form of participation; the obligation to give reasons; the obligation to balance interests. It is important to note that integrating international soft law into national constitutional open norms faces various pitfalls, such as a lack of democratic legitimacy and accountability and a lack of legal certainty. These issues fall outside the scope of this contribution.

II. Procedural fairness

In everyday life we all subscribe to different notions of fairness. Some may argue that fairness is a synonym of, or at least closely related to, justice. Others may assert that fairness means “not cheating” or “sticking to the rules”. Even in philosophical literature, there are various concepts of “fairness”. However, this section is not intended to provide a comprehensive account of those concepts. Rather, I seek to find a definition of “procedural fairness” that is suitable to give an indication as to which requirements a procedurally fair expropriation procedure has to meet.

The first consideration would be that “procedural fairness” cannot only concern compliance with the rules of the expropriation procedure. If the rules of the procedure are unfair, the whole procedure is unfair, even if the participants comply with those rules.

The next aspect to be considered is the relationship of the procedural rules to the outcome of the procedure. Can the rules of the expropriation procedure be fair if its outcome proves to be unfair, for instance because it is unjust? This question mirrors the dichotomy of procedural fairness and substantive fairness in philosophical literature. Whereas procedural fairness is often confined to the fairness of the rules of the expropriation procedure that lead to the outcome, substantive fairness gives an answer to the question whether or not the outcome of the expropriation procedure is just according to independent standards. That does not imply, however, that scholars advocating procedural fairness are indifferent to the outcome of the procedure. A common definition of procedural fairness is that the people affected by a procedure are treated equally and that their interests are advanced. It would be contrary to that definition if the expropriation authority did not take due account of all interests involved and did not strike a fair balance between those interests. Hence, the outcome of the procedure and, therefore, the procedure itself would be unfair if the expropriation authority did not comply with those rules. Therefore, the second consideration would be that an expropriation

11 Estlund 2008, pp. 65 et seq.
12 Cf. Estlund 2008, pp. 69 et seq.
13 Estlund 2008, p. 69.
14 Estlund 2008, p. 73.
procedure will be fair if the rules of the procedure are fair and the outcome reflects a fair balancing of the interests involved. The outcome does not need to be just according to independent standards.

The third consideration would be that procedural fairness requires input from the people. Public participation refers to the contributions to, and comments on, a proposed expropriation by the public in an administrative procedure conducted by the expropriation authority.\(^{15}\) This need arises from the fact that State authorities are often not able to gather all necessary information and to consider the subject-matter from all perspectives.\(^{16}\) The purpose would be that the State authority can strike a fair balance between the interests involved.

The fourth consideration would be that there is no such thing as purely procedural fairness. Let us define purely procedural fairness as the formal equal treatment of all people affected by the procedure. Every affected person receives the same information, has equal access to the procedure and has the same opportunity to provide information and to express their view.

In practice, however, such a notion of procedural fairness disadvantages people who do not have well-developed communication skills. Effective participation requires knowledge on the subject-matter and the procedure, communication skills, creativity as well as courage.\(^{17}\) It is widely acknowledged in the literature that the ability to participate effectively is “unevenly distributed”.\(^{18}\) Some people simply cannot participate effectively. Other people with less well-developed abilities are, in practice, silenced by the conditions under which they have to participate or by those with better developed abilities.\(^{19}\) Therefore, what Estlund classifies as preference anonymity seems to be a valuable addition to the concept of procedural fairness. Preference anonymity means that the results of the procedure would not be different if certain interests were not held and advocated by their holder, but by someone

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\(^{15}\) Coglianese, Kilmartin & Mendelson 2008, p. 3. Consequently, participation does not refer to all contributions of the people or their representatives to an expropriation decision. In particular, it does not refer to deliberations among members of a directly elected body that has been authorised to expropriate. Sections 226(1) and (8) of the UK Town and Country Planning Act 1990, for instance, authorise directly elected councils of districts, boroughs and counties to issue compulsory purchase orders that have to be confirmed by the Secretary of State. Deliberations among the elected representatives are also contributions of the people and may enhance the democratic legitimacy of the decision, but are not considered in this contribution.


\(^{18}\) O’Neill 2001, p. 484.

It would certainly be unrealistic to demand that this principle be fully implemented in practice. Yet, expropriation authorities should strive to empower disadvantaged participants to participate effectively so that it is no longer of major importance whether an opinion is defended by a person with well-developed communication skills or by a person with less well-developed communication skills.

In the light of the foregoing, procedural fairness concerns the rules of the expropriation procedure. As a starting point for the legal analysis of this term, I assume that it entails the equal treatment of all parties affected by the expropriation and that the outcome must reflect a fair balance between the affected interests. These two aspects require input from the people on the subject-matter on the one hand and, as the concept of equal treatment is based upon a substantive notion of equality, the empowerment of disadvantaged participants to participate effectively on the other hand.

In South African and Namibian administrative law, which legal orders are both largely influenced by English common law, procedural fairness is closely connected to the *audi alteram partem*-principle. This principle requires that the persons who are affected by administrative action are given an opportunity to participate in the procedure and to influence the decision. In Namibian administrative law, this mainly entails that the affected persons receive information on the subject-matter and can make representations. Furthermore, it also follows from Section 18 of the Namibian Constitution that a fair expropriation procedure requires that the authority furnish reasons for its decision. As of yet, Namibian administrative law does not contain any measures specifically meant to empower disadvantaged participants.

In South African administrative law, Section 3(2)(b) of the Promotion of Administrative Justice Act (PAJA) contains the minimum requirements for procedural fairness. Before taking the expropriation decision the expropriation authority would at least have to give persons whose rights or legitimate expectations are materially and adversely affected by the expropriation adequate notice of the nature and the purpose of the administrative action and to give those persons a reasonable opportunity to make representations. Section 33(2) of the South African Constitution and Section 5(2) PAJA contain an obligation of the expropriation authority to give adequate reasons for its decision. At first glance these provisions do not

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20 Estlund 2008, pp. 78 et seq.
22 *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), paras 49 and 51.
23 Glinz 2009, pp. 6 et seq.
include empowering measures. The South African Constitutional Court, however, tends to construe the terms “adequate (notice)” and “reasonable (opportunity)” so as to answer to the needs of the illiterate and the uneducated.25

In South African and Namibian administrative law, procedural fairness thus mainly includes the equal right of every affected person to receive information and to make representations as well as the right to be given reasons for the administrative decision. At least in South Africa, some empowering measures are taken. The Voluntary Guidelines, however, do not even mention the terms “fair” or “fairness” in relation to administrative procedures. What, then, is the connection between procedural fairness and the Guidelines? The Guidelines contain recommendations for the rules governing expropriation procedures. Guideline 16.2 recommends that expropriation procedures should be transparent and participatory. In that provision, the Guidelines address the problems of the provision of information, the access to the procedure and the form of participation. The Guidelines 3B.3 and 3B.6 also deal with these issues. In addition, these provisions make recommendations as to empowering measures. The Guidelines thus concern problems that the philosophical and legal concepts of procedural fairness seek to resolve. Therefore, it seems justified to take the Voluntary Guidelines as a source of good governance standards that can guide the interpretation of the right to a fair expropriation procedure.

III. Benefits of Participatory Expropriation Procedures

Guideline 16.2 provides that the expropriation procedure should be participatory. In an ideal situation, where all people are able to participate effectively and can defend their interests on the basis of a sufficient amount of information, participation can contribute substantially to the fairness of the expropriation procedure and, thereby, to security of tenure. First, it provides the competent authority with more information on the subject-matter, including on the impact that the decision would have on disadvantaged members of society.26 It thus enhances the fairness of the procedure and the quality of the decision because the competent authority can better balance the affected interests. Secondly, participation that goes beyond the mere provision of information can serve as an accountability and control mechanism that protects the people.27 The people that are affected by a decision can verify whether the

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information is complete, the competent authority has taken due account of their interests, and whether the reasoning of the competent authority is flawed.

Thirdly, it enhances the (democratic) legitimacy of the decision to expropriate. The people that are affected by a decision will be more likely to accept the expropriation if they have received all information on the subject-matter and have had the opportunity to express their view in an expropriation procedure with sufficient safeguards. Participation thus prevents unrest and interference with the use of the land after the decision, thereby promoting security of tenure. The fourth benefit of participation is capacity building. Citizens have to learn how to participate effectively in democratic and administrative processes. If the State has to ensure that participation is active, free, effective, meaningful and informed, the State will encourage the people to improve their knowledge on land issues and their communication skills. This may in the future prevent decisions that further disadvantage already disadvantaged people.

There are, however, certain hindrances to the realisation of these benefits. The States must ensure that all affected persons are equally and effectively represented and that the legal framework is properly implemented. Participation is also often found to introduce poor-quality thinking, e.g. flawed reasoning and considerations that are not based upon all relevant facts, into the decision-making process and to lead to results that are overly protective of the affected interests. The competent authority should therefore seek support from experts in both the participation process and the decision-making process in order to avoid these effects. Furthermore, the participation of the general public must not require so many resources and time that the process is considerably delayed or that the quality of the decision declines.

Non-empirical legal research cannot answer the question to which extent these requirements are met in practice, and the examination of these aspects therefore goes beyond the scope of this contribution. These aspects, however, must be taken into account when expropriation procedures are designed and are mentioned below when different forms of participation are discussed. The Guidelines confirm this with regard to the availability of resources. Guideline 6.1 explicitly states that the States should ensure “to the extent that resources permit” [emphasis added] that the implementing agencies should have the capacity to implement laws and policies in a timely, effective and gender-sensitive manner. Guideline 16.4 confirms this rule with regard to expropriation procedures.

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30 See fn 19.
31 Dietz & Stern 2008, pp. 54 & 64.
32 Barnard 2001, p. 143; Dietz & Stern 2008, p. 34.
IV. The Empowerment of People to Participate Effectively

As has been pointed out above, empirical evidence suggests that there are disadvantaged groups of people who cannot participate effectively in general or are not able to participate effectively if the conditions under which they have to participate do not allow for their effective participation or if power imbalances silence them. The question is whether or not the Guidelines reflect this empirical finding. Guideline 3B.6 provides that the State should ensure that the participation is active, free, effective, meaningful and informed. This provision suggests that disadvantaged people have to be empowered because their input would otherwise not be active, free, effective and meaningful.

Guideline 3B.6 also recommends that the State take into account power imbalances between the people when designing participation mechanisms. Guideline 3B.3 establishes equity and justice as leading principles of the Guidelines. These principles entail that the State should acknowledge that there are differences between people and that the State should take positive action, including empowerment, in order to promote equitable tenure rights and access to land. Guideline 6.6 confirms that States should take positive action because it recommends that States should consider additional measures to support vulnerable or marginalised groups who would otherwise not be able to access administrative services. Guideline 4.10 points in a similar direction by recommending that the States facilitate participation. The empowerment of people was already demanded during the consultations and entailed in particular that the people are empowered to participate effectively, i.e. to be consulted meaningfully and to provide feedback and comments.\(^{33}\) As means to achieve this goal, the participants of the consultations mentioned education and awareness raising.\(^{34}\)

The conclusion would be that the Guidelines acknowledge that there are differences between people as to their ability to participate in an expropriation procedure and that some people cannot participate effectively. Guideline 3B.6 thus entails that the State should take appropriate measures to empower the people in order to ensure free, active, effective, meaningful and informed participation, and to prevent interference from more privileged participants.

V. The Provision of Information

Guideline 16.2 provides that the expropriation procedure should be participatory and transparent. Transparency is a pre-condition of informed participation in the expropriation

\(^{33}\) Outcome document of consultation meetings (see fn 8), p. 4.

\(^{34}\) Outcome document of consultation meetings (see fn 8), p. 5.
procedures. Only if the information is easily available, will the public be able to detect incomplete information, unfair treatment and errors in the reasoning of the administrative organ and to base their views upon all the available information. Guideline 3B.8 recognises transparency as a leading principle of responsible governance of tenure. It entails that the States should clearly define and widely publicise decisions, policies, laws and procedures. Concerning the expropriation procedure, this definition thus requires transparency as to the details of the procedure. In the literature, a more general definition of transparency is used, which also requires access to information about the facts underlying the procedure. This aspect of transparency can also be traced in Guideline 3B.6, which provides that the State should ensure that the participation of the public is informed. Furthermore, it was a major demand of the participants in the consultations in 2009 and 2010 that information be easily accessible. The principle of transparency thus ensures that the people can make an informed contribution and enables them to detect incomplete information, unfair treatment and errors in the reasoning of the administrative organ, and to base their views upon all the available information.

In what follows, I examine three aspects of the provision of information to the people: the group of people that have access to information; the amount of information that is provided; and the pro-activeness of the State. As to the group of people that have access to information, an adequate solution must be reconcile the need for the maximisation of valuable input from people and the need to use time and resources sensibly. The Guidelines adopt a mixed approach. Guideline 3B.8 recommends that the States widely publicise information on the procedure. The entire public should thus have access to the details of the expropriation procedure. The access to information on the subject-matter, however, should be regulated differently. Guideline 16.2 is the provision regulating expropriation procedures. This Guideline states that the States should ensure that the persons who are likely to be affected by the decision are properly informed. This provision thus clearly makes a distinction between persons who are likely to be affected by a decision and those who are not. The access to information on the subject-matter is thus restricted.

The second aspect to be examined is the content of the information that the State should provide. Guideline 16.2 states that the States should ensure that the persons who are likely to be affected by the decision are properly informed. Guideline 3B.6 recommends that the States

35 Coglianese, Kilmartin & Mendelson 2008, p. 3; Gutmann & Thompson 1996, pp. 47 & 95.
36 Coglianese, Kilmartin & Mendelson 2008, p. 3.
37 Outcome document of consultation meetings (see fn 8), p. 4.
38 Coglianese, Kilmartin & Mendelson 2008, p. 3; Gutmann & Thompson 1996, pp. 47 & 95.
ensure active, free, effective, meaningful and informed participation. The deduction would be that the States have to provide all the information necessary to enable the people to make meaningful representations and to defend their interests.

The third aspect to be considered is the degree of pro-activeness required from the States. Guideline 3B.8 recommends that the States widely publicise the procedure to be followed. Furthermore, according to Guideline 16.2, the States should ensure that the participants make a contribution that is based upon a proper information basis. The Guidelines thus envisage a pro-active expropriation authority that provides information without being requested to do so. Given the commitment of the Guidelines to empowering disadvantaged people to participate effectively, this choice is logical. However, proactiveness requires time and resources that could also be spent on other features of the procedures.

VI. The Access to the Procedure

The next question to be addressed is which persons can participate in the expropriation procedure. Ideally, the more people participate in a procedure, the more information and views on the proposed expropriation the competent authority will gather and consider when taking their decision. This may lead to an improvement of the quality of the decision. This advantage, however, is unlikely to materialise in practice. The first reason is that it is difficult to ensure that the affected groups, disadvantaged groups in particular, can participate equally and effectively or are equally and effectively represented. It will be even more difficult to give the views of disadvantaged groups the necessary weight if unaffected groups with vested interests also contribute to the procedure. The second reason is that participation of more people requires more resources and more time, which may eventually result in the quality of the decision declining.

The Guidelines recommend restricting the access to the procedure. Guideline 16.2 states clearly that the State should identify persons who are likely to be affected, inform them properly and consult them. Guideline 3B.6 that establishes consultation and participation as leading principles of the Guidelines uses a different term, namely persons who, having legitimate tenure rights, could be affected. Guideline 16.2 is the provision applicable to expropriation procedures, which is why Guideline 3B.6 does not have direct influence on who should have access to the procedure. However, it may indicate that persons are only, or at

41 Cf. Dietz & Stern 2008, pp. 61 et seq.
least more likely to be affected in terms of Guideline 16.2 if they have legitimate tenure rights that would be affected by the expropriation. The conclusion is that the Guidelines recommend restricting the access to the procedure to a certain category of people.

VII. The Form of Participation

The people who may participate in the expropriation procedure can contribute to the procedure in different ways. Throughout the world different forms of participation are discussed and implemented.\(^{43}\) They allow for different degrees of popular input and have a different impact on the quality of the outcome. Before analysing the form of participation that the Guidelines recommend, I introduce four broad categories of forms of participation as well as their advantages and their disadvantages. These categories do not form an exhaustive list; many procedures share elements of two of the categories.

The first form of participation is the provision of information. This entails that the participants provide the competent authority with information on the subject-matter. This form of participation answers the need of the competent authority for information.\(^ {44}\) The information enables the authority to consider alternative decisions and to predict their impact. Ideally, this provision of information will enhance the quality of the decision. This result, however, depends upon the effective representation of all affected groups because the competent authority may otherwise not have all necessary information.\(^ {45}\) Furthermore, the provision of information cannot serve as an accountability or control mechanism because the competent authority and the participants do not discuss how this information influences the opinion of the authority on the proposed expropriation. The (democratic) legitimacy that this participation mechanism generates is limited because the participants do not express their views. The capacity building will also be limited because the participants only (need to be empowered to) provide information, but do not engage in discussions.

The second model of public participation is consultation. In this model the citizens not only provide information, but the competent authority also gives the citizens the opportunity to give their opinion on the proposed expropriation.\(^ {46}\) No deliberations follow and the decision is exclusively taken by the competent authority. Ideally, the competent authority will not only

\(^{43}\) An overview of different forms of participation: Arnstein 1969, pp. 216 et seq.


\(^{45}\) O’Neill 2001, p. 484 and 486; Nordic Council of Ministers 2002, p. 41; Doubtful about whether or not this is the case: Bekkers & Edwards 2007, p. 51; Dietz & Stern 2008, pp. 60 et seq.

have the necessary information, but will also be able to view the case from the perspectives of different participants, which will enhance the quality of the decision. Yet again, it is essential to the success of this participation mechanism that all affected groups are effectively represented. Not only would the provision of information otherwise be selective, the competent authority would also tend to view the case from the perspective of a certain group of people. Moreover, consultation mechanisms cannot fully function as an accountability or control mechanism because consultations do not guarantee that the competent authority takes the views into account when taking the decision. An additional obligation to justify the decision to expropriate and to state how the authority took account of the participants’ views might be a solution, but does not guarantee that the authority actually reflects on their opinion. Concerning the generation of (democratic) legitimacy, this mechanism will generate more than the first model because the participants may also express their views on the subject-matter. Consultations will also contribute more to capacity building in that the participants must (be empowered to) express their opinions on the subject-matter.

The third form of participation is deliberation. It combines consultation with deliberation. This model is based upon three elements: the provision of information by the participants; the opportunity of the participants to express their view on the subject-matter; and deliberation. Deliberation refers to reasoned dialogues that may lead to a change of opinions of the participants and the authority. There may be two-way communication between the authority and the participants and multi-way deliberations among the participants and between the participants and the authority.

Deliberation plays a particular role in deliberative theories of democracy. Scholars argue that we all have certain beliefs and preferences on which we hardly ever reflect. These beliefs and preferences, of course, also play a role when citizens express their opinions in administrative procedures. The importance of deliberation is that citizens have to consider all facts, including the drawbacks of their position, and the arguments of others. On the basis of equality and the ability of citizens to reason, scholars assume that citizens will then revisit their beliefs and preferences and change them if they think this appropriate. The eventual input of citizens will thus better reflect their living conditions and the preferences that result

47 See fn 45.
48 Arnstein 1969, pp. 216 et seq.
51 Peter 2009, pp. 43 et seq.
52 Peter 2009, pp. 43 et seq.
from those. Ideally, deliberations can effectively perform all functions of participation. They provide the competent authority with information, the reconsidered views of citizens and force the authority to reflect on their opinion. The latter also indicates that deliberation can better serve as an accountability and control mechanism than consultations. The deliberation will enhance the (democratic) legitimacy of the decision because every actor could express and reflect on their opinion, thereby also contributing to capacity building. This improvement will be even greater if the authority hosts multi-way deliberations instead of only two-way deliberations.53

There are, however, a few obstacles to this improvement. Not only may certain concerned groups not be effectively represented in the deliberation,54 but deliberations, if badly managed, are also prone to being dominated by charismatic figures.55 The latter may lead to preferences that would not have been shaped in deliberations without this influence. Furthermore, deliberations are particularly time-consuming and require a lot of resources. As there are fewer resources available for the rest of the decision-making process, this may result in the quality of the decision decreasing.56 Furthermore, the improvement is limited by the fact that the competent authority proposes a draft decision, thereby defining problems and the main aspects of the decisions, which mostly remain unquestioned in the participation process.57

The fourth form of participation is the decision by the people on whether or not land should be expropriated.58 To what extent this form of participation effectively performs the functions of participation first depends upon whether the proposed decision is the result of deliberations among the people and not determined by a competent state authority.59 If the decision has been proposed by a state authority, the people can control the authority and can also democratically legitimise the decision, provided that all affected groups are informed and vote.60 At the same time, the vote will not directly contribute to the quality of the decision, only indirectly if the rejection of the proposal leads to a review thereof. Its contribution to capacity building will depend upon whether or not information is provided before the vote

54 See fn 45 and O’Neill 2001, p. 484, 486 and 493, who also points to the proper authorisation of representatives; O’Neill 2001, p. 484; Turnhout, Van Bommel & Aarts 2010, p. 26, point to the fact that the people do not have equally well developed cognitive and communication skills.
55 See fn 54.
56 Coglianese, Kilmartin & Mendelson 2008, p. 4; and Barnard 2001, p. 143.
and public deliberations take place. If the proposal has been developed through deliberations among the people, the input from the people can also enhance the quality of the decision and this process can contribute to capacity building. This improvement, however, will depend upon the effective participation of all affected groups, the accessibility and provision of all relevant information on the subject-matter, and the quality of the deliberations.

The Guidelines recommend a form of participation that goes beyond the provision of information. Guideline 16.2 clearly states that the States should consult at all stages the persons who are likely to be affected by the decision. A purpose of these consultations is to gather information about possible alternatives and strategies to minimise disruptions. The fact that the Guidelines use the term “consult” does not imply that they refer to the concept that has been described above. Consultations in terms of the Guidelines rather have distinct deliberative elements. The reason is that Guideline 16.2 provides that these consultations should be conducted in accordance with the principles of the Guidelines. Guideline 3B.6 that establishes consultation and participation as leading principles recommends that the States engage with, and seek the support of, the people who, having legitimate tenure rights, could be affected. Furthermore, the States should respond to contributions of participants. These recommendations indicate that the contact between the States and the people should go beyond the opportunity for the people to express their view. The Guidelines suggest that the States and the people should discuss the matter thoroughly and, where possible, come to a mutual understanding. Interestingly, the Guidelines only seem to refer to interactions between the State and the participants, but not to deliberations among the participants. This would limit the effects of deliberations. It remains to be seen whether, given scarce resources, it is feasible for the States to implement this Guideline.

VIII. The Obligation to Balance Interests and the Obligation to Give Reasons

An obligation of the competent authority to balance the interests of the participants and an obligation to give reasons for their decisions can guarantee the quality of the procedure and ensure that participation can actually achieve its goals. The obligation to balance interests, which is, for instance, laid down in Art. 3:4(1) of the Dutch General Administrative Law Act,

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61 Bekkers & Edwards 2007, p. 51; see fn 54.
64 Bekkers & Edwards 2007, p. 51.
forces the competent authority to consider the opinions and interests of the participants.66 In particular, it cannot confine itself to adopting the point of view of one participant.67 Ideally, this obligation will make the competent authority reflect on their own point of view. The obligation to give reasons also performs this function and may ensure that the obligation to balance interests is effective.68 Under Dutch law, for instance, the justification of the decision must show that the competent authority has actually balanced the interests of the participants.69 This entails that the competent authority not only has to refer to the relevant statutory provisions in the justification, but also has to respond to representations made by participants.70 The obligation to furnish reasons also performs other functions. The reasons of a decision can provide the basis for judicial review.71 Moreover, if the decision is properly justified in comprehensible language, the people will be more likely to accept the decision.72

The Guidelines largely remain silent on this point. Guideline 21.4, which recommends that decisions on tenure conflicts be in writing and based upon an objective reasoning, is not applicable to expropriation procedures. But the obligation to furnish reason is implied by other Guidelines. Guideline 3B.9 postulates accountability as a leading principle of the Guidelines. Guideline 6.9 states that the States should guarantee the access of the people to judicial review. It is obvious that the people can only hold the competent authority accountable and that a judicial review is only possible if the competent authority provides reasons for their decision.73 That said, an explicit provision on a justification is nowhere to be found.

IX. Conclusion
The Voluntary Guidelines on the Responsible Governance of Tenure recommend a legal framework for transparent and participatory expropriation procedures. Based upon the acknowledgement that people are not equally gifted with the ability to participate in administrative procedures and that some cannot effectively participate without assistance, the Guidelines provide that the States should empower the people to participate. The States should actively provide information on the procedure and on the subject-matter instead of

68 Hoexter 2012, p. 464.
69 Kluwer Sociale Zaken (online commentary), Art. 3:46 Awb, No. 1.2.
70 Art. 3:47(2) Awb demands references to applicable statutory provisions. Art. 3:46 Awb stipulates that the decision has to be based upon a solid justification. See: Damen et al. 2009, p. 433.
71 Hoexter 2012, pp. 463 f.
72 Hoexter 2012, p. 463.
73 Hoexter 2012, pp. 463 f.
merely granting access to it. Information on the subject-matter should be provided to all persons who are likely to be affected by the decision to expropriate. The access to the procedure should be restricted to those persons. These recommendations are choices between conflicting priorities, particularly the maximisation of meaningful input from the people and the maintaining of the functionality of the authorities. The persons who have access to the procedure ought not only to have the opportunity to express their view on the subject-matter, but also to engage in deliberations with the competent authority. If the States succeed in empowering the people to participate, in having experts assist in the procedure, particularly the deliberations, and in ensuring a fair procedure, the expropriation procedure is likely to contribute to the legitimacy and the quality of the decision to expropriate. Moreover, it will give the people an opportunity to control the authority and will enhance the capacity of the people to participate.

The Guidelines partially answer to the need to concretise the term “procedural fairness” with regard to participation in expropriation procedures. In South African and Namibian administrative law, for instance, procedural fairness entails an opportunity for affected persons to participate in the procedure and to influence the decision of the expropriation authority. The Voluntary Guidelines specify what is needed in order for the people, both privileged and disadvantaged, to be able to participate in the expropriation procedure and to influence the expropriation decision. Furthermore, the Guidelines base their requirements upon the latest insights from practice. The Guidelines can thus assist the States in designing effective expropriation procedures that comply with the state of the art. They also have an added value. Namibian expropriation law, for instance, does not provide for measures that empower disadvantaged people, such as the illiterate and the uneducated, to participate effectively, whereas the Guidelines recommend taking such measures.

That said, there remains a lot to be done. The Guidelines contain rather abstract recommendations. Therefore, they have to be concretised. For instance, it is not clear what form the deliberations should take and what safeguards should be in place to ensure that participation actually benefits the process. Preferably, the concretisations must be country-specific so as to ensure that the rules answer to the different needs of the people in each country.

Furthermore, the FAO and its partners must promote the implementation of the Guidelines. The dissemination of the Guidelines has begun. Regional awareness workshops were held in

74 See Guidelines, p. V. The Guidelines mention supplementary guidelines on technical details.
2013 and awareness workshops at national level are held in 2014. Furthermore, the FAO encourages stakeholders to form partnerships and enhance their capacity to improve tenure governance sustainably. These partnerships are meant to identify flaws in the current tenure regimes and press for changes. These flaws can then be remedied through, for instance, constitution conform interpretation. Past experience shows that the implementation of such soft law instrument can be successful. For instance, many States have integrated into their policies and legislation the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security. Another challenge will be to monitor progress once the States have started to implement the Guidelines.

The concretisation and the monitoring of the implementation pose a lot of research challenges. There are three research objects, the Guidelines, the regulatory frameworks of States and what is actually happening on the ground. Concerning the Guidelines, legal and social researchers will have to concretise the Guidelines jointly with the communities. These dialogues between researchers and communities can be inspired by best practice examples from other countries that the researchers have gathered. The researcher could then, for instance, make check lists for a specific state or a specific community. This would facilitate the monitoring because it would be clear what a transparent and participatory procedure would mean in a specific setting. Concerning the regulatory framework, legal researchers could examine it. Concerning the reality on the ground, social researchers could regularly examine whether or not the regulatory framework is properly implemented on the ground and whether it has unintended effects. The researchers could then jointly write a country report. The check lists would then regularly be used to find out whether the regulatory framework as it is implemented in practice complies with the Guidelines. The constant monitoring of the implementation of the Guidelines on the basis of these data paves the long road to fair expropriation procedures.

76 Arial et al. 2012, p. 70 and 72.
77 Arial et al. 2012, p. 72 f.
78 See: Arial et al. 2012, p. 73.
79 Arial et al. 2012, p. 72 f.
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