

Land Resource Compensation

A Pacific Regional Symposium

Final report for AusAID – 7 September 2011

Hosted by the UTS: Asia-Pacific Centre for Complex Real Property Rights in association with the International Academic Association for Planning, Law and Property Rights

11-12 July 2011, University of Technology, Sydney

APCCRPR

 UNIVERSITY OF
TECHNOLOGY SYDNEY



Planning Law and Property Rights
An international academic association



Australian Government
AusAID

With funding assistance from the AusAID
International Seminar Support Scheme

This document comprises the final report from the Land Resource Compensation symposium and is prepared in accordance with the AusAID ISSS template.

Introduction:

- Event Title:

Land Resource Compensation – a Pacific Regional Symposium hosted by UTS: Asia-Pacific Centre for Complex Real Property Rights in association with the International Academic Association for Planning, Law and Property Rights

- Location/Venue:

University of Technology, Sydney, 702-730 Harris Street, Ultimo, NSW 2007

- Duration:

Monday 11 July – Tuesday 12 July, 2011

- A brief paragraph about the Organisers:

The symposium was organised and facilitated by Professor Spike Boydell, Foundation Director of the UTS: Asia-Pacific Centre for Complex Real Property Rights, a centre based at the University of Technology, Sydney. The **UTS: Asia-Pacific Centre for Complex Real Property Rights** was established in 2009. We acknowledge both the legal and economic schools of thought on property rights, but realise that the multiple interests, factors, stakeholders, and relationships in many property rights situations are often too complex to be resolved by one discipline in isolation. Instead, we offer a truly transdisciplinary approach to addressing complex real property rights. We achieve this by developing productive relationships investigating property rights at the interface of law, land and the political economy, urban planning, human geography and sociology. These dynamic relationships continually force a team of discipline specialists to think outside of the box, beyond their comfort zones, to deconstruct debate and tackle contemporary property rights conundrums.

Current UTS: APCCRPR research areas:

- Property rights in land and buildings
- Politics and economy of emerging property rights
- Urban planning and compensation
- Leasehold issues, including expiration and renewal
- Institutional arrangements and land trusts
- The financial management of inalienable customary land in Australia and the South Pacific
- The challenge of common property in urbanised areas

See: www.dab.uts.edu.au/apccrpr/

The **International Academic Association for Planning, Law and Property Rights** was established in 2007, and its functions include:

- To serve as an academic peer group for research in the field. Usually, faculty members in planning schools who do research in this area lack a large enough peer group with whom to discuss their research and obtain useful comments. The association convene together the people in the various countries who do research on the relationship between planning and law, thus creating a good-size peer group so necessary for any good academic exchange.
- To promote research with a cross-national comparative perspective so as to enable exchange of knowledge that is so lacking in the current state of research.
- To exchange approaches and methods in the teaching of planning law to planning students so as to improve this essential area.
- To support young academics researching in the fields of planning, law, and property rights

See: www.plpr-association.org

- Aims and Objectives of the event:

AIMS - With a focus on land management, this seminar provided a forum to debate key issues of land compensation related to mineral exploration, indigenous dispossession and emergent property rights relating to climate adaptation (e.g. carbon and water).

OBJECTIVES -

- i. The identification of best practice of Small Island Developing States in Melanesia facing the Millennium Development Goals in relation to the four key themes of the seminar as listed above.
- ii. Expanded knowledge pertaining to good governance practices in the management of mineral exploration on land in their jurisdictions and strengthened land professional development in Melanesia.
- iii. The acquisition of information and materials on how best the land sector can face the challenges presented by climate change and mineral exploration and facilitate equity in access to land and marine resources.
- iv. The development a collaborative learning resource from the symposium aimed at developing or improving the administration and management of land and natural resources in relation to climate change, access to land, and good governance.

- Why was the event held?

The administration and management of land in the Pacific is often very challenging, requiring rational, equitable and transparent policies; and adequate capacities to administer and manage lands effectively and efficiently. This special symposium hosted by the UTS: APCCRPR aimed to support policy makers, land administrators, land professionals and other stakeholders in addressing the above challenges by looking how best to operationalise guidelines and policy recommendations when confronted with plural registers and expectation at the nexus of development and custom. Using five pre-read papers as prompts, the issues were contextualised to the challenges confronting best practice in the areas of good governance in the administration and management of land for the countries in Melanesia. This related to adaptation to climate change;

improvement of access to land, coastal and marine resources and their resilience; and provision of governance in land tenure and administration.

Delegates:

- How many people (approximately in total) attended the event?

28.

- What groups/organisations were they from?

Government Ministries, Lands Department, Chief Valuers/Valuer Generals, Academics (property theorists, valuers, planners, economists, lawyers).

- What were the final numbers funded under ISSS? 7 – see table below

Title	Forename	Surname	Country	Position
Mr	Pene	Baleinabuli	Fiji Islands	Deputy Secretary, Ministry of Lands and Mineral Resources, Fiji
Mr	Richard	Dick	Vanuatu	Senior Valuer, Department of Lands, Vanuatu
Mr	Joseph	Foukona	Solomon Islands	School of Law, University of the South Pacific
Ms	Flora	Kwapena	Papua New Guinea	Valuer General, Department of Lands and Physical Planning, PNG
Mr	Paula	Raqeukai	Fiji Islands	School of Land Management and Development, University of the South Pacific
Mr	Menzies	Samuel	Vanuatu	Valuer General, Vanuatu
Mr	Stanley	Waleanisia	Solomon Islands	Under-Secretary, Ministry of Lands and Housing, Solomon Islands

- List their name, organisation and their country.

See table below

Land Resource Compensation - A Pacific Regional Symposium, UTS: APCCRPR / IAAPLPR, University of Technology Sydney, 11-12 July 2011

List of Delegates

	Title	Forename	Surname	Country	Email Address	Position
1	Professor	Rachelle	Alterman	Israel	alterman@technion.ac.il	Founder IAAPLPR & David Azrieli Chair in Architecture/Town Planning, Technion University, Israel
2	Mr	Pene	Baleinabuli	Fiji Islands	pene.baleinabuli@govnet.gov.fj	Deputy Secretary, Ministry of Lands and Mineral Resources, Fiji
3	Professor	Spike	Boydell	Australia	Spike.Boydell@uts.edu.au	Director UTS: APCCRPR & Chair of the Built Environment UTS
4	Mr	Tony	Burns	Australia	TBurns@landequity.com.au	Managing Director, Land Equity International
5	Ms	Diane	Butt	Australia	butt_diane@hotmail.com	
6	Mr	Richard	Dick	Vanuatu	richardtenator@gmail.com	Senior Valuer, Department of Lands, Vanuatu
7	Ms	Kate	Fairlie	Australia	Kate.Fairlie@uts.edu.au	UTS: APCCRPR
8	Mr	Joseph	Foukona	Solomon Islands	foukona_j@VANUATU.USP.AC.FJ	School of Law, University of the South Pacific
9	Dr	Sumita	Ghosh	Australia	Sumita.Ghosh@uts.edu.au	School of the Built Environment, UTS
10	Dr	Leonie	Janssen-Jansen	Netherlands	leonie@janssenjansen.nl	President, IAAPLPR & Researcher, University of Amsterdam
11	Associate Professor	Andrew	Kelly	Australia	andrew_kelly@uow.edu.au	School of Law, University of Wollongong
12	Ms	Flora	Kwapena	Papua New Guinea	kwapenaf@lands.gov.pg	Valuer General, Department of Lands and Physical Planning, PNG
13	Professor	Greg	Lloyd	UK	mg.lloyd@ulster.ac.uk	Head, School of the Built Environment, University of Ulster
14	Mr	Vincent	Mangioni	Australia	Vincent.Mangioni@uts.edu.au	UTS: APCCRPR
15	Mr	Mike	McDermott	Australia	mikemackd@hotmail.com	HTW Valuers Darwin & UTS: APCCRPR
16	Dr	Mark	McMillan	Australia	Mark.McMillan@uts.edu.au	UTS: APCCRPR & Jumbunna Indigenous House of Learning
17	Mr	Solo	Nata	Fiji Islands	snata@titb.com.fj	Deputy General Manager, iTaukei Land Trust Board
18	Mr	Franklin	Obeng-Odoom	Ghana	odoomj6@yahoo.co.uk	Political Economy, University of Sydney
19	Professor	Deborah	Peel	UK	d.peel@ulster.ac.uk	Professor of Planning Research and Scholarship, University of Ulster
20	Mr	Paula	Raquekai	Fiji Islands	raqekai_p@usp.ac.fj	School of Land Management and Development, University of the South Pacific
21	Mr	Menzies	Samuel	Vanuatu	msamuel@vanuatu.gov.vu	Valuer General, Vanuatu
22	Associate Professor	Glen	Searle	Australia	g.searle@uq.edu.au	Program Director, Planning, School of Geography, Planning and Environmental Management, University of Queensland
23	Professor	John	Sheehan	Australia	John.Sheehan@uts.edu.au	Deputy Director UTS: APCCRPR & Pacific Rim Rep IAAPLPR
24	Ms	William	Singh	Fiji Islands	william.singh@govnet.gov.fj	Chief Valuer, Ministry of Lands and Natural Resources, Fiji
25	Associate Professor	Garrick	Small	Australia	g.small@cqu.edu.au	Faculty of Arts, Business, Informatics & Education, Central Queensland University
26	Mr	Stanley	Waleanisia	Solomon Islands	stanley.waleanisia@gmail.com	Under-Secretary, Ministry of Lands and Housing, Solomon Islands
27	Ms	Nicole	Watson	Australia	Nicole.Watson@uts.edu.au	UTS: APCCRPR & Jumbunna Indigenous House of Learning
28	Associate Professor	Ian	Wight	Canada	ianwight@shaw.ca	Department of City Planning, Faculty of Architecture, University of Manitoba

Content:

- What was the theme (if any) of the event? Please attach a copy of the program.

The theme of the symposium was Land Resource Compensation. A copy of the program and papers is attached.

- What topics were covered?

There were five key themes: Takings, Emergent Property Rights, Indigenous Dispossession, Compensation Models, Place-making & Well-being.

- Which presenters spoke and what topics did they speak about?

No papers were presented at the symposium. Instead, the written papers were made available to attendees in advance of the symposium and were taken as read by the participants. Two lead discussants were invited to facilitate the discussion on each paper (not the authors) and they were given the opportunity to respond in detail, for around 15 minutes each, contextualising the authors written paper to their own expertise before a wider discussion for some 45 minutes with contributions and input from all delegates, at which point the author(s) were given 15 minutes to sum up, synthesise the feedback and add to the discussion.

Lead Discussants

- Paper # 1: Takings - Stanley Waleanisia & Franklin Obeng-Odoo
- Paper # 2: Emergent Property Rights - Greg Lloyd & Pene Baleinabuli
- Paper # 3: Indigenous Dispossession - Mark McMillan & Flora Kwapena
- Paper # 4: Compensation Models - Garrick Small & Menzies Samuel
- Paper # 5: Place-making & Well-being - Mike McDermott & Joe Foukona

The approach provided for a far more engaged learning and knowledge exchange for all concerned (than multiples of disconnected papers, each with 15 minutes on PowerPoint).

- Highlight keynote speakers and their main talking points.

The symposium drew on the expertise of six thought leaders in the field, who prepared five inter-related papers for discussion – Professor Rachelle Alterman (Takings), Professor John Sheehan (Emergent Property Rights), Professor Oren Yiftachel (Indigenous Dispossession), Professor Spike Boydell & Ulai Baya (Compensation Models), and Associate Professor Ian Wight (Place-making & Well-being).

- Elaborate on the stated aims and outcomes as outlined in the application with particular reference to the ISSS funded participants – were they all met?

The identification of best practice of Small Island Developing States in Melanesia facing the Millennium Development Goals in relation to the four key themes of the seminar as listed above. Outcome (i) was achieved through the particular approach taken in the symposium, so that rather than merely listening the nominated participants were forced to reflect on, engage with, and articulate responses to the ideas being shared from their respective Melanesian contexts.

Expanded knowledge pertaining to good governance practices in the management of mineral exploration on land in their jurisdictions and strengthened land professional development in Melanesia. Outcome (ii) builds on outcome (i) and served to build

capacity of those Melanesian land professionals, government officers and NGOs tasked with leading negotiations over the sequestration or mineral related land use on (or under) customary land.

The acquisition of information and materials on how best the land sector can face the challenges presented by climate change and mineral exploration and facilitate equity in access to land and marine resources. Outcome (iii) increased awareness of the good governance guidelines (developed by AusAID, the Pacific Island Forum Secretariat, the World Bank and the UN FAO) and allowed for discussion and engagement at the operational level.

The development a collaborative learning resource from the symposium aimed at developing or improving the administration and management of land and natural resources in relation to climate change, access to land, and good governance. Outcome (iv) ensured that the benefits of the symposium extended beyond the participants, and that the resources are made more widely available.

- Were there any additional outcomes achieved during the event (with particular reference to the ISSS funded participants) that were unexpected (ie) not known at the time of submitting the application?

None specific to ISSS participants, although it is worth noting that as a direct consequence of the participation of the Deputy Permanent Secretary for Lands (Pene Baleinabuli) the Fiji Public Service Commission funded the participation of the Chief Valuer, William Singh, at the symposium. Likewise, the i Taukei Land Trust Board funded the participation of the Deputy General Manager (Operations), Solo Nata. This spin-off effect of the ISSS funding was a very positive outcome, as both William Singh and Solo Nata made a significant contribution to the symposium.

Future:

- Where to from here?

The need to resolve equitable land resource compensation is firmly on the agenda of governments in the region. The issue of land resource compensation is central to the agenda of the new O'Neill-Namah government in PNG.

- What new initiatives/ideas were developed/are to be developed as a result of the event?

The symposium discussed at length the application of a hybrid land resource compensation model (the Boydell & Baya model) that engages synergistic value (marriage value) to recognise the synergy between the interests of the customary landowners and the economic potential of the prospective tenants interest.

- Will there be another event in future – When? Where?

A related symposium is being planned by the Fiji Government for later this year. There was demand from symposium participants to run a similar event in 2012/13, either as a

UTS: APCCRPR initiative or in collaboration with the IAAPLPR as a regional meeting. Logistically, this will be held in Sydney or Suva (building on existing collaborations with the University of the South Pacific). Meanwhile, the UTS: APCCRPR is providing ongoing support to the Melanesian participants through its research agenda.

The UTS: APCCRPR has been approached by a number of countries about the development of in-country training that deals with the specific legal, cultural, economic and political framework of land resource compensation specificity from a transdisciplinary perspective (for example, to bring together valuers, land managers and spatial specialists from lands departments with their counterparts from environment, agriculture, forestry, fisheries, mining etc.) so that a holistic approach can be engaged in dealing with land resource issues and the associated compensation dimension. The UTS: APCCRPR will work with its network in the region to develop bi-lateral proposals that could be supported by the ISSS arrangement.

ISSS Funded Delegates:

- How did each of the AusAID funded delegates participate in the event?

Five of the AusAID funded delegates took the role of lead discussants, and given the focus on five pre-read papers all delegates were able to share their particular expertise and have their ideas heard within the format of the symposium.

- How will the event benefit the work of each delegate in their own country?

Each of the AusAID funded delegates' deal with land resource compensation issues on a day-to-day basis. The feedback received from the delegates that the structure of the forum had allowed them to engage deeply with the issues being discussed. By pre-reading the five papers, the delegates were able to clarify issues that they were unclear about and build their capacity in the area of land resource compensation.

- Were there certain topics or information sessions that they expected to covered but were not?

None were raised.

- What do they intend to do with the information gained from attending the event and how will they disseminate this new information back home?

This was indicates as two fold, with internal meetings with their respective colleagues to socialise the learning outcomes, together with policy influence and advice.

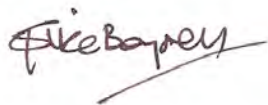
General:

- What would you change or do differently next time?

Request funding for administrative support. Whilst there were significant benefits in bringing 7 AusAID funded Melanesian participants to the event, the logistics (flight, accommodation, per diem, contact/management such as visa support letters, refreshments, paperwork, room organisation etc.) fell on Professor Spike Boydell, with the paperwork/finances being processed by the Faculty in conjunction with the contracts department of UTS Research and Innovation Office. Whilst this micro-management approach from a senior academic had a positive impact on the success of the event, it represented a significant financial contribution from the Faculty and University.

- Any concluding comments...

The symposium was a success. This success was largely attributable to the engagement and participation of the Melanesian delegates (7 funded under the AusAID ISSS and 2 funded by the Fiji Public Service Commission and the iTaukei Land Trust Board respectively). The support of AusAID was critical to the participation of seven of the delegates and UTS acknowledges this welcome collaboration between AusAID and the UTS: Asia-Pacific Centre for Complex Real Property Rights.



7 September 2011

Professor Spike Boydell PhD FRICS FAPI FIVEM
Director, UTS: Asia-Pacific Centre for Complex Real Property Rights
Professor of the Built Environment, Faculty of Design Architecture & Building, University of Technology, Sydney
Distinguished Visitor, School of Law, University of the South Pacific
Adjunct Professor, School of Land Management and Development, University of the South Pacific
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11-12 July 2011, University of Technology, Sydney

APCCRPR



Planning Law and Property Rights
An international academic association



Australian Government
AusAID

With funding assistance from the AusAID
International Seminar Support Scheme

Venue:

The DAB 'Research Seminar Space' (Room 06.06.38), Level 6, UTS Faculty of Design, Architecture and Building (UTS Building 6, the Peter Johnson Building), University of Technology, Sydney, 702-730 Harris Street, Ultimo, Sydney.

The DAB Building is located between Broadway and the ABC building on Harris Street. For those staying in the Mercure Hotel, it is located just by the junction of George Street/Broadway and Harris Street (see location map on following page).

DAB can be entered from Harris Street or the Ultimo Pedestrian Walkway. The Research Seminar Space is on the sixth floor, and is a glazed fronted room to the left as you come up the stairs (on the opposite side of the atrium to the lifts). There will be signage around on the day.

Agenda:

Monday 11 July 2011	
8:45 am	Arrival/Registration
9:00 am	Welcome to Country & Introductions
9:20 am	Discussion on Paper 1 - Takings
10:40 am	Morning Tea/Coffee
11:10 am	Discussion on Paper 2 – Emergent Property Rights
12:45 pm	Lunch
1:45 pm	Discussion on Paper 3 – Indigenous Dispossession
3:15 pm	Afternoon Tea
3:40 pm	Discussion on Paper 4 – Equitable Compensation Models
5:10 pm	Wrap up of Day 1
5:30 pm	Drinks
7:00 pm	Dinner (pay-as-you-go) at local restaurant
Tuesday 12 July 2011	
8:45 am	Arrival
9:00 am	Discussion on Paper 5 – Place-making and Well-being
10:30 am	Morning Tea/Coffee
11:00 am	Workshop Issues / Idea
12:50 pm	Close of Symposium
1:00 pm	Lunch

Background:

With a focus on land management, this symposium will provide a forum to debate key issues of land acquisition and land compensation related to mineral exploration, indigenous dispossession and emergent property rights relating to climate adaptation. On the second day there will be an integral workshop to contextualise and build on the ideas discussed during the first day.

The symposium aims to support policy makers, land administrators, land professionals, academics and other stakeholders in addressing the above challenges by looking at how to operationalise guidelines and policy recommendations when confronted with plural registers and expectations at the nexus of development and custom.

We are taking the five papers (attached herewith) as read. The papers are being circulated in advance of the Symposium so that all participants can familiarise themselves with them, reflect on them, and come prepared to discuss the papers from their own particular experience and locational context. There will be no PowerPoint presentations. The authors of each paper will be present, but they will not be presenting their ideas. Instead, the participants will start the discussion on each paper and the authors will have the opportunity to summarise the feedback and ideas raised at the end of each session.

Day 1 (Monday 11 July, 2011)

Four key papers have been invited that tackle these themes from an international perspective. These papers will not be presented at the symposium, rather the intention is that the written papers will be made available to attendees two weeks in advance of the symposium and will be taken as read by the participants. Two lead discussants will be invited to facilitate the discussion on each paper (not the authors) and they will be given the opportunity to respond in detail, for say 15 minutes each, contextualising the authors written paper to their own expertise before there is a wider discussion for some 45 minutes, at which point the author(s) is given 15 minutes to sum up, synthesise the feedback and add to the discussion. This approach provides for a far more engaged learning and knowledge exchange for all concerned. Authors and discussants will be engaged on the basis that the sessions will be recorded and podcasts available online after the event.

Day 2 (Tuesday 12 July, 2011)

Building on the activities of the first day, attendees will participate in an integral workshop on ethos making and integrally informed journaling to assist professional decision-making in land and resource management issues.

Organisation:

The Symposium is being hosted by the UTS: Asia Pacific Centre for Complex Real Property Rights in association with the International Academic Association for Planning, Law and Property Rights. AusAID, the donor arm of the Australian Federal Government, has kindly supported the participation of a number of Melanesian land specialists (including Valuer General's, Deputy Permanent Secretaries of Land, and academics) through the International Seminar Support Scheme.

The [UTS: Asia-Pacific Centre for Complex Real Property Rights](#) was established in 2009. We acknowledge both the legal and economic schools of thought on property

rights, but realise that the multiple interests, factors, stakeholders, and relationships in many property rights situations are often too complex to be resolved by one discipline in isolation. Instead, we offer a truly transdisciplinary approach to addressing complex real property rights. We achieve this by developing productive relationships investigating property rights at the interface of law, land and the political economy, urban planning, human geography and sociology. These dynamic relationships continually force a team of discipline specialists to think outside of the box, beyond their comfort zones, to deconstruct debate and tackle contemporary property rights conundrums.

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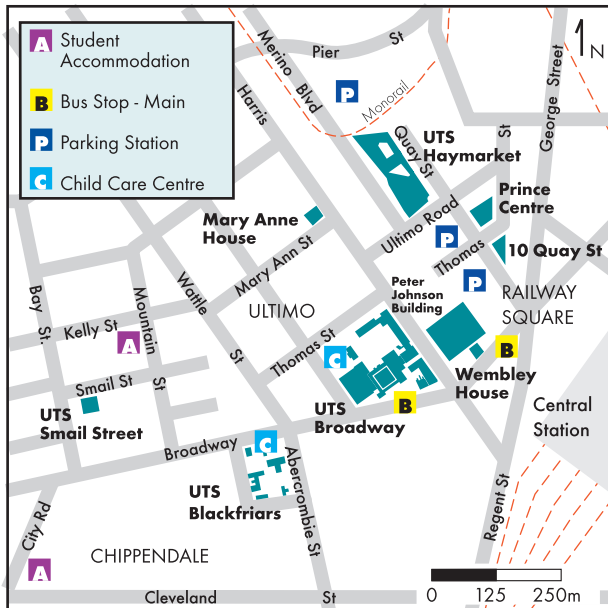
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CITY CAMPUS

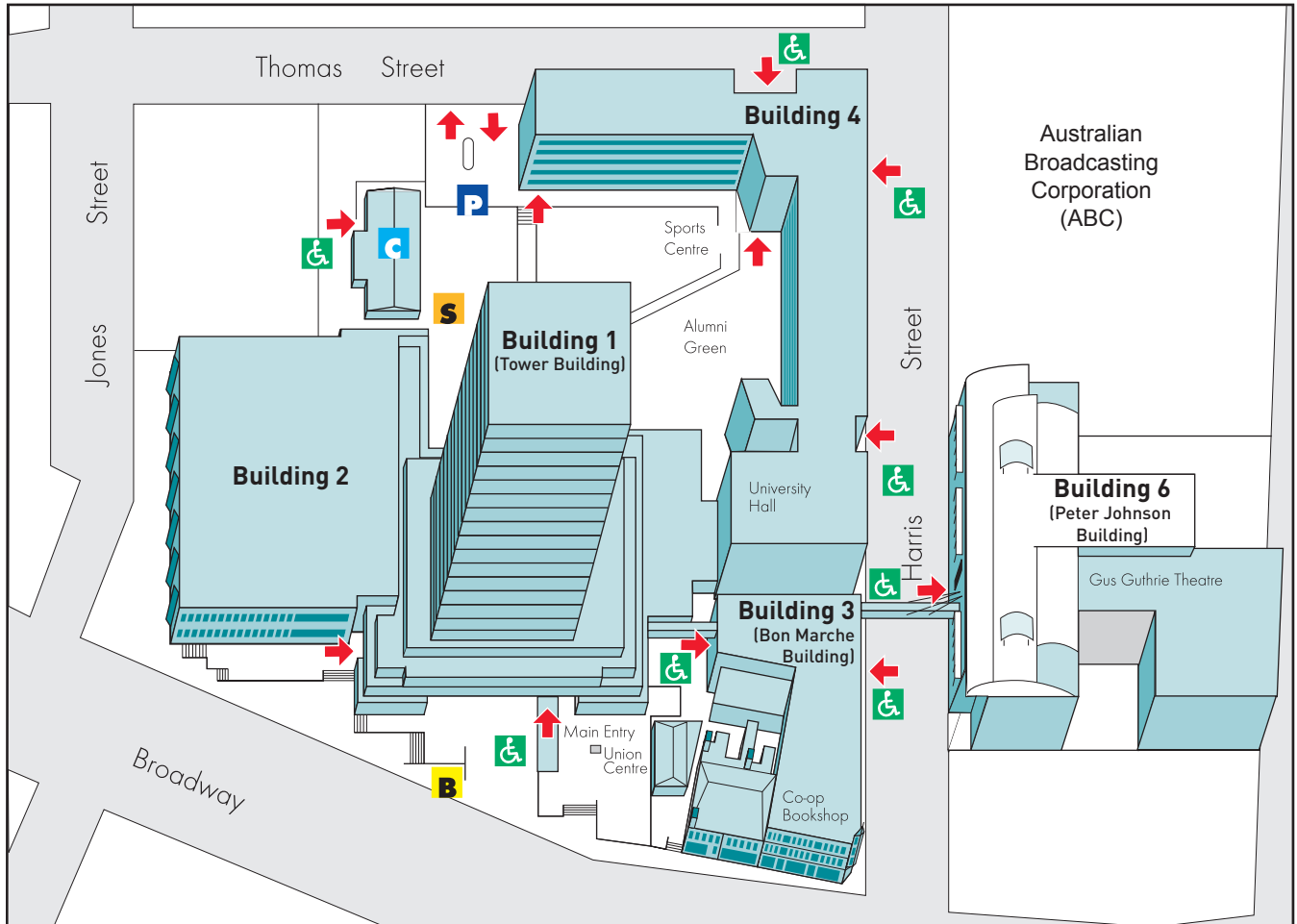


The Faculty of DAB is located at 702-730 Harris Street, Sydney NSW on the Broadway site of the City Campus of the University of Technology, Sydney.

The Campus is just minutes walk from the City's central bus and train interchange providing services to:

- ♦ Sydney Harbour 15 minutes to the north
- ♦ our city beaches 20 minutes to the east
- ♦ and the Sydney International Airport, Kingsford Smith, 20 minutes south.

BROADWAY SITE



Takings

by Rachelle Alterman

Prof. Rachelle Alterman is the David Azrieli Chair in Architecture/Town Planning, Technion – Israel Institute of Technology, and Founder of the International Academic Associate on Planning, Law and Property Rights.

A version of this paper has been published as ‘The U.S. Regulatory Takings Debate through and International Lens’ in The Urban Lawyer, 42–4/43–1, Fall 2010 / Winter 2011, pp.331–355.

The United States leads the world in the complexity of its regulatory takings law, the amount of academic writing devoted to the topic, and the intensity of the surrounding public debate. This is one of the (ancillary) findings of a large-scale comparative study of regulatory takings law. A look from the “outside” may shed light on American takings law and the “property rights” debate. An international looking glass can allow both sides in this debate either to find alternative models to support their own position (with appropriate adjustments) or to develop middle-of-the road approaches towards a rapprochement in this long- raging contest.

In every country where land use regulations and development controls operate (the vast majority of countries today), they change the economic value of real property. The question addressed here focuses on the downwards effect—what Americans call “regulatory takings.” Do landowners have a right to claim compensation or some other remedies from the planning authorities? This topic addresses an inherent raw nerve of planning law and practice, bearing deep economic, social and ethical implications. However, not in every country does the issue generate the same intensity of legal and public debate as it does in the United States.

This article draws on the findings of comparative research encompassing thirteen countries around the world.¹ Readers of this Festschrift, who are acquainted with American takings law, will be able to view it from this new perspective. A comparative perspective can help to create a sense of scale and proportionality that conventional domestic legal analysis cannot offer.

I. The Dearth of Systematic Comparative Research on Regulatory Takings

Given the near-universality of the takings issue, one might have thought that the law of regulatory takings would be a prime topic for cross- national research. Surprisingly, an international survey of academic literature reports little comparative research on this topic.² The research project on which this paper is based is, to the best of my knowledge, the first large-scale comparative research that focuses specifically on regulatory takings. Interestingly, most of the other contributions, as well as the present one, were all published in the United States.

The seminal theoretical and comparative contribution that focuses directly on regulatory takings (as well as on the converse—value capture) covers five English-speaking countries with advanced economies (the UK, Canada, Australia, New Zealand, and the United States) and addresses both the upwards and the downwards effects of regulations on land values.³ The introductory chapter provides a now-classic framing of the issue, and the rest of the book analyzes selected instruments designed either to tame the negative impact of planning regulation or to capture the windfalls and redistribute them. A 2006 comparative work by Alexander presents an in-depth study of constitutional property rights in three countries: the United States,

¹ The detailed research findings and the detailed citation of legal sources are presented in my recently published book, Rachelle Alterman et al., *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (2010).

² The survey of literature covers publications in the English language and partially in French as well.

³ *Windfalls for Wipeouts: Land Value Recapture and Compensation* (Donald G. Hagman & Dean J. Misczynski ed., 1978).

Germany, and South Africa, with some discussion also devoted to Canada.⁴ Kotaka and Callies' edited volume (2002) is a comparative study covering ten Asian-Pacific countries that reports on expropriation (eminent domain) law and, for some of the countries, also on regulatory-takings law.⁵ A 2007 law review article analyzes three English-speaking countries: the United States, Canada, and Australia.⁶ Finally, Kushner's book is a collection of excerpts from previously-published papers on a wide variety of planning-law topics, among them two brief items on regulatory takings outside the United States—one on Germany, and one comparing U.S. and Swiss law.⁷

Considering Europe's quest for a "single market" and the importance of the free movement of capital—including real estate investments—one would have expected that European scholars would study the similarities and differences in regulatory takings and compensation laws across Europe. Yet, there has been very little comparative research on regulatory takings among European countries.⁸ This is not because European countries have similar laws on regulatory takings (they don't); it is simply because in most European countries the issue is perceived as not very salient.

II. The Jurisdictions Selected and the Research Method

Thirteen countries were selected for comparative analysis. A large and varied sample of countries was necessary in order to avoid a pre-determined focus on a particular model or on presumed convergences. In the absence of prior legal or social-science theory about hypothesized similarities and differences in regulatory takings laws, there was no room for any statistically valid random sampling of countries. Instead, a wide spectrum of countries was studied in order to span different approaches to regulatory takings.⁹

The common denominator for all countries chosen is a democratic system of

4 Gregory S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006). Alexander's book focuses only on constitutional law, while in most countries regulatory takings law is largely governed by statutory law. This probably explains why Alexander's book does not focus on the law of regulatory takings, except in the discussion of the United States. See also Alterman, *supra* note 1, at 75-89.

5 *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (Tsuyoshi Kotaka & David L. Callies eds., 2002).

6 Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 *Brook. J. Int'l L.* 345 (2007).

7 James A. Kushner, *Comparative Urban Planning Law* 163-96 (2003). Chapter seven is devoted to regulatory takings, but it is not a systematic, comparative analysis. The countries covered differ widely from topic to topic, according to the availability of published papers. The papers compare some aspect of American takings law with Italian, Swiss, German, or international law.

8 The major comparative project on planning law and institutions commissioned by the European Commission (1997-2000), hardly addresses regulatory takings. European Union, *The EU Compendium of Spatial Planning Systems and Policies* (1997, 2000). Schmidt-Eischstaedt's 1995 book is another important comparative analysis of planning laws, but it too does not cover regulatory takings. See Gerd Schmidt-Eichstaedt, *Land Use Planning and Building Permission in the European Union* (1995).

9 My research was also confined to countries where I had located suitable scholars in the planning law field.

government, a reasonably working and accountable public administration, and an advanced (or fast-emerging) economy.¹⁰ All the countries selected are members of the Organization of Economic Development and Cooperation and the sample represented approximately 40% of all OECD members. The state of Oregon was added, in addition to the federal United States due to its unique story, so in total fourteen jurisdictions were analyzed.

Beyond the predetermined common denominator, a variety of countries were included in the sample based on four variables: (1) representation of both major, Western families of law (common and civil law); (2) global geographic location; (3) sovereignty system (unitary or federal); and (4) cultural-language groups affiliation. To represent the two major legal traditions, the sample includes five common-law countries: the UK, Canada, Australia, the United States, and Israel¹¹ and eight civil-law countries: Netherlands, France, Sweden, Finland, Germany, Austria, Greece, and Poland. Because Europe encompasses the majority of the world's democratic, advanced-economy countries, nine of the thirteen countries are part of Europe. The sample includes both federal countries (the United States, Canada, Germany, Austria, and Australia)¹² and unitary ones (the other eight). There are also several cultural-language groupings (for example, the United States and Canada, or all four English speaking countries; Germany and Austria, Sweden and Finland, and to some extent also the Netherlands, Germany and Sweden). Some countries are culturally stand-alones: France, Greece, Poland and Israel.

Analysis of the laws of thirteen countries is beyond the capacity of a single researcher. There are also language barriers, for example—none of the non-English speaking countries in the sample offers translations into English of court decisions in the planning area and only a few translated their planning legislation into English. Therefore, for each of the candidate countries, leading experts on planning law provided a detailed analysis of their country's laws and practices on regulatory takings. To enable rigorous comparative analysis, a set of detailed guidelines were developed and tested based on a series of scenarios. The challenge of bringing the parallel analysis of all the countries onto a common platform was not easy. The details of the takings law in each country are complex and nuanced, and require in-depth knowledge of each country's law, jurisprudence and practices. Often, what a particular author assumed to be easily understandable to readers from other countries was in fact quite opaque and at times even of opposite meaning. We worked hard to

10 Developing countries were not included in this study because planning laws in most of those countries are often bypassed due to corruption or widespread noncompliance. Regulatory takings law, if it exists, is likely to be almost dormant (no claims filed). More onerous issues, such as outright condemnation of property, are in the forefront.

11 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 Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, *Comparative Legal Traditions: Text, Materials, and Cases on Western Law* 948, 976-82 (2007) (discussing mixed jurisdictions in general, and 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.

12 In the United States, Canada, and Germany, the federal level is the most important for regulatory takings law. Therefore, the analysis of these countries focused on the federal level. Austria does not have any overarching federal body of law on regulatory takings and each of the nine states in this small country has its own statutory law which differs from the other states. In Australia, in addition to federal-level constitutional law, state statutes are very important in takings law. We chose the state of New South Wales for analysis.

provide enough contextual information so that readers from other countries would understand the implications of a particular law or institution.

III. The Scope of the Research and the Categories of Regulatory Takings

In this research, one overarching question was asked and then divided into several conceptual sub-categories. The overall research question is:

Under each country's laws, do landowners¹³ have the right to claim compensation (or some other remedy) when a government decision related to planning, zoning or development control causes a reduction in property values? If so, what are the legal and factual conditions that a landowner must meet to claim compensation? And how extensive are such claims in practice?

As this question indicates, this study does not cover all conceivable types of regulations that may injure property values. The study focuses only on land-use related regulations. The law of eminent domain or physical takings also falls outside this study. Topics such as exactions and negotiated agreements are also beyond the scope of this research, and deserve comparative analysis.¹⁴ However, the jittery seam line between regulatory takings and eminent domain is included because it is a legal issue in many countries.

As every land use lawyer knows, regulatory takings are not a monolithic concept and have many variations. The international literature has yet to develop a general conceptual categorization. For the comparative study, regulatory takings were classified into three main types: (1) major takings, (2) partial takings with direct injuries, (3) partial takings with indirect injuries. This last type was further divided into (a) partial takings with the indirect injuries caused by public development and (b) partial takings with the indirect injuries caused by private development.

A. Major Takings vs. Partial Takings

"Major takings" refer to situations where regulation extinguishes all or nearly all of the property's value. Different countries use different terms for this situation.¹⁵ In U.S. jurisprudence (only), major takings are known as a "categorical" or "per se" takings.¹⁶ In Canada, a major taking is sometimes called "constructive expropriation,"¹⁷ while in the UK it is called "planning blight." In Greece it may be

¹³ Or holders of lesser property rights; countries differ on this question.

¹⁴ See Private Supply of Public Services: Evaluation of Real Estate Exactions, Linkage, and Alternative Land Policies (Rachelle Alterman ed., 1988) (including a comparative analysis of exactions in a few countries).

¹⁵ I have translated the non-English terms literally. For detailed analysis see Rachelle Alterman, Comparative Analysis: A Platform for Cross-National Learning, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 21-74 (2010).

¹⁶ See Thomas E. Roberts, United States, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 215-28 (2010). For more information, look to any text on takings in an American land use law, for example: David L. Callies, Robert H. Freilich, & Thomas E. Robert, *Cases and Material on Land Use* 334 (4th ed., 2004). U.S. case law also recognizes a second type of categorical taking—a physical taking—but this is not relevant here. American jurisprudence draws a clear distinction between regulatory and physical takings and different principles apply. See Thomas E. Roberts, *Tahoe-Sierra and Takings Law*, in *Taking Sides on Takings Issues: The impact of Tahoe-Sierra* 5-14 (Thomas E. Roberts ed., 2003).

¹⁷ See Raymond E. Young, *Canadian Law of Constructive Expropriation*, 68 Sask. L. Rev. 345 (2005). The Canadian

termed “de facto expropriation”; in Poland, “planning expropriation”; in Switzerland “material expropriation.”¹⁸ The term “major takings” was selected because it is intuitively understandable and is distinct from expropriation. “Major takings” was used rather than “full takings” as the natural antonym to “partial takings” because it might be confused with a physical taking or taking of title, whereas in all the jurisdictions studied, including the United States, there is a legal line drawn somewhere between a physical or title taking on the one hand and a regulatory taking on the other. All thirteen countries in this study do provide for some remedy in cases of major takings, but the threshold, contexts, procedures, and remedies vary significantly among the countries.

B. Direct vs. Indirect Injuries

The second and third types of takings are both “partial.” They both refer to situations where property values suffer only a small or moderate decline. Where partial takings are concerned, there is much less convergence among the countries. The degree of compensation rights granted for partial injuries is therefore a much better “litmus test” than major takings for ranking the countries along the “scale” of compensation rights, as will be presented below.

The distinction between direct and indirect injuries is much less familiar to American readers. Direct injuries are caused by regulatory decisions that apply to the same plot of land that suffers the depreciation. This is the usual way in which regulatory takings are conceived. Indirect injuries conjure up a very different concept. They refer to regulatory decisions that apply to plots of land other than the ones suffering the depreciation. Indirect injuries arise from actual or anticipated negative externalities which cause depreciation in the value of a neighboring property. The legally recognized degree of geographic proximity between the cause and effect differs among countries. Indirect injuries often conjure up issues of distributive justice because their context is inherently unequal: Land plots that have gained more development rights cause the depreciation of other plots.

The concept of indirect injuries naturally brings to mind the law of damages. In a few countries, some types of damages from externalities caused by government regulation are also actionable under nuisance law. However, this study addresses only the realm of public law because it, and not torts law, is at the center of public debate about property rights.

More jurisdictions in the sample recognize the right to compensation for direct injuries than for indirect ones. This does not indicate that indirect injuries are necessarily of lesser economic impact. For land-owners, indirect injuries may be substantial. In the few countries where there are broad compensation rights for indirect injuries, such rights are responsible for many claims and a heavy burden on public finances. In determining the rank-order of the countries this study took into account not only the law on direct injuries but also on indirect ones.

C. Publicly-Caused vs. Privately-Caused Indirect Injuries

Supreme Court too has used the term “de facto expropriation”. *Canadian Pac. Ry. Co. v. City of Vancouver*, [2006] 1 S.C.R. 227, 2006 SCC 5 (Can.), available at <http://scc.lexum.umontreal.ca/en/2006/2006scc5/2006scc5.pdf>.

¹⁸ Switzerland is not included in this book. See Enrico Riva, *Regulatory Takings in American Law and “Material Expropriation” in Swiss Law—A Comparison of the Applicable Standards*, in *Comparative Urban Planning Law*, 167-73 (James A. Kushner ed., 2003) (1984).

Indirect injuries may be caused either by developers of public infrastructure or by developers of private-type land uses. Although these categories have a fuzzy conceptual boundary, the laws in some countries do make this distinction (applying somewhat different definitions). More countries grant compensation rights for indirect injuries stemming from government approval of public infrastructure (such as public roads, rail- ways and airports) than from approval of private-type development. The latter category is fully recognized as compensable in only two countries in the sample, not including the USA. In these two countries, claims for indirect privately caused takings represent a major part of all compensation claims.

IV. A Comparative “Scale” of Compensation Rights

The findings show that there is no universally consensual approach, nor even a dominant approach. The differences are multi-dimensional¹⁹: they fall along each of the categories of regulatory takings defined above. In addition, there are many seemingly minor differences that may have great impact on whether a landowner has grounds for a compensation claim and the chances of winning one. Such differences (not all discussed here) include the eligible types of tenure, the breadth of types of government decision that may trigger a takings claim, time limits of various kinds, and procedural accessibility factors.

The current U.S. property rights debate should be viewed as focusing not on a binary “yes” or “no” but on degree. The debate is about the appropriate balance between unimpeded government policy and un- bridled private property rights, but there are great disparities in the balance points deemed appropriate. The laws of the counties studied can be roughly ranked on a scale of compensation rights (see Figure 1). On one extreme edge of the scale there are “no compensation rights” at all. On the other extreme are “extensive compensation rights” for every imaginable type of regulatory injury to real property. In order to place the different countries along the scale, each country’s relative position with respect to the various categories of takings law and the nuanced details and conditions were merged into a single dimension along the scale.

No country in the sample falls at either extreme, but some counties’ laws come close to one of the two edges. The set of counties represents a broad spectrum of compensation rights. Each country’s set of laws and policies differs significantly from every other’s equivalent set. There was no difficulty in grouping the countries into three sets and in placing them on the scale: (1) countries with “narrow compensation rights”; (2) countries with “moderate or ambiguous compensation rights”; and (3) countries with “broad compensation rights.” However, the internal order on the scale within each group is not cast in stone.

The five countries in the group of “narrow compensation rights” recognize only major takings. The internal ordering takes into account the different degrees of compensation rights for major injuries. The most extreme “no compensation” country, Canada, barely recognizes even major takings as compensable, while the other four countries recognize such takings as compensable in different degrees and situations.

¹⁹ A detailed analysis of the differences is presented in Alterman, *supra* note 1, at 1-90.

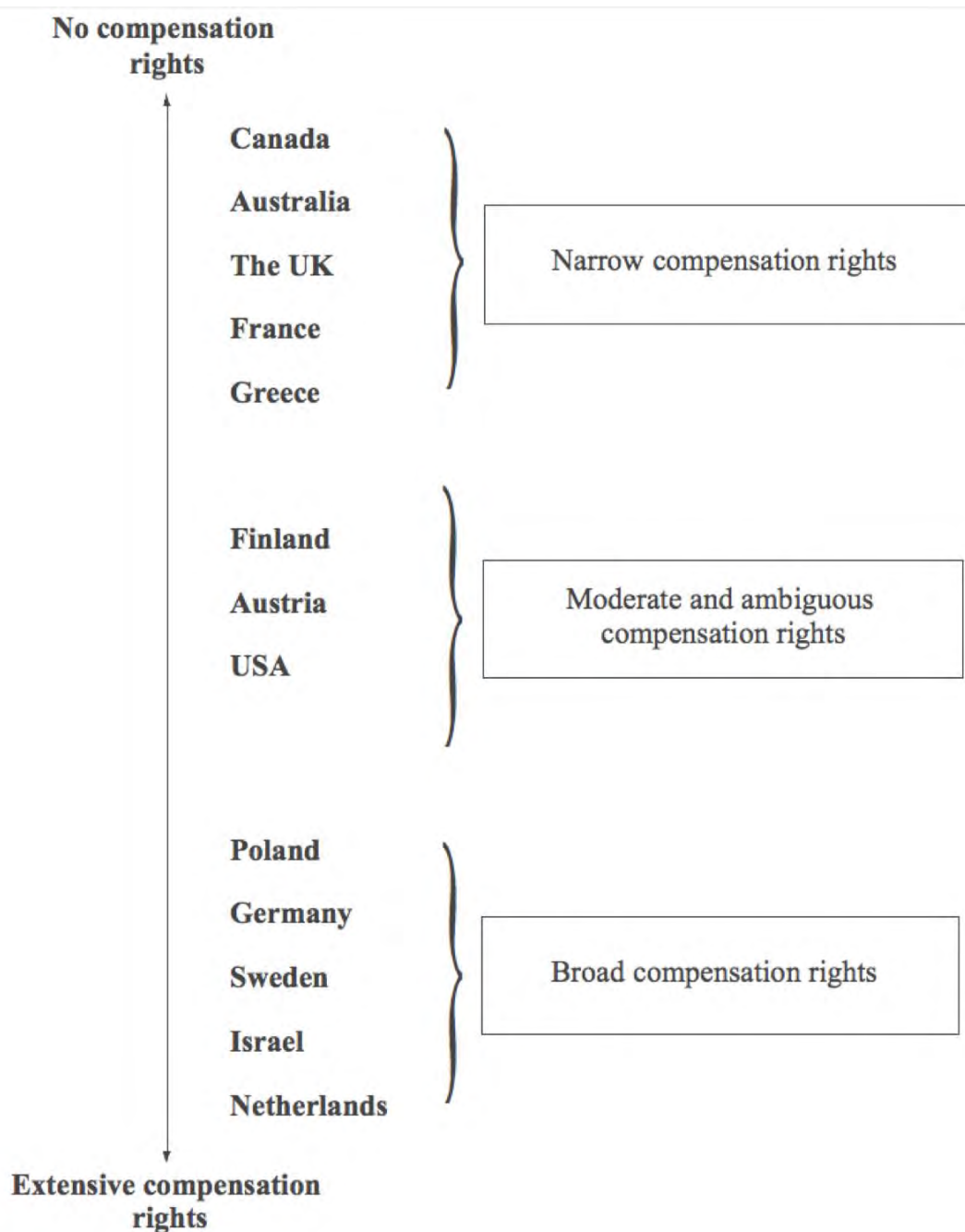


Figure 1

The group at the opposite side of the scale, the “extensive compensation rights” group, includes five countries. These offer compensation rights not only for major takings but also for a broad range of partial injuries. The ordering of the countries along the scale is based on the degree of additional constraints placed on partial takings claims, such as the threshold level of injury, the range of compensable government decisions and time limits. The two countries with the most generous compensation rights in the entire set—Israel and the Netherlands—could also be placed in a group of their own because they are the only ones that recognize broad categories of indirect injuries—including those caused by private developers. These two countries also set a very low threshold requirement for compensation and

encompass a broad range of government land-use decisions.

The countries in the middle category, which include the United States, are characterized by legal uncertainty or inconsistency. They do offer remedies for major injuries, but regarding partial injuries their laws are unclear or inconsistent.

V. Constitutional Protection of Property Rights and Its Relationship with Regulatory Takings Law

An obvious question is whether property rights are constitutionally protected in each of the countries and how this is expressed in takings law. In all the sample countries except the United States²⁰ there is a statutory law that defines regulatory takings, sets out the types that are compensable, details the procedural rules, etc. Most of the countries in the set do have constitutional protection of property rights, yet statutory laws about regulatory takings have been enacted whether or not property rights are constitutionalized. They intermediate between takings law and constitutional law. The question is whether one can discern a relationship between the degree of constitutional protection of property and the contents of statutory law and its interpretation by the courts.

The findings indicate that the differences among the thirteen countries in the law of regulatory takings are only partially attributable to the specific language of the constitutional protection of property.²¹ Such protection usually allows a wide margin of tolerance not only for differences in the law on regulatory takings, but to some extent even on expropriation (condemnation) law.²²

These findings are not intuitively understandable. The comparative analysis shows that there is only a partial and uni-directional link between the constitutional standing of property and regulatory takings law. Such a link is visible only among the three countries where property is not constitutionalized—Canada,²³ the UK²⁴ and Australia.²⁵ The laws of these three countries grant only minimal compensation

20 A small minority of U.S. states have enacted statutes that grant statutory causes of action for a limited set of partial takings. These statutes have had a limited effect—excepting Measure 37 in Oregon until it was repealed. See Roberts, *supra* note 16, at 215-28. See generally Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 39 *Urb. Law.* 619-32 (2007); Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, *Land Use L. & Zoning Dig.*, July 2000.

21 For country-specific analysis, see Alterman, *supra* note 1, at 24-35.

22 See Alexander, *supra* note 4.

23 See Bryan P. Schwartz & Melanie R. Bueckert, *Canada*, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 93-106 (2010).

24 The UK does not have a written constitution. Like all other European countries, the UK comes under the European Convention on Human Rights—see *infra*. In 1998 the UK enacted the Human Rights Act, which brought into force most of the rights set out in the Convention. However, if a government authority is obliged to act in a certain way according to primary legislation—such as the planning act—this action would not be unlawful under UK law. See Michael Purdue, *United Kingdom*, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 119-37 (2010).

25 Australia's constitutional property protection is indirect and weak in that it only empowers parliament to make laws "with respect to the acquisition of property on just terms." See my comparative constitutional analysis on Cluster 1

rights for regulatory injuries. Even this uni-directional relationship has an exception: Israeli law has been granting landowners extensive compensation rights as a result of case law delivered before constitutional protection of property was enacted in 1992.

The reverse relationship, where property rights are constitutionalized, is weaker. Ten countries in the set have constitutions that protect property. Yet these countries' regulatory takings law covers almost the full spectrum of degrees of compensation rights (except for the most extreme non-compensable position). Obviously, statutory law and case law have created the differences among these countries' regulatory takings laws over the years. France²⁶ has a famous and old legacy of constitutional protection of property,²⁷ yet offers a very low degree of compensation rights for regulatory injuries, to the extent that French planning legislation says explicitly that compensation may not be paid for regulatory injuries. Greece²⁸ grant only minimal compensation rights for regulatory takings, and Finland²⁹ grants only modest and uncertain rights, yet both countries' constitutions do have a protection clause.

At the other end of the spectrum are the five countries with extensive compensation rights, including for partial takings (in ascending order— Poland, Germany, Sweden, Israel and the Netherlands). It is difficult to account for the extensive compensation rights in this cluster or for the differences within the group of countries based on the language of their constitutional property protection.

One of the most interesting findings about the relationship between constitutional law and takings law concerns the nine European countries in the sample. They are all bound by an additional, supra-national constitutional layer—the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950. Article 1 of the First Protocol of ECHR provides for property protection, but qualifies it “with the general interest.”³⁰ Yet this shared constitutional canopy has not brought about a significant convergence in the regulatory takings law of these nine countries, except to rule that extreme cases of major takings should be compensated or remedied in other ways.³¹ The “general interest” clause has not visibly affected the domestic takings laws, and four among the nine European countries do grant extensive compensation rights for regulatory takings, including partial takings.

countries in Alterman, *supra* note 1, at 27-30; see also John Sheehan, Australia, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 107-18 (2010).

26 See Vincent A. Renard, France, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 139-48 (2010).

27 For a comparative constitutional analysis on Cluster 1 countries, see Alterman, *supra* note 1, at 27-30.

28 See Georgia Giannakourou & Evangelia Balla, Greece, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 149-67 (2010).

29 See Katri Nuuja & Kauko Viitanen, Finland, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 171-94 (2010).

30 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, however, 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 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Mar. 20, 1952, Fr., available at <http://conventions.coe.int/treaty/en/Treaties/Html/009.htm>]

31 For a more detailed discussion see Alterman, *supra* note 1, at 26-27, 84.

VI. The Features of U.S. Takings Law from a Comparative Perspective

A comparative analysis highlights several aspects of U.S. law on regulatory takings. These are: the mid-way position along the scale, the absence of statutory law to mediate and the direct application of constitutional law, several unique attributes of U.S. takings law, the intensity of the property rights debate, and the paradox of extensive scholarly analysis.

A. The Mid-Range Position Along the Scale

When viewed from a cross-national perspective, the most striking finding about U.S. regulatory takings law is the glaring disparity between the intensity of the “property rights debate” and the factual positioning of U.S. takings law midway along the “scale” of degree of compensation rights for regulatory takings.

U.S. takings law holds a middle seat both on major takings (known as “categorical” in the United States) and on partial takings.³² On major takings, U.S. law is more or less in line with the majority of countries studied. In some ways, U.S. law is tougher on landowners by setting conditions that are difficult to meet. In other ways, U.S. law is more generous. On partial takings, too, U.S. law is mid-scale, joining half of the set of countries where partial injuries are compensable to some extent. But unlike its image, U.S. law places a high quantitative threshold for partial claims as well as various preconditions that make it difficult for American landowners to win challenges for partial takings (except for a few state-law exceptions). The third type of taking—indirect injuries—is not recognized in U.S. law at all, not even for indirect injuries induced by public infrastructure. On many other counts, it is fair to say that U.S. takings law is also highly “ambiguous” and uncertain.

B. The Unmediated Application of Constitutional Law and the High Level of Uncertainty

Another key difference between the United States and the other countries studied is the 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 United States is takings law decided largely by direct application of the Constitution. In the few states where there are “regulatory takings statutes”—Oregon excepted—these laws add only minor causes of action beyond constitutional law.³³

³² For a concise summary of U.S. takings law formatted for comparative analysis see Roberts, *supra* note 16, at 215-27.

³³ 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 Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, Land Use L. & Zoning Dig., (July 2000); John D. Echeverria & Thekla A. Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories* (2008), available at <http://www.law.georgetown.edu/gelpi/TrackRecord.pdf>. Regarding Florida, see Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 39 Urb. Law. 619, 619-32 (2007).

In interpreting the constitution, the U.S. Supreme Court has refrained from making “bright line” rules, leaving many legal issues to be decided through case-by-case determination.³⁴ The result is that U.S. takings law is characterized by a high degree of uncertainty that both land- owners and government agencies face whenever regulatory takings are challenged in the courts.³⁵ After many decades and a large body of jurisprudence, there are even some fundamental questions unresolved.³⁶

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 very few claims and hardly any jurisprudence to interpret the language of the statute or its relationship with the constitution. The unique feature of U.S. takings law is that high legal uncertainty persists despite a huge body of jurisprudence extending over almost nine decades. (The number of Supreme Court decisions on regulatory takings, however, is not high in comparative terms).

C. Several Other Unique Specifics of U.S. Takings Law

On several counts, U.S. regulatory takings law is more generous to landowners than the laws of most other countries in the set. While these aspects may expand the causes of action, they do not raise significantly the chances of winning a takings claim.

First, for the most part, takings claims in the other countries can only be made when a government body changes an existing land use regulation to a more restrictive category.³⁷ Owners of farmland, environ- mentally regulated open space, or even vacant land that generates no income, cannot demand that the land be rezoned for a more lucrative use. The United States is the only country studied where refusals to upzone or to grant a development permit can (theoretically) serve as grounds for a taking challenge.³⁸ Although a challenge on these grounds is very difficult to win, the threat of one lurks in the background when policymakers in the United States decide,

³⁴ See Roberts, *supra* note 16, at 215-27; see also *infra* note 51.

³⁵ Many American authors make a similar point regarding insufficient clarity and inconsistencies. See, e.g., Callies et al., *supra* note 16, at 380; see also Edward J. Sullivan & Kelly D. Connor, Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution, in *Current Trends and Practical Strategies in Land Use Law and Zoning* 47-83 (Patricia E. Salkin, ed., American Bar Association, 2004). Sullivan and Connor argue that the degree of certainty and uniformity intended by the Federal Constitution has not been accomplished in the field of takings law. *Id.* at 67.

³⁶ One example is the basic question of whether “the character or extent of the government action”—that is, whether the public purpose or public gain should be weighed against the private loss. One would have thought that after so many decades of jurisprudence a question so fundamental to determine the underlying rationale of regulatory takings would have been settled. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) is deemed by many legal analysts to have provided a clear negative answer. See, e.g., Roberts, *supra* note 16, at 215-27. However, even after this Supreme Court decision, some scholars remain dubious. See Michael E. Lewyn, Character Counts: The “Character of the Government Action” in Regulatory Takings Actions, 40 *Seton Hall L. Rev.* 597, 597-637 (2010).

³⁷ The exceptions are Finland and Greece. In both countries, the traditional law that applied to rural areas outside urban zones included, as part of property law, the right to build housing units within some limitations. The exercise of these rights, however, is fast shrinking when it is overridden either by urban zones or by declaration of environ- mentally protected rural zones. For Finland, see Katri Juuja & Kauko Viitanen, *supra* note 29, at 171-94; for Greece, see Georgia Giannakourou & Evangelia Balla, *supra* note 28, at 146-67.

³⁸ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

for example, to institute an exclusive farmland zone.

Second, in most countries, regulatory takings, especially partial takings, are not an open-ended concept; a statute usually defines a limited set of government decisions which 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 land-use decisions are necessarily included). For example, some environmental regulations may not be compensable. In the United States, because takings law is largely constitutional law, unmediated by statutory law, a regulatory taking may be ruled against any government decision, at any level and jurisdiction, and on any substantive topic. In the words of Justice Scalia, “[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act and not with the government actor.”³⁹ According to this view, even decisions of the judicial arm itself may constitute a taking.⁴⁰

D. The Intensity of the Property Rights Debate

Perhaps the most prominent feature of U.S. takings law is the intensity of the debate surrounding it.⁴¹ An outside observer listening to the fervor of the arguments on both sides would get the impression that U.S. law is extreme (on either side). The arguments of proponents of the “property-rights movement” would lead one to think that U.S. law denies remedies even for major takings, while the arguments of spokespersons for the social-function view of property would lead one to assume that U.S. takings law grants very generous compensation rights in cases of partial and indirect takings with a low threshold level of injury. In no other country in the sample has the issue of regulatory takings occupied a similarly prominent position in public opinion. 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 Measure 37 and then to its quick demise within only three years. Interestingly, in most other countries, the relatively docile status of the takings issue exists regardless of the position occupied by that country’s takings laws on the compensation rights scale: whether on the very restrictive side (Canada, Australia, the UK, France, or Greece); or on the broad-rights side (Poland, Germany, Sweden, the Netherlands, and Israel). The regulatory takings issue simply does not capture the interest of voters, politicians, and scholars as much as it does in the United States.

39 *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t. Prot.*, 130 S. Ct. 2592, 2601 (2010).

40 As an outsider I find this analysis surprising. I wonder what other countries’ courts might reach a similar conclusion instead of simply reversing the decision of the lower court.

41 The debate has produced many books and papers on both sides, often with vivid titles. On the property protection side, see *Land Rights: the 1990s’ Property Rights Rebellion* (1995). On the property protection side, see William Fischel, *Regulatory Takings: Law economics and Politics* (1995); E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 *Wm. & Mary L. Rev.* 1177, 1178 (1997). On the liberal, social-view side, see, e.g., *Let the People Judge: Wise Use and the Private Property Rights Movement* (John Echeverria & Raymond Booth Eby eds., 1995); Harvey M. Jacobs, *State Property Rights Laws: The Impacts of Those Laws on My Land* (1999); *Who Owns America? Social Conflict Over Property Rights* (Harvey M. Jacobs ed., 1998). Many other scholars have criticized the legislative initiatives of the property rights movement. See Glenn Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 *Fordham Env’t. L. Rev.* 521, 567-80 (1997).

E. The Paradox of Scholarly Research

The combination of intensive public debate, the dependence of takings law on direct constitutional analysis, and the high level of legal uncertainty have generated what is by far the largest body of scholarly research and publications on regulatory takings anywhere in the world. A Lexis Nexis search using the terms “regulatory takings” together with “land use” yielded a larger number of items than the program was able to report. In total there are probably thousands of scholarly papers and hundreds of books that discuss the “takings issue.” This body of publications is several times larger than all the scholarly writing on the topic in all other countries and languages combined. Every new Supreme Court decision generates scores, sometimes hundreds, of scholarly publications. Beyond quantity, this body of publications, as a whole, is characterized by a high analytical level, cross-disciplinarity, and innovation not encountered in other countries.

The paradox is that this huge body of knowledge has not contributed to the reduction of uncertainty but in some ways, to the contrary. Much of the scholarly analysis takes one or the other side in the debate and is “colored” by it. The result is that the immense body of superb scholarly analysis has not dissipated the persistent uncertainties inherent to U.S. regulatory takings law; the reverse might be true.

F. Oregon’s Measure 37 from a Comparative Perspective

The hyperactive rise and demise of Oregon’s Measure 37 deserves special analysis. It is a tale with no counterparts anywhere else in the world. It is indicative of the volatility of the property rights debate in the United States 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.⁴² It soon turned out to be so unworkable that it was replaced in 2007 by Measure 49. The latter Measure too has no international counterparts in takings law—neither in the statute’s excessive length nor in its complexity. The assortment of remedies enabled by Measure 49—many of them in kind rather than financial—has no apparent 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. As reported above, there are legal regimes where some types of partial takings are compensable. These regimes do seem to “work” reasonably and are sustainable for decades as 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 in their history a need for legislative revision to cool down excessive and burdensome claims, but nowhere does one encounter a dramatic turnabout like that in Oregon.

From its inception, 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 in this study. First, Measure 37 was deeply retroactive, unlike any other legislation in this study. Oregonians had the right to claim compensation for

⁴² None of the statutes in the other countries in this research were born of direct citizen ballot initiatives. In most countries there is no such procedure.

regulations approved all the way back to 1950, as a one-time opportunity which 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 or a qualitative threshold to represent “reasonableness”, “social contribution” or “justice”. Third, legislators went out of their way to remove most legal-administrative burdens and costs for landowners. Thus, even transaction costs—effective in some jurisdictions in cooling down claims fever—were absent in Measure 37. The costs of processing claims were placed largely on the taxpayers. In contrast, the two other countries where the number of claims became burdensome—Israel and the Netherlands—both imposed an administrative fee on claimants. Fourth, the statute defined as compensable any regulatory decision on any land use subject, up to the state level. 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 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 genealogists.⁴³ Sixth, 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 U.S. constitutional takings jurisprudence. This meant that Oregonians could “sit” on their development rights for decades, but when these rights would be restricted, the landowners could ask the taxpayers to compensate them for their loss. This blank-check policy is out of line even with countries with generous compensation rights such as Germany, Sweden, and the Netherlands. In these jurisdictions, landowners are expected to share the risks (in different ways). Only Israeli law is similar to Oregon’s on this point, and it has proven to be similarly unworkable and is now before parliament for revision. Finally, the fatal difference between Measure 37 and all other countries’ laws was Measure 37’s “about turn” clause. It gave the authorities open-ended powers to grant an exception to those who submitted a claim, instead of paying compensation.⁴⁴ No other country’s statutes provide such an unabashed waiver of the need to justify a retraction from public policy simply because of financial costs. The predictable effect of this clause was that almost no claims were actually paid, while a large number of development proposals that would have previously been rejected or modified were granted development permits. Thus, during Measure 37’s life, Oregon’s famous land use and environmental policies regressed. To an outsider looking at the saga of Measure 37, it is not surprising that this statute did not survive infancy and had to be followed by Measure 49—a strange spare-parts sibling.

VII. The Mutual Images of Americans and Europeans

In academic and professional discussions one sometimes encounters Europeans referring to the “American approach” to property rights, and the conversely—Americans who contrast their own approach with the “European Approach.” The

⁴³ Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 *Envtl. L.* 131 (2006).

⁴⁴ See William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 *Envtl. L.* 105 (2006).

comparative research shows that these views are no more than legal stereotypes. The two images parallel the two sides of the philosophical debate on property rights. Many European practitioners and scholars imagine that U.S. law is extremely protective of property, especially real property, rights.⁴⁵ They assume that takings law would offer landowners extensive protection from downzoning and generous compensation rights. On the American side, one often encounters the assumption that there is a “European approach” to real property law, that this approach is grounded in the social view of property, and that it grants lesser protection of property rights in case of regulatory takings than U.S. law.

The evidence from the thirteen-country study shows that both images are far from accurate (they may or may not hold for other spheres of property law). There is no “European approach” to regulatory takings. This holds despite the fact that all the European countries in this study come under the ECHR’s constitutional canopy and are members of the European Union. 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. As noted above, the canopy of the ECHR constitutional law has shown high tolerance for the variety of interpretations of regulatory takings law. 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 anywhere on the scale except for the very extreme edge of “no compensation rights.”

The comparative findings also show that there is no unitary “British approach” to contrast with the U.S. approach. The four countries with British law in their background—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.

VIII. Possible Models for Cross-Learning

Measure 37 is probably not the last time that proponents of property rights in the United States will 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 the high degree of uncertainty that characterizes American takings jurisprudence as long as constitutional law is unmediated by statutory law. Within the federal structure of the United States there is much more room for “experimentation” among the fifty states than in unitary countries.⁴⁶

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 other countries’ models operate 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 a risky business. At the same

⁴⁵ Thomas Roberts, the author of the U.S. chapter, is well aware of this false image, and points it out. See Roberts, *supra* note 16, at 215-28.

⁴⁶ Although Germany too is federal, planning law is largely a national-level competence.

time, the survey of a large variety of legal models presented here may help to stimulate new ideas on both sides of the debate.

A. Models for the Social View Side

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. Among these, the UK is the most relevant. 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 its laws dysfunctional. France is also unsuitable because its planning statute explicitly disallows payment of compensation for any land use regulation and is likely too extreme to withstand U.S. constitutional challenges.

Canada, at the federal level, presents another extreme no-compensation doctrine which is at odds with U.S. constitutional protection of property rights. However, some of the Canadian provinces have enacted more moderate statutes or administrative practices. These may well merit further study. Australia is somewhat less extreme in its no-compensation doctrine. The Australian state statutes are more consistent than their Canadian counterparts in granting compensation rights for major (“categorical”) takings. Especially interesting would be to look at the differences among the Australian states and evaluate their legal and public impacts. Since 2007, several Australian states⁴⁷ have begun a reassessment of their regulatory takings laws and the outcomes are worthy of follow-up.

The UK is the most interesting model.⁴⁸ UK law is the most coherent on the narrow-compensation side of the scale. Its 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 compensation 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 U.S. 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.⁴⁹ From then on, statutory plans, which had previously functioned like U.S. zoning, would no longer grant development rights. Thus there could no longer be a “downzoning.” The right to develop (called “planning permission”) would be granted on a discretionary case-by-

⁴⁷ See Land Reform Comm’n of W. Austl., *Compensation for Injurious Affection* (2007), available at <http://www.lrc.justice.wa.gov.au/2publications/reports/P98-DP.pdf>. The state of Victoria also commenced on a reform track in 2008-09. See Interview with Rebecca Leshinsky, Manager, Planning Legislation Review, in Victoria, Austl. (Nov. 2008).

⁴⁸ See Daniel R. Mandelker, Afterword, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 365-66 (2010).

⁴⁹ Malcolm Grant, *Compensation and Betterment*, in *British Planning* 62-76 (Barry Collingsworth ed., 1999).

case basis and would be valid for five years only.⁵⁰

If government decides to withdraw a planning permission 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-pocket costs. In practice, revocations are made only when there is an overwhelming public consideration for a policy change and number very few nationally. Because, under the UK system, permission to develop is considered and granted very close to the maturity of the development, government can adjust its policies and faces little uncertainty. Decades of practice show that the UK system “works” without overburdening the public purse.

Recognizing that property values might be diminished when land use plans—though advisory—designate land for some types of uses, UK law grants landowners two optional causes of action for inverse condemnation claims. One procedure, called “planning blight” is available when a local plan designates private land for a distinctly 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 nationwide is very small.

B. Models for the Property-Rights Side

What can proponents of property rights take from this study? They should first heed the lessons, detailed above, from the Measure 37 experience. If new statutes are proposed, they must have a solid rationale and contain adequate internal checks and balances. Proponents of new state statutes have much to learn from the international experience. The survey established that seven countries other than the United States 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, Israel, and the Netherlands). 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 ambiguity to be useful. Among the five remaining countries, the Netherlands and Israel are models that can help to foresee what mistakes to avoid. These countries’ laws—though to a lesser extent than Measure 37—have overburdened 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

50 Philip Booth, *Planning by Consent: The Origins and Nature of British Development Control* (2003); Victor Moore, *A Practical Approach to Planning Law* (2005).

but interesting differences (this pair is the only one showing knowledge transfer). Both laws draw a clear distinction between major and partial takings and provide a high level of 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.

Under German and Swedish law, in cases of partial takings there are rights to full compensation (beyond a *de minimis* level). However, there is a set of preconditions. Unlike U.S. law on partial takings, where the precondition of showing “investment-backed expectations” has no pre-set 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 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 (and are additional to the regular statute of termination). 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 uncertainty for both sides and more need for litigation.

The concept of reliance on government decisions underlies the regulatory takings laws of most countries, including the United States. Under German and Swedish takings laws, the principle of reliance becomes transparent to both sides. Unlike UK planning law, German and Swedish laws are similar to those in most countries where statutory plans or zoning do grant (or take away) development rights. These two countries’ laws grant full or almost full compensation rights when government changes its mind and downzones. At the same time, the German and Swedish models qualify this right by setting a time frame. It is 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 expires. Note that 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 either to regulate or to incentivize developers. In high-growth areas in the United States 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 is determined at the time of each new plan-approval decision. Interestingly, neither in Germany nor in Sweden is the implementation period perceived as a growth management instrument. However, in Sweden there is a recent and increasing (though still small-scale) use to incentivize commercial developers in urban redevelopment

projects.⁵¹

IX. Learning from One Another

The diversity of regulatory takings law around the globe is great: no two countries have the same law on regulatory takings—not even countries with ostensibly similar legal and administrative traditions. The purpose of this comparative research was to enable the readers to learn from other countries' experiences and thus to gain a new perspective on their own country's laws and policies. Not only American lawyers, legal scholars, and planners should be able to learn from other countries—the same holds for each and every country.

This article was written especially for American readers because in the United States the debate over property rights is more intensive than in other countries. Both the proponents of more protected property rights and the supporters of enhanced social obligations by property owners may gain by looking at U.S. takings law from the outside. Both sides can also look to other countries for alternative models to support their own position (with appropriate adjustments). And perhaps both sides could look for middle-of-the road approaches that may contribute to a rapprochement in this long-raging contest.

51 The limited and relatively new use of this tool (mostly vis-à-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. See Interview with Thomas Kalbro, (Dec. 2008); Thomas Kalbro, Sweden, in *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* 293 (2010).

Emergent Property Rights

by John Sheehan

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INTRODUCTION

When Augustus Caesar returned in Rome in 29 BC from Egypt, the restoration of the property rights of the Roman citizen was a compelling *liet motif*¹ of the new but autocratic Augustan Empire, because:

*...[t]o the Romans, security of tenure was a moral as much a social or economic good.*²

Such action was necessary because much earlier in 49 BC, Gaius Julius Caesar and his legionaries had crossed the narrow stream known as the Rubicon, the border between the Roman Province of Gaul and Italy to the south. In crossing the Rubicon and illegally marching on Rome, Caesar had overturned such prized values as “private property” and “rights before the law”³, resulting in the eventual collapse of the Roman Republic.

Recrossings of the iconic Rubicon to establish yet again such values were attempted through the French and American Revolutions⁴, however arising from 21st century concerns over climate change, unexpectedly emerging property rights in water and carbon are arguably attempting to re-establish such ancient moral, social as well as economic values. Such climate-related notions of property struggle to describe necessarily profound concepts of property which have great or specified extensions of the conventional elemental land property right, and can be unfamiliar or even *sui generis*⁵ within property theory and formal property law.

These proposed extensions of the conventional land property right expose the shallowness of current property tenures such as freehold and leasehold, and it is useful to describe these emerging climate-driven property rights as ‘deep property’. Admittedly, this succinct term usefully describes these new and profound property concepts of property however the aegis of deep property still remains trenchantly elusive. Nevertheless, whilst only dimly understood the increasingly murky characteristics of deep property are slowly being revealed as imbued with inherent complexity and pervasive cultural baggage. However deep property is not incomprehensible or taciturn; a unique world of property rights is emerging with a genius, which is sometimes indefinable, and yet often disconcertingly intelligible in its terrible simplicity. Nevertheless, any attempt to uncover deep property necessitates penetration and peeling of the layers comprising the conventional elemental land property right, many which remain inchoate.

1 Dominant idea or theme

2 Holland, Tom (2004) *Rubicon: The Triumph and Tragedy of the Roman Republic* (London: Abacus) 382

3 Holland, xxi

4 Holland, xxii

5 Of its own kind, unique.

Importantly, interrogation of these layers may need to occur repeatedly using different lenses if an understanding of the characteristics of deep property is to develop, and the reasons for its complexity and culture uncovered. In attempting to garner the concept of deep property, such inquiries may be placed on a seemingly vulnerable theoretical limb on the extremity of current thinking on property and what it means. Yet, in the process of doing so, current property theory and formal property law will be richly extended.

The following account canvasses an attempt to uncover this world of deep property in the area of emerging climate-related property rights, notably water and carbon.

THE PROBLEM WITH EMERGING PROPERTY RIGHTS

Emerging property rights in water and carbon have literally exploded Anglo-Australian property law. Absent now is the notion all rights except minerals are held in the conventional elemental land property right, which Australians are so familiar with. The unbundling of the “bundle of legal rights” which was originally embedded in land has resulted in the emergence of a raft of hitherto unknown property rights such as water and carbon. In addition we have seen the emergence of other more exotic forms of property such as electro-magnetic spectrum, all of which must be defined in order that they may be attributed moral social and economic worth by Australian society.

Australia has sovereign control over more land and surface area than any other country except for the USA, Russia and Canada. This point is very pertinent for the development of new forms of property such as water and carbon, and arguably explains why the crucial High Court decision in *Mabo v Queensland (Mabo No 2)* (1992) 175CLR1, was not so much about native title but about the notion of a legal “bundle of rights”. Some traditional landowners may hold those rights in an archaic form which we now know to be native title, or more correctly described as indigenous property rights.

While these ancient rights survived the intervention of British sovereignty in the late 18th century, their recognition by the High Court in 1992 flagged the commencement of new directions in the conceiving of property rights in Australia. The unbundling of the “bundle of legal rights” which were originally embedded in land has resulted in the subsequent progressive identification of a raft of hitherto unknown property rights such as indigenous property rights, water property rights, and biota property rights.

In addition, there are subsets of some of these main classifications of emerging property rights which are or will be created specifically by statute to deal with a particular need, such as carbon property rights, saline property rights, and even

transferable development rights. Interestingly the first two of these subsets are part of the classification biota property rights.

At the outset of this paper, I provided a historical analogy pertinent to emerging property rights – one describing the historical importance of moral social and economic values, which are the current overarching issues of water and carbon in Australia. These historical roots and the current crystallisation of property rights are coalescing to ensure that deep property will have a pivotal role in the ensuing decades. The resilience and appropriateness of conventional land titling systems for the newly emerging property rights in water and carbon have raised fundamental issues rooted in emerging property theory. Even archaic rights such as native title have shown that existing notions of property are probably incapable of accommodating the changes necessitated by the emergence of these property rights. Fundamental to the creation of property rights in natural resources such as water and carbon is the question of territoriality – the placement of an individual property right on the cadastre.

Increasing recognition of the need to introduce appropriate and robust regimes of property rights which meld those most evident desirable features of conventional land titling with emerging understanding of the nature and content of various natural resources such as water and carbon, clearly show the issue of definition of these rights is pivotal. The conceiving of property rights in a particular natural resource lies in the realm of property theory, if legal private rights are to emerge.

Property theory explains that there are a minimum number of characteristics, which must be present for legal rights to property to exist, and using this established matrix we can identify which of those characteristics may be problematic and require concerted effort for resolution. Water, for example as arguably the most ephemeral of all emerging property rights provides a major conceptual test for those attempting to construct a property rights regime.

The “bundle of rights” embedded within anglo-Australian land law and practice underpins all such endeavours, and provides a conceptual base for the development of these neophyte water property rights. As the various States have responded to federal competition policy over the last decade, we have seen the progressive emergence of legislation breaking the nexus between land and water. For example in NSW, the *Water Management Act 2000* swept aside a century of legislation based upon a previously indissoluble link between land and water.

However it is clear that these statutory regimes have not recognised how difficult the task is of conceiving property rights in water, given as said earlier that water is the most ephemeral of all of the property rights. The release on 18 February 2004 of the groundbreaking report entitled “An Effective System of

Defining Water Property Titles”⁶ by the Commonwealth Government revealed how vexed the task of defining of water as a property right has been.

However, for the purpose of this paper I have chosen to consider in some detail the somewhat more difficult and challenging topic of carbon property rights. In the following section of this paper I will canvass the notion of property rights in carbon, and the critical issue of defining of this emerging property right.

THE CHALLENGE OF CONCEIVING CARBON PROPERTY RIGHTS

The issue of property in carbon has both complexity and simplicity, more so than for other property rights such as land, minerals or even water. As a subset of biota property rights, carbon can be allocated to the admittedly simplistic category of terrestrial flora, which has an inherent territoriality making the definition of carbon property somewhat less problematic than for other subsets such as fauna, which are often much more mobile.

This easier approach to the definition of territory is not available in some other property rights, notably water property rights. As stated earlier, water has been described as the most ephemeral of property rights not without reason; this inherent fluidity rather than a pun is the inescapable reality of conceiving property rights in such a natural resource.

The other biota categorisation, fauna has already been addressed to some extent by the High Court in the decision *Yanner-v-Eaton* (1999) 201 CLR 351, (Yanner) and it is worthwhile noting that the Court saw in Yanner's crocodile the inherent problem of constructing a property right in that category of biota. Nevertheless, while terrestrial fauna can often exhibit territoriality analogous to terrestrial flora, other forms of fauna such as marine animals or avifauna do not have the benefit of this fixity when one attempts to construct a property right.

There is clearly a whole raft of sub classes within the broad biota categorisations of flora and fauna, however the legal notion of biota property rights requires that the outcome of interactions between different biota should still result in a national reductive stereotype. To conceive different property rights regimes for biota in various States or Territories would result in an untenable situation producing unnecessary confusion across the Australian continent. There is no argument that can be advanced in favour of differential legal regimes between States or Territories, given that biota does not respect the human definition of territory – the cadastre. This applies somewhat to carbon as a subset of biota property rights, notwithstanding any inherent territoriality.

Hence, the biophysical environment requires that a regime of carbon property rights must be an endogenous enterprise derived from the reality of carbon in its

⁶ ACIL Tasman in association with Freehills (2004) An Effective System of Defining Water Property Titles. Research Report PR040675 (Canberra: Land and Water Australia)

milieu. If a legal platform in natural resources is to be extended to carbon with the aim to produce moral social and economic values in this biota, then continent-wide security of tenure must be available. At the outset, a titling system rooted in the legal notion of property in carbon will be required in order for the creation of legally enforceable economic values, given that banking and financial institutions have over the last 150 years grown comfortable with the security of tenure offered by Robert Torrens' land titling system, wherein the State agency certifies:

...on behalf of the State that the person thereby entitled holds such an estate or interest to the extent of his entitlement, subject to such interests recorded in the relevant folio of the Torrens Title Register and as appear (or should appear) on the Proprietor's certificate of title or duplicate Crown grant.⁷

However in attempting to construct a regime of carbon property rights, it is also necessary to recognise there will always be a demand for natural carbon stock, notwithstanding that significant substitutes such as single species carbon forests will be developed in lieu of naturally occurring forests. There is inter-species variation and intra-species variation in natural carbon forests, which can have a significant effect upon the naturally occurring sequestration rates present in natural forests.

Carbon, as terrestrial flora already has a recognised market value in terms of carbon sequestration, however there is disagreement as to whether "conservation of old forests is a better policy for tackling global warming than planting new ones."⁸ As early as 1992, Riccardo Valentini of CarboEurope highlighted the questionable economics of sequestration, stating that:

"[countries]...will be able to claim carbon credits for the new planting, while in reality releasing huge amounts of CO₂ into the air."⁹

Terrestrial flora has also in the past been the subject of proposals to introduce tax incentives for the protection of high conservation value native vegetation, which is a very specific approach which uses conservation covenants to target such financial incentives¹⁰. Moral and social values in addition to economic values emerge through such proposals, revealing property rights in natural carbon stock are indeed a form of deep property imbued with inherent complexity and pervasive cultural considerations.

7 Frank Hallmann (1973) Legal Aspects of Boundary Surveying as apply in New South Wales (Sydney: The Institution of Surveyors, Australia, New South Wales Division), 140.

8 New Scientist (2002) "Tree farms won't save us after all", (26 October) 10.

9 Riccardo Valentini cited in New Scientist, 10.

10 Carl Binning & Mike Young, (2002) Talking to the Taxman About Nature Conservation: Proposals for the introduction of tax incentives for the protection of high conservation value native vegetation. National Research & Development Program on Rehabilitation, Management and Conservation of Remnant Vegetation, Research Report 4/99 (Canberra: Environment Australia).

Notwithstanding that some forms of property rights currently exist in terrestrial flora for the limited purpose of carbon sequestration, it is clear an overarching regime of carbon property rights has to be conceived capable of accommodating moral and social values well as economic values. In the concluding section of this paper, the ambit of this critical task will be canvassed.

TOWARDS EMERGING CLIMATE-RELATED PROPERTY RIGHTS

It is posited the conceiving of property rights in water and carbon should evidence the historical importance of prized moral social and economic values contemporaneously imbedded with such Roman Republican values as “private property” and “rights before the law”¹¹. Novel theory is not needed to generate an omnibus narrative on water and carbon property rights, as the fundamentals of property rights, the history and logic of property and existing property regimes reveal that property rights in water and carbon are attainable within anglo-Australian property law.

It is worthwhile focussing briefly on the specific issue of carbon in this context. At present carbon exists as a private good attached to the elemental land property right. If it was a public good, it could be better conceived as common property, however as a private good attached to the elemental land property right it is implicitly part of the bundle of rights conveyed into private hands by freehold or leasehold title. Some aspects of carbon may be either sufficiently mobile, or sufficiently distributed, to make a linkage to specific land titles impossible. The commercial exploitation of the potential opportunities arising from carbon may not neatly align to individual land parcels and could conceivably entail some degree of privatisation of common property. These aspects of carbon would not be problematic if it was a public good, even if one that had some degree of spatial definition. However, the challenge of designing private property in carbon lies in harnessing departures from the cadastre without producing such a degree of innovation that the common law understanding of private property is betrayed.

The construction of a system of private property in carbon must be embarked upon from the standpoint that such rights must meet a defensible test of what a durable private property right is. If these property rights are to be meaningful to users, purchasers, and especially the banks and financial organisations that will use these rights as collateral for mortgage-based loans, then the test of whether they are property rights is crucial.

In constructing such a test, it is essential to gain an appreciation of existing judicial considerations of the notion of “property”. Starke J. in *The Minister of State for the Army-v-Dalziel* (1944) 68 LR at 290 (*Dalziel*) indicated that such a definition:

...extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and chooses in action.

¹¹ Holland, xxi

Starke J. (at 290) also comments that:

...to acquire any such right is rightly described as an acquisition of property.

As previously mentioned this approach to constructing a definition of “property” has been further strengthened in *Yanner*, where the High Court took the opportunity to contrast property in the conventional sense with the “property” or “ownership” that the Crown asserts over natural resources.

The Court stated that:

The word “property” is often used to refer to something that belongs to another....“property” does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of “property” may be elusive. Usually it is treated as a “bundle of rights”.

But even this may have its limits as an analytical tool or accurate description, and it may be...that “the ultimate fact about property is that it does not really exist; it is mere illusion”.¹²

Also, the Court usefully stated that the common law position of natural resources including biota was as follows:

At common law there could be no “absolute property”, but only “qualified property” in fire, light air, water and wild animals.¹³

Nevertheless, as stated earlier in this paper, “property” is generally understood as a titled right to land or to exploit natural resources such as minerals. Commonly these property rights are referred to by the terminology “real estate”, with its emphasis on the immoveable nature of the “property” concerned such as land, buildings and minerals.

The range of interests that are classed as “property” while limited only by our imagination, has however been restrained by the Courts of common law countries who have only recognised a few kinds of interests in land, which are regarded as usual property rights. Some of these rights will be readily recognised such as freehold and leasehold, however a few such as mining rights, fishing rights, and water entitlements have also been recognised.

As stated earlier in this paper there has also been the more recent recognition of carbon as a property right, and legislation in various states is developing this concept.¹⁴ The objective in recognising carbon as “property” is:

¹² *Yanner* at 8 per Gleeson CJ, Gaudron Kirby & Hayne JJ.

¹³ *Yanner* at 11.

¹⁴ Jacqueline Bredhauer “Tree Clearing in Western Queensland – a Cost Benefit Analysis of Carbon Sequestration”, *Environmental and Planning Law Journal* 17:5 (2000) 389.

*...to provide secure title for carbon sequestration rights through registration on the land title system. The practical effect of this will be that a carbon right attached to property will be held separately from the land ownership, and the carbon right attached to land will be viewable on a property title search, putting the world on notice of the obligations that flow with that land.*¹⁵

In support, the findings of a Commonwealth Public Inquiry (known as the *Voumard Inquiry*)¹⁶ were published in July 2000, where it was recommended:

*...the applicant [seeking access to biological resources] would be required to negotiate, with the holder (or owner) of the biological resources, a benefit – sharing contract which covers the commercial and other aspects of the agreement.*¹⁷

Underpinning the above recommendation was the issue of ownership of biota, and whilst in the context of terrestrial flora in Commonwealth areas, it is pertinent that the Inquiry noted that:

*[a]t common law, ownership of land includes all the substrata below the surface. Natural things attached to land (or its substrata) or growing on (or in) it, whether cultivated or not, form part of the land and will be the property of the owner of the land. It would seem to follow that biological resources generally that are attached to or growing on or in land would be regarded as the property of the landowner. The common law rule would be subject to valid legislation or to any agreement (lease, licence, contract) to the contrary into which the landowner had entered.*¹⁸

Importantly, the above comments were only raised in the context of Commonwealth areas and clearly any policy narrative must be conducted in the light of the existing land tenure within Australia much of which is privately held. Whilst a nationally consistent approach underscored the Inquiry's recommendations, it is instructive that it was recommended:

*...[t]hat further consultations be held with State and Territory governments to address the broader issue of a nationally consistent approach cross jurisdictions.*¹⁹

Clearly it was recognised by the Inquiry that the former Australian colonies and now States have always been “invested”²⁰ with the control and management of Crown lands, and administer the title systems for alienated land. Hence, the pervasiveness of private property rights in the Australian milieu must underpin any attempt to elucidate a private property rights regime for water and carbon.

¹⁵ Ibid.

¹⁶ John Voumard, (2000) Access to Biological Resources in Commonwealth Areas, Report of Commonwealth Public Inquiry (Canberra: Natural Heritage Division, Environment Australia) July. (Voumard Inquiry)

¹⁷ Voumard vii.

¹⁸ Voumard 42.

¹⁹ Voumard, 118.

²⁰ Richard H Bartlett (2000) Native Title in Australia (Sydney: Butterworths) 66.

Arguably, the views expressed in the *Voumard Inquiry* are evidenced in the text of the *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources (NCA)*²¹ which was executed on 12 October 2002 by the Commonwealth States and Territories. The presence of private property rights in land and therefore carbon, are recognised in the common elements of access and benefit-sharing arrangements which the NCA sets out, in particular stating that:

*So as to facilitate biodiscovery and maximise certainty...reassurance should be provided that arrangements do not alter existing property or intellectual property law:*²²

The establishment of new forms of specific private property rights such as water and carbon has highlighted the need to recognise the impact of isolating these rights from the “bundle of rights” currently residing within the conventional elemental land property right. It is instructive that this issue is canvassed in the area of carbon credit property rights,²³ and by extrapolation saline credits. There is clearly growing recognition of interconnectedness between these less familiar forms of property and even archaic property rights such as native title²⁴, and the prospect for conflict in some circumstances.²⁵

A useful example of this interconnectedness is when carbon in wood fibre is unlocked through the removal of existing vegetation to permit agricultural pursuits. The connection is reasonably clear, however the impact of flow-ons such as rising water tables, and hence increasing salinity in soil is less clear. The substitution of salt tolerant vegetation and the adoption of altered farming practices in a more saline environment suggests that saline credits may be more difficult to create as a valuable property right, than say carbon or water. Early indications are that terrestrial carbon credits have already had a measurable impact on the price of rural land in various part of Australia.

All of the above illustrates the difficulties likely to be encountered when an Australian water and carbon property rights impact upon broader moral and social values, apart from economic values.

Nevertheless, a common feature of current property rights is that the interests in question are territorial, in so much as the right is contained only within defined boundaries. This is commonly achieved by way of a legal description of the boundaries, which have been defined by means of a cadastre. In addition, these rights are also proscribed in so far as what activities can occur within the

21 Natural Resource Management Ministerial Council, (2002) *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources (NCA)*, (Canberra) October.

22 NCA- (Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources) (2002) “Common Elements of Access and Benefit-sharing Arrangements Established in Australian Jurisdictions”, 3(e).

23 for a detailed discussion on property rights in carbon see Bredhauer at note 16.

24 Michael Davis, (1999) “Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to protection,” *Australian Indigenous Law Reporter* 4(4), 1-32.

25 James Woodford, (2003) “Hunters and protectors”, *The Sydney Morning Herald*, (6-7 December), 4s, 5s.

territory²⁶, the manner in which the right is to be paid for, and other obligations incurred or limitations imposed.

Some of these usual property rights can be acquired outright, while some such as fishing rights and water entitlements may be attached to rights that are or were once held in a parcel of land adjacent or nearby.

Whilst carbon property rights are capable of construction within Anglo-Australian property law, it is the view of the author that there remains an intellectual quantum leap to understand how existing property law will interface with property theory in the context of carbon. This interface lies somewhere between these boundaries, and if true property rights in carbon are to emerge the positioning of this interface is of critical importance.

Arguably there are gaps in both law and property theory, and it is necessary that there be a debate over such issues which should not be undertaken lightly. History could condemn us for underestimating the task ahead.

Finally, the task of conceiving water and especially carbon property rights is one embedded with the issues of definition (or territoriality) and the ascribing of a correct worth to those rights. As stated in the introduction to this paper, this task is one of both complexity and simplicity, and will severely test the capacity of anglo-Australian property law to accommodate these neophyte property rights.

²⁶Donald Denman (1981) "Recognising the property right" *The Planner* 67(6), 161.

Indigenous Dispossession

by Oren Yiftachel

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Oren has provided two items for discussion. The first is a long abstract on indigenous legal struggle against land dispossession. The second is a chapter in a forthcoming book titled "Indigenous (In)Justice, which attempts to reframe the writings on the Bedouins in terms of a colonial paradigm, focusing on relations between indigenous groups and settler societies .

Indigenous Challenge to Legal Dispossession: Bedouin Land Rights and the al-Uqbi Case, Israel.

Alexandre, (Sandy) Kedar, Ahmad Amara and Oren Yiftachel

Abstract: The paper documents a recent challenge mounted against a long standing Israeli legal doctrine which has made it all but impossible for traditional Bedouin land holders in the desert regions to gain legal ownership. The current challenge harbors significant ramifications for both ethnic relations in Israel/Palestine, and other indigenous land struggles in settler societies. It relates to key global legal rights and debates on issues of indigenous and minority rights, customary law, legal pluralism and transitional justice.

For centuries, the Bedouins of the Negev/Naqab (Hebrew/Arabic) were semi-nomadic people subsisting on farming and raising herds. During the last few centuries they accelerated a process of sedentarization and settlement. Since the creation of Israel in 1948, the Jewish State and its indigenous Bedouin citizens have been entangled in a protracted legal and territorial struggle. The approximately 190,000 Bedouins of the Negev/Naqab constitute about 12% of the Palestinian Arab minority in Israel. About half of them live in "unrecognized localities" and are legally defined as trespassers, as the state denies their ownership over their ancestors' lands.

The consequences of this denial have been severe: the villages are the poorest localities in Israel; they are denied most basic services, such as water, electricity, housing, roads and schools, and suffer repeated and increasing house demolitions. On the other hand, the state is offering to concentrate the Bedouins into planned and fully serviced towns, and about half the Bedouins (mainly landless) have taken the offer. While the living conditions and accessibility to modern services in the towns are better, the towns have remained marginalized and impoverished.

Most Bedouin villages are located on traditional Bedouin lands, passed through intergenerational inheritance. Since the C16, the Bedouins developed an autonomous indigenous land system, which functioned under the auspices of both Ottoman and British systems. The two empires sanctioned the traditional Bedouin systems, and allowed them broad autonomy, including all matters of land possession, ownership and transfer. No official land settlement process was conducted in the Negev. Thousands of Arab individuals and several Jewish companies did register that land, but unlike other parts of the country, where the British conducted organized land registration (settlement of title), in the Negev Bedouins were allowed to continue their traditional tribal system, with government recognition. The indigenous land system persists until today among the Bedouins, but without state recognition.

During the 1960s, as part of the attempt to Judaize the land, Israel began to re-interpret the Ottoman and British legislation. It began to complete the land registration process, but used a new dispossessive doctrine, that never existed during Ottoman, British and early Israeli land regimes.

The doctrine claims that lands held by Bedouins before 1948 should be classified as 'mawat' ('dead', desolate – also spelt 'mewat') and consequently be registered as state property. In this way, the Israeli legal approach resembles the 'Terra Nullius' doctrine which typified the dispossessive treatment of local populations by European colonial regimes, especially in settler societies, such as Australia, South Africa and Algiers. The doctrine was enshrined in several key Supreme Court decisions, which rest on manipulative Israeli interpretation of 1921 British and 1858 Ottoman land legislations.

Israeli courts used the British 1921 mawat law for first the time in the Badran 1962 case, and then famously in the al-Hawashlah case in 1984, to dispossess the Bedouin land possessors. The state claimed (controversially) that if cultivated lands in the Negev were not registered by 1921 (as requested by the British 1921 mawat ordinance), the land is be considered state land, turning the Bedouin possessors to trespassers on their ancestors lands.

The new doctrine required Bedouins to prove land possession and cultivation prior to 1858 (when the Ottoman Land Code was introduced), or lose their land. This reinterpretation by the Israeli state, with the approval of the courts, created a 'reverse terra nullius' process, which was applied 'back in time'. This legal process dispossessed the Bedouins by presenting impossible conditions to prove ownership over land possessed, inhabited and cultivated for generations by the Bedouins.

This doctrine stands behind on-going dispossession of Bedouins, and continues to frame the Israeli state's refusal to recognize the informal 'unrecognized' villages and towns, which have grown dramatically around Beersheba. This denial has caused decades of deprivation, poverty, exploitation and pervasive criminalization, in a process which we conceptualize as 'internal colonialism'.

But recently, for the first time in decades, the doctrine has been seriously questioned. The legal challenge was mounted by the al-Uqbi indigenous tribe, which sued the state in 2006 asking to 11 plots of land on their names. These plots were held, settled and cultivated by the tribe for generations, before its forceful eviction in 1951. Since 2002, several families from the tribe have returned to live on the contested lands.

The paper outlines the legal strategy and mobilization around the al-Uqbi case in which, for the first time in Israel's history, a concerted scholarly, legal and communal challenge has been mounted against the mawat state doctrine. The analysis focuses on several key areas, where the tribe and a supporting group of lawyers and land experts have built

serious counter-claims: (a) the active settlement and agricultural history of Negev Bedouins during the C19; (b) the lack of effective Ottoman rule in the region until 1901, and parallel crystallization of traditional tribal land system; (c) the legal autonomy granted to the Bedouins by the post-1901 Ottomans, and – most importantly -- by the 1917-1948 British mandate; (d) the redundancy of the British mawat ordinance; (e) the problematic Israeli interpretation of Ottoman and British land regimes; and (f) the persistence of a functioning customary land system to the present.

The case shows that the 'terra nullius' Israeli land doctrine, like those of most settler states, rests on questionable historical, geographical and hence legal assumptions. The counter arguments demonstrate the legality of Bedouin land claims, particularly against international legal and political mobilizations around indigenous, minority and human rights, and the possibilities of incorporating customary and modern legal systems. The analysis points to a need for Israel to examine new and legal and policy approaches, which would adopt 'transitional justice' as a legal framework to facilitate restitution and reconciliation.

**In: Amara, A., abu-Saad, I. Yiftachel, O. (eds) Indigenous (In)Justice,
Harvard Human Rights Press, Cambridge (forthcoming).**

D R A F T

Chapter 8:

Situating the Bedouins in Israel/Palestine – Time for a Colonial Paradigm?

Oren Yiftachel¹

The concluding chapter to this volume briefly charts the main approaches to the study of Bedouins in the Naqab/Negev² and argues for re-situating that study within a colonial scholarly paradigm, where the Bedouins can be defined as an indigenous community subject to a process which began as colonialism imposed from the outside, and has continued as 'internal colonialism' since military government was lifted during the late 1960s. The essay highlights three promising perspectives within this paradigm: settler society, indigeneity and 'gray space', to form an initial step in redefining the field. The ideas presented here undoubtedly need further elaboration, substantiation and reflection, and the review presented below is not exhaustive. Neither are the ideas entirely new, as some authors have used the colonial paradigm for the Bedouins, although they have remained few and far between.

Given the state of the field, the present book makes an important contribution by treating the Bedouin Arabs of Southern Israel/Palestine as an indigenous group, subjected in recent times to the regime of a modern settler state. To the best of the editors' knowledge, this is the first scholarly book on the Bedouin to take this approach, which most notable in the chapters by Sheehan, Stevehagen and Amara, abu-Saad and Yiftachel, but runs as a theme in the other chapters as well.

However, the novelty of our volume further highlights the limits of existing paradigms for studying Bedouin society. These have been framed, in the main, by the concepts of modernization, urbanization, politics of identity

¹ I wish to thank Ahmad Amara, Ismael abu-Saad, Avinoam Meir, Cedric Parizot, Sandy Kedar, Safa abu-Rabi'a, Yuval Karplus, Arnon Ben-Yisrael and Batya Roded for their useful comments.

² Negev and Naqab are the Hebrew and Arabic names for the region which is now southern Israel. I use the latter in this paper because it focuses on the Bedouin Arab community.

and gender, and most recently globalization. The settler-indigenous axis – so central in understanding the Naqab, is by and large, absent (for a comprehensive review, see Karplus and Meir, 2011).

The limitations of past studies begin with the definition of 'Naqab Bedouin society'. This 'society' constitutes on small remnants of the Arabs living in the region prior to 1948. It continues to be embedded within far wider networks in Sinai and Transjordan, and in the Palestinian West Bank and Gaza and of course in Israel itself (Parizot, 2004). The usage of this category should therefore be constantly problematized as reflecting a forced division the Naqab Bedouins from other parts of their own society. I have chosen to use the 'Naqab/Negev Bedouins' terminology in this chapter chiefly because it is the name most commonly used by this community itself, both in Arabic and Hebrew. However I use the term with full acknowledgement of the existence of this community as an integral part of the larger Palestinian and Arab societies, and not as a marker or distinct existence.

In the past, the most common scholarly approach has treated the Bedouins, previously locally known as Arab a-Sab'a (Arabs of Beer Sheva) as nomads undergoing a process of sedentarization. Rich studies have traced the subsequent modernization, urbanization and the resultant family, economic, political and societal transformation (see as examples: abu-Rabi'a, 2001; al-Hammde, 1997; Ben-David, 2004; Dinero, 2004; Kressel, 1993; Marx, 1967, 2000; Meir, 1994; 1997; Porat, 2005, 2010). These dealt with key issues such as immigration (Ben-David and Gonen, 2001) housing, economy, community transformations and -- most importantly -- with the question of land (see: Kressel, 2007; Kedar, 2004; Meir, 2005, 2009; Levin et al, 2010, Franzman and Kark, 2011).

Much attention has been devoted in academic and professional literature to the planning of Bedouin settlement, according to the 'best' modern knowledge (see: Ben-Arie, 2009; Stern and Gradus, 1979; Gradus and Stern, 1979; Ben-David, 1991; Kliot and Medzini, 1985; Medzini, 2007; Soffer and Bar-Gal, 1985; Razin, 2000). In later years, more critical studies have conceptualized the Bedouins as a peripheral minority within a centralizing, ethnic state, experiencing multiple deprivations and marginalities (abu-Bader and Gottlieb, 2008; Tarrow, 2008; abu-Rabi'a, 2001; Fenster, 1993; 1999; Meir, 1988; Nevo, 2003; UN, 2003). These studies focused on patterns of discrimination against the Bedouins, and their geographical, economic and political marginalization.(see, as examples: abu-Sa'ad and Lithwick, 2000; Swirsky 2008). Other studies have linked Bedouin marginality to a series of communal crises and pathologies, such as growing crime rates, communal violence and pervasive alienation (abu-Rabi'a, 2001; Ben-David, 2004; Meir, 1997).

Another recent approach has treated the Bedouins as part of the divided Arab or Palestinian nation, embroiled in an on-going struggle with the Israeli state. Focus on land, identity, Arabness, culture, Palestinization (see, for example, abu-Saad and Yonah, 2000; Cook, 2004; Falah, 1989; abu-Sitta, 2001; Bar-On and Kassem, 2004; Parizot, 2004; Hameissi, 2009), and most recently on the Nakbah and its ever-present impact on Bedouin life (abu-Rab'ia; abu-Mahfuz, 2008). An offshoot from this approach, but from an opposite political and ideological perspective, sees the rapidly growing Bedouin community as part of the Arab and Palestinian geographic and demographic threat to the supposedly embattled Jewish state. This is common Israeli-Jewish discourse led academically by the works of Soffer, and by a variety of analysts associated with Israeli land and planning authorities (Soffer, 2007, 2009; see also: Altman, 2009; Zandberg, 2009; Krakover, 1999).

Bedouin society has also been studied in recent years by using critical gender and globalization perspectives. The former places gender relations, and especially the plight of Bedouin women at the center of inquiry, showing the prevalence of deep chauvinism as well as increasing signs of mobilization and resistance among Bedouin women (al-Krenawi and Graham, 1999; abu-Bader and Gottlieb, 2008; Fenster, 2002; abu-Rab'ia-Quider, 2008). The globalization perspective explains the effect of economic and cultural trends on the Bedouins, linking it, *intra-alia*, to accelerating pace of social transformation, to marked decline in community cohesion and to growing Islamism (Gradus, 2008; Meir, 2006).

The Need for a New Perspective

The above approaches, which were sketched here only very briefly, explore and explain key aspects of Bedouin life and grievance in the Naqab. Yet, past research appears to largely skirt around a fundamental factor– the existence of the Bedouins as a colonized indigenous people residing within a settler state. This factor underlies much of the Bedouin experience since 1948, and has impacted on every aspect of their lives. Colonialism, I argue, critically informs the modernization, dislocation, discrimination and gender inequality described by the other main perspectives.

Most Israeli scholarship considers the state's democratic, modern and western character, as a given. This is based on its European origins, the self-perception of the state-founding elites, and on the existence of partial and superficial democratic and liberal 'features' which have glossed over an 'ethnocratic' state structure (see: Yiftachel, 2006). To buttress this problematic perception, Israeli scholarship has used a set of erasure

practices, including the near total dismissal of the Palestinian Nakbah (the 1948 'disaster', during which two thirds of the Arabs in Palestine were driven out of Israel). Most historical and social science accounts skipped over the events of the 1948 war and its consequent ethnic cleansing and destruction of Arab society in Palestine.

The routine treatment of Israel as western and democratic also 'necessitated' the bracketing out of the Palestinian refugee issue from analyses of Israeli society. In later years, the post 1967 occupation was treated as temporary while awaiting resolution as part of a 'peace process'. In this vein the Bedouins too were presented in many studies as 'only' a peripheral community struggling to adjust to life in a modern western society. An extension of this analysis, spelled Bedouin political detachment from the history of the Nakbah and daily reality of the occupation – both critical foundations of the Judaization policy which also directly affects their life in the Naqab.

Hence, as already noted, the treatment of Bedouin society as a marginalized modernizing minority, important as it is, ignores a central factor in shaping Bedouin existence since 1948, namely Israel's ethnic internal colonialism in their region. This led directly to dispossession, forced movement, refugees, and to constant struggle with Israeli authorities for land, development and housing rights. Bedouin concentration into planned 'development towns' has been marked by poverty and social degradation (see: abu-Saad 2001; Yiftachel, 2003). Under the Israeli regime, Bedouins have become 'invaders' of their ancestors' land, and 'obstacles' for development. Past scholarship has been unable to answer a simple question – why are the Bedouins discriminated against more than other minorities in Israel/Palestine?

The answer lies in two critical goals pursued by Zionist settler society – land and demography. Bedouins present acute impediments to Israel's 'ethnocratic' regime (Law-Yone, 2003; Yiftachel, 2006) and its consistent push to Judaize (and hence de-Arabize) the territories under its control, both in Israel and the Occupied Territories. Prior to 1948, the Bedouins in the Naqab held vast expanses of lands, estimated at 3-5 million dunams in varying types of possession (Kedar 2004). This explains the particular severity of the ethnic cleansing of this region, whereby some 80-85 percent of Arabs were driven outside the state boundaries during the 1948-49 war and the following years.

This enabled Israel to 'legally' appropriate most of their lands and allocate it for Jewish use. The Bedouins who remained in Israel were strictly controlled, and their traditional land ownership system disregarded (see: Kedar, 2004; Livnat, 2010; Shamir, 1996), allowing the state to claim total

territorial control. Demographically, the Bedouins are commonly accused of 'dangerously' high fertility rates, which putatively threaten the modern and enlightened way of life sought by the architects of Israeli society. In these respects an overtly racist discourse has developed, essentializing the Bedouins as different and inferior.

The above must be qualified, because the colonization of the Bedouins has not been the only face of Israeli policies, which display other characteristics, at times progressive and enabling. Moreover, Israeli policies have not been homogenous, embodying competing approaches towards the management of local Bedouins. Yet, it is imperative to understand that the Judaization approach has provided a hegemonic meta-narrative for most policy directions, and has provided relatively clear limits for policy-makers for over six decades.

Looking Again through a Colonial Lens: Settler Society, Indigeneity and 'Gray Space'

Given the above, I suggest that scholars re-examine their approaches to the study of Bedouin Arabs under the Israeli regime. Credible research should no-longer avoid engagement with the issue of the Israeli ethnocratic regime in general, and Jewish colonization of Palestine/Israel in particular. Analysts and policy makers need to use the most comprehensive and robust frameworks of analysis that can best account for the community dynamics (for some beginnings in this direction, see: abu-Saad, 2003, 2009; abu-Rabi'a, 2008; Yiftachel, 2003, 2009; Livnat, 2010).

This does not mean, of course, that studies taken from other angles are of lesser value, but rather that they would benefit from dealing seriously with the internal colonial dynamic. It also means that the credibility of studies using the colonial angle would be also tested by their engagement with other scholarly perspectives which highlight the complexity of societal processes beyond the colonizing-indigenous binarism.

Scholarly accuracy, however, is not the only aspect here: adopting a colonial framework is also an act of mobilization, which unveils vitally important forces in a critical and possibly liberating manner. The use of the colonial 'angle' also exposes the previous scholarly 'politics of depoliticization', as it shows how the overlooking of the colonial setting conceals state and ethnic oppressions. Hence, my call is for a scholarship that would not only be accurate, but also amend the distortions of the power-knowledge nexus of previous studies.

Let move to some necessary definitions. Colonialism is of course a much-discussed and debated term. Space doesn't allow to enter these debates

here (see: Fredrickson, 1988; Kipfer, 2007; Stasilius and Yuval-Davis, 1995; Gregory, 2006). For this paper, and based on the definitions provided by these scholars, suffice is to define it as a systematic project of seizing, appropriating and expanding control by an external group over contested regions, lands, people and resources. In colonialist relations, the entering group is placed 'above' its original inhabitants. Colonialism is not limited to the European form prevalent during "the colonial era". Throughout human history, other colonial systems have developed, most notably territorially contiguous systems of expansion and appropriation over neighboring groups and regions.

Colonialism can be 'external,' (and hence often imperial) expanding beyond the boundaries of sovereignty, but also 'internal,' affecting internal frontier areas.

'Internal colonialism' is particularly important for this paper, and it implies adoption of development, land and planning policies that discriminate, exploit, and displace minority populations in frontier areas within the sovereign state. As developed by the works of Hechter (1975), Zureik (1979) and Wall (200), the relationship between the settlers and developers and the area's native population, is similar to a colonial relationship between nations. The formal citizenship of the indigenous group, if it exists, is emptied from much of its content by a series of discriminatory laws and regulations. The internal colony produces resources and power for those ethnically or economically close to the government, and generally alienates the indigenous population who are different in their ethnic, religious, or racial identity.

In relations to studying the Bedouins, I suggest that important aspects of Bedouin life, such as modernization, urbanization, patriarchy, education, tribalism, human rights, gender and globalization, cannot be separated from this 'meta' colonial point of reference. Consequently, I suggest three main scholarly perspectives, through which the colonized experience of the Bedouins should be studied: settler society, indigeneity and 'gray space'. This is not an exhaustive list by any means, but a suggestion for a kind of preliminary research agenda able to tease out the profound impact of colonized subordination. As noted, these directions are not entirely new: previous studies have followed Zureik (1979) pioneering study and framed Zionism within the colonial framework (see: Kimmerling, 2004; Shafir, 1996; Yiftachel, 1992; Yuval-Davis, 1995); while several studies even analyzed practices of 'internal colonialism' towards Israel's Palestinian citizens (see: Falah, 1989; Yiftachel, 1996). However, apart from few exceptions (see abu-Saad, 2003; Yiftachel, 2003; Sheehan, Stevenhagen and Amara, this volume), very few scholars have connected

the two fields of knowledge and used these colonial perspectives to understand the Bedouins of the Naqab.

A Settler Society

The settler society approach has long informed the study of the 'new world', and developed concepts critical to understanding the process of societal construction through 'frontierism', immigration, settlement, new nationalism and rapid development. Several important studies started to analyze Israeli society within this framework, most notably headed by Kimmerling (1982; 2002), Shafir (1989) and Yuval-Davis (1995), who focused mainly on the sociology and political economy of the immigration-settlement process, largely neglecting the geography and planning aspects..

But geography, needless to say, is highly relevant for the interaction between the Bedouins with the institutions, practices, legalities and discourses of Jewish/Zionist settler society. The suggested research angle could focus on these interactions and interfaces, where lofty ideas of development and progress meet the naked 'internal colonialism' project which typifies all settler societies. In Israel, as well known, the state has promoted long standing goals of 'conquering the wasteland', 'making the desert bloom', and 'Judaizing the periphery'. This is a force initially imposed on the Bedouin community from the outside, but over the years diffused into its inner workings and protocols. Although settling the Southern frontier has declined in recent years as a societal value, Judaizing the region has remained high on the Israeli government agenda. For this end new policy efforts have focused on land control, selling of land to single-family Jewish farms and attempts to restrict Bedouin construction and cultivation (see: Yiftachel, 2006: Chapter 8).

The most visible and painful interaction has seen the practices of land dispossession. This has involved a denial of ancestral land rights, and massive forced relocation, accompanied by persistent segmentation. Since 1948, Israel conducted a concerted policy to Judaize the Land of Israel, or historic Palestine, building close to 1,100 Jewish settlements between Jordan and the Mediterranean Sea. At the same time, it destroyed over 400 Arab villages and forbade Arabs to build new localities anywhere in this territory. The only exception was the (coerced) urbanization of the Bedouins in the Jaleel/Galeel³ and Naqab, for which the state has built to date 28 Bedouin towns and villages. It must be mentioned that these localities offer urbanizing Bedouins a path of modernization and most urban services lacking in their traditional settlements. However, and

³ In English: Galilee

despite this, the planned Bedouin localities have remained isolated and impoverished. As a result, most Bedouin land owners (claimers) have remained to stay on their ancestral lands, then urbanize to the planned localities. The Bedouin experience must therefore be studied within this highly relevant geopolitics. This is particularly relevant to the Naqab region, where the state has worked to minimize Bedouin land control, block the return of refugees, and marginalize Bedouins in terms of planning, development, education and local government status (see: abu-Saad, 2003).

Importantly, however, settler societies are not identical, and a credible use of this perspective necessitates scholars to also engage with the specific nature of Zionist colonialism. This begins with the troubled history of persecution and genocide which drove Jews to Palestine, making Zionism in effect a 'colonialism of refugees' (Yiftachel, 1997), with Israel being a recognized and sovereign Jewish state. Yet, an attitude of insecurity still prevails among many Jews and Israeli policy makers, despite massive augmentation in Israeli and Jewish power since the early Zionist days. This constitutes the basis of the enormous importance attached to 'security' within the Israeli regime and its governing apparatus.

Scholars should also note the variety within Zionist groups and over time, with regards to the colonization of Palestine/Israel. Several Zionist groups, such as Brith Shalom and the Communist, actively opposed the movement's colonialist attitudes and programs, while others, such as Etzel (The Irgun), promoted for decades not only the Judaization of Israel/Palestine, but also Jewish control and settlement on the East Bank of the Jordan River. The variety in time is also meaningful – Zionism's early stages were marked by legally legitimate methods of immigration and colonization, centering around land purchase and development programs coordinated with the British regime. During the early periods, relatively little contact existed between Jews and Bedouins, and when it occurred it was generally amicable (Meir, 2009). The later stages of the Zionist project were increasingly more violent and outwardly colonial, peaking with the hotly contested occupation and illegal settlement of the West Bank.

Another important feature of Israeli settler society is the strong sense of Jewish belonging to the land. Zionism did not only aim to find a safe haven for Jews, but carefully chose the ancient Hebrew homeland (believed to be the cradle of Judaism) as its target territory. It therefore mobilized to liberate Jews from their subaltern diasporic existence, thereby creating a strong sense of indigeneity among the settlers. In that respect, one may conclude that in terms of self-perception, *both Bedouins and Jews in the Naqab/Negev see themselves as indigenous.*

An additional factor is the intensifying diversity of Jewish society, which has deepened in recent years with the large-scale migration of ethnic Jews from the former Soviet Union and Ethiopia and with the growing economic liberalization and the associated socioeconomic gaps. The above aspects – mentioned here only briefly -- should be explored seriously as scholars ask questions about the interaction of Bedouins with the Jewish settler society.

To complicated matters, the Naqab Bedouins were also formally included in the Jewish state, receiving formal citizenship in 1949-50, which effectively came into effect (at least formally) with the lifting of military government during the late 1960s. Citizenship has allowed the Bedouins to campaign for rights and equality and organize politically in a way not possible for Bedouins under other regimes. In some important ways, the Naqab Bedouins have used the spaces of mobilization offered in the Israeli system, most notably in the local politics of planned towns, which have created a process of democratization.

Yet, outside their small enclaves, Bedouin citizenship remains only formal -- a method of registration, organization and surveillance, offering negligible political clout. It never allowed for genuine participation in state or regional affairs, or as a platform receiving a fair share of public resources. The Bedouins have remained, as noted by Swirsky (2008), 'transparent citizens', observing the settler state mobilizing massive resources for Jewish seizure of their ancestors lands (see also: Noah, 2009; Livnat, 2010; Tzfadia, 2010). The meaning of minority citizenship in such a settler society is still awaiting serious exploration. It is noteworthy that most Israeli scholars dealing with Bedouin land and resources have adopted the state interpretation that the indigenous population possesses no land ownership rights. They have written this explicitly (see: Ben-David, 2004; Levine et. Al, 2009; Franzman and Kark, 2011; Kressel, 2007), or – more typically, have remained silent on the issue.

Typically to colonial engagements, the Bedouin interaction with the Israeli settler state has made them subject to policies of division and identity manipulation. In order to minimize their resistance, the state has attempted to emphasize their 'Israeliness' (through, of course, not Jewishness), divide them from other Palestinian communities in Israel/Palestine, and consequently 'de-Palestinianize' and even 'de-Arabize' their identity (see: Yonah et al, 2004). Bedouins have been commonly constructed in Israel as culturally 'unique'; an exotic people, whose loyalty belongs to the desert and not to any particular culture or nation. While the Naqab Bedouins do possess their own cultural and ethnic features, they have always been part of the general Arab world, and undoubtedly belong to the Arabs of Palestine. Their natural inclusion as

'Palestinians of Bedouin origins' within Palestinian societies in exilic locations attests to this orientation, as clearly shown by abu-Mahfuz (2008).

The divisive colonial strategy has been accompanied by a system of partial cooptation, whereby the state attempted to incorporate the Bedouins while keeping them on the margins. In the Naqab settings this received support from some local Arab leaders, who enshrined their leadership over towns and tribes with the aid of the state's colonizing apparatus. But state support came at a price; the severing of ties with Palestinian and other Arab or Muslim groups, encouragement to serve in the Israeli army, and condoning of the Judaization of the region outside its Arab enclaves (see: Livnat, 2010).

This identity regime has also operated 'inside' the communities with attempts to segregate Bedouin society internally by supporting the traditional patriarchal tribal system, and by condoning practices such as marriage of close relatives and minors, pervasive polygamy (al-Krenawi and Graham, 1999), and internal racism. The Israeli state even quietly supported, until the late 1980s, the highly conservative Islamic movement which was seen as providing a 'softer' locus of identity to nationalizing Palestinian movements. Here lies a paradox: settler societies, including Israel, commonly represent themselves as modern and Western, yet they are reactive in prolonging and deepening reactionary practices among the local populations. These aspects have rarely been studied, and their exploration is critical to the interaction of the settling state with the indigenous population.

Finally, another important interaction worth studying in the working of a settler society is the rise of civil society. Specifically, Arab-Jewish organizations begin to articulate a joint struggle for the Naqab's various ethnic communities. This has surfaced in joint regional struggles around environmental hazards, investment incentives and tax concessions. While this is still a minor phenomenon against a history lacking cooperation, the influence is gradually reaching regional discourses and policies. Recently, several key civil society organizations with considerable funding, have begun to construct a common Arab-Jewish space and struggle, in which the democratization of a colonial settler society can be imagined, debated and planned.

Indigeneity

An important field of study, highly relevant to the Bedouin experience, has lately developed around the experience of indigenous peoples and the concept of indigeneity. A range of theoretical, historical and empirical

studies have now accumulated into a burgeoning body of knowledge about people residing in colonized regions and states, who have subsequently become 'indigenous'. This field illuminates the plight of minorities commonly 'hidden' under the previous state-centric approaches of knowledge-generation. It has politicized the traditional anthropological and Orientalist approaches of studying these people as exotic phenomena to be 'documented' prior to their likely disappearance from the stage of history through modernist assimilation. The politicization constructed the category of 'the indigenous' as an agent of history, a perpetrator of development and struggle, no longer a passive recipient of colonial policies.

There is no one definition of 'indigenous' although most studies and legal approaches emphasize the following features:

- primary occupation and use of colonized homeland regions
- maintenance of traditional customs, laws, language and cultures
- unbroken residence in the colonized region (save forced evictions)
- widespread land dispossession
- loss of pre-existing sovereignty

Indigeneity under the new approach has become a claim for power, self determination, culture and place (Smith, 1999; Tsosie, 2002; Howitt, 2006). It combines scholarly approaches with an anti-colonial surge, equipping colonized people not only with a critique of the powers ruling over their lives, but with substantive knowledge about their history, struggles and resistances. This body of knowledge found its way to a wide range of forums in which indigenous peoples have developed strategies to turn their subordination into more equal coexistence with other groups now residing in 'their' territory, while re-building their culture and sovereignty (see: abu-Saad and Champigne, 2006).

A particularly rich area of inquiry has revolved around different forms of indigenous legalities, customary laws and regulation systems, and the ability to imagine and design 'multiple sovereignties' between indigenous groups and the modern nation-states established on their territories (see: Burrows, 2005; Daes, 1999; Kedar, 2004). In addition, 'indigeneity' has inspired new epistemologies, drawing on native 'ways of knowing' and traditional methods of managing indigenous lives (see: Malone, 2007; Louis, 2007), and new perceptions of politics, culture and identities (see: Riseth, 2007). The political climax of this genuinely global campaign has been the adoption in September 2007 of the UN Declaration on indigenous peoples, which identified a range of protections for the culture, land and sovereignty of indigenous peoples (UNPFII, 2007).

This surge has led to a variety of political, legal and cultural struggles in most countries where indigenous peoples began to rally around their history, identity and resources. One of the major achievements the famous 1992 Mabo decision, which recognized for the first time, the existence of native title in Australia, and hence repealed the 'terra nullius' doctrine used for over a century for annulling aboriginal land rights (see Howitt, 2006). The Mabo decision has had a major influence on land struggles of indigenous groups world-wide, including the Bedouins in the Naqab, which have used the example of the Australian break-through in their dealings with Israeli authorities and courts (see Meir, 2009).

The relevance to the Naqab Bedouins is clear. It is a group that resides on ancestral land for centuries prior to Zionist settlement, while subsequently facing dispossession and marginalization. Prior to Israeli rule, the Bedouins had a system of tribal governance, as well as a set of well established traditions and customary laws, which operated largely uninterrupted under previous Ottoman and British colonial regimes, as documented by extensive work of scholars such as Bailey (1980, 2010), Luz (2008), Avci (2009), Meir (2009), Falah (1983, 1989) and abu-Sitta (2003, 2010).

The history of every group is of course unique, but Bedouin history -- and particularly the manner in which they interact with the new rulers of their land, resembles in important ways that of other indigenous peoples such as the Maoris in New Zealand, Aborigines in Australia or Zapatistas in Mexico; all lost their self-determination but have continued to struggle to regain land control and cultural autonomy (see: abu-Saad, 2008; Stevenhagen and Amara, Sheehan, this volume).

The indigeneity angle can develop these comparisons, and interrogate fascinating questions such as the impact of indigenous consciousness on the Bedouins' struggle, the rise of indigenous globalism, the intertwining of indigenous awareness and Islam. In addition, research can explore the sensitive relations between the various segments of Bedouin society itself, in which stratification is often based on an internal 'indigeneity order', whereby Arab immigrants and farmers ('Fellaheen') who mainly came to the region during the 19th Century enjoy a lower social status than those perceived as original land owners ('Asliyeen'). Another sensitive issue is the relations between the general Palestinian and specific Bedouin senses of indigeneity, as the two coexist in the struggle for a post-colonial future for Israel/Palestine.

'Gray Space':

Another angle in which to study Bedouin existence is the recent developments in political geography, globalization research and urban

studies, which explore the growing phenomenon of urban informality. This refers to enclaves, populations and economies only partially incorporated into their 'host' society. I have termed this phenomenon 'gray space'; positioned between the 'whiteness' of legality/approval/safety, and the 'blackness' of eviction/destruction/death. Gray spaces are neither integrated nor eliminated, forming pseudo-permanent margins of today's urban regions, which exist partially outside the gaze of state authorities and city plans. (see, Yiftachel, 2008).

In the urban policy sphere, including planning, gray spaces are usually quietly tolerated, while subject to derogatory discourses such as 'contaminating', 'criminal' and being a 'public danger' to the desired 'order of things'. Typically, the concrete emergence of 'stubborn' informalities is 'handled' not through corrective or equalizing policy, but through a range of delegitimizing and criminalizing discourses. This creates boundaries that divide urban groups according to their status; a process of 'separating incorporation' and 'creeping apartheid'. This double-edged move tends to preserve gray spaces in a state of 'permanent temporariness'; concurrently tolerated and condemned, perpetually waiting 'to be corrected'. A multitude of informalities has come to characterize a vast number of metropolitan regimes. While this phenomenon is deeply rooted in colonial times and urban planning (Ferara, 2009), its recent manifestation has amplified to the extent that more than half the population can be classified as 'informal' (see: Davis, 2006; Neuwrith, 2006; Roy, 2005, 2009; Yiftachel, 2009).

The relevance to Bedouin society is obvious. Around Jewish Beersheba, gray spaces have rapidly grown into sprawling expanses of Bedouin-Arab shanty towns and villages, constructed of tin and wooden shacks (Yiftachel and Yacobi, 2004). This is a clear bi-product of Israeli policies which have refused to recognize Bedouin ancestral land ownership, effectively turning them into 'invaders'. Gray space is also evident in the planned Arab development towns around Beer Sheva, where squatters are increasingly occupying public open spaces. There is also a growing number of 'temporary' Arab residents in the metropolis of modern Jewish Beer Sheva, where they mainly reside in the dilapidated Ottoman-Arab city centre and the adjacent impoverished neighborhoods. While around a thousand professional Arabs are permanent residents of the city, a few thousand others constitute an 'urban shadow', and are usually not registered as city dwellers, nor are they represented in its local government. Subsequently, they are denied basic communal services, such as Arab education facilities, places of worship and political representation (see: abu-Saad, 2009; Yiftachel, 2009).

The Bedouin experience around Beer Sheva can thus be compared to the plight of indigenous urbanizing populations in vast regions of the global South, such as South America, Asia, the Middle East and Africa. Studies have shown that in such regions, new types of ethno-class relations have been formed in today's cities, based on new spatial configurations of residence, power and capital resources. This emerging urban order may be conceptualized as the 'new colonialism', which constitutes a de-facto form of metropolitan governance, facilitating the expansion of dominant interests through exploitation, denial and segregation (see: Mbembe, 2005; Roy, 2007).

In this sense, the existence of most Naqab Bedouins within the globalizing Beer Sheva metropolitan region exposes them simultaneously to both 'old' and 'new' types of colonial relations. The first alludes to the ethno-national expansion 'from above' described earlier, whereby the dominant population has seized control over indigenous groups and their resources, while the latter points to a new phase of 'centripetal' colonialism, during which marginalized populations create gray spaces 'from below' In this way they become subject to exploitation and segregation, and are unevenly incorporated in the latest product of capitalist globalization – urban 'creeping apartheid' (Mbembe, 2007; Davis, 2006). It is time to explore this aspect of Bedouin existence as they face a new 'layer' of exclusion, namely the economic relations forged under the current neo-liberal age.

Sumood

Importantly, processes of colonization, old and new, are never unilateral. In most cases, including the Naqab Bedouins, they meet resistance and change, which should be studied and understood to complete the understanding of such settings. Recent international studies have shown that in a wide variety of cases, colonized populations find resourceful ways to challenge penetrate and even prevail over oppressive power relations. Bayat (2004), for example, notes the 'quiet encroachment of the ordinary' into spaces of opportunity in such new settings, while Perara (2004) notes a process of inverse 'indigenization' of colonial infrastructure. Appadurai (2001), Roy (2007), and Angotti (2006) show how local politics are organized in today's slums and shanty towns, and how these are creating new hubs of globalizing civil society networks, often with surprisingly effect on tempering centralized power.

The Bedouin Arabs, like most indigenous populations, have not been passive recipients of colonial and globalizing forces. A notable process of self-empowerment and politicization has taken place during the last couple of decades, with a stubborn struggle of 'sumood' – the Palestinian

Arab term for 'hanging-on' and surviving against persistent crises and difficulties. In the Bedouin case, 'sumood' has meant holding-on to their ancestors land, and rebuilding their communities after several rounds of evictions and dispossessions (see abu-Frih, 2010; Noach, 2009; Yiftachel, 2009). This has been promoted through the formation of several civil bodies and institutions, most notably the voluntary Regional Council of Unrecognized Bedouin Villages (RCUV), which has assumed a leadership role in guiding the Bedouin struggle.

Like most indigenous politics, which operate under the coercive, fragmenting and luring attraction of colonial power, Bedouin politics have been highly volatile. It has waxed and waned between the need to present a united front against a dispossessing government, and the deeply rooted tribalism, chauvinism, cynicism, and tensions emanating from the differing agendas and personalities. Another source of tension exists vis-a-vis Northern Palestinians in Israel and the Palestinian national cause, all steeped in profound uncertainties and divisions, but framed within a common struggle and a post-colonial vision. For indigenous Bedouin communities, there are powerful and confusing forces at work daily as it negotiates its position within its traditional and colonized homeland.

Finally, resistance and survival under a colonizing regime also involves positive elements, such as the nurturing of cultural traditions and community spirit. As Ehrenreich (2007) and Conell (2007) remind us, celebration and joy has always been a central part of native and minority life and survival, not the least among Palestinians (Serhan, 2008). Somewhat removed from the direct political arena, communal events such as weddings, holidays, youth activities, women's groups, plastic art, poetry, music and the valorization of public interaction, sustain the various Bedouin communities, and display their ability to enjoy and celebrate survival under harsh circumstances. This too, can be a promising line for future cultural-political research.

The current volume is indeed a major step in generating new knowledge on the Bedouin Arabs communities of southern Israel/Palestine, as embroiled in the dynamics of settler-indigenous relations. Yet, as I tried to show above, more is needed in order to unpack, understand and challenge the (internal) colonial relations currently existing in the Naqab, and equally important, construct ways to transform Naqab society into a post-colonial stage. This is a major challenge for future research and policy in the area.

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Equitable Compensation Models

by Spike Boydell & Ulai Baya

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Abstract:

Many Pacific Island countries are challenged by aspirations for development and western commercialism that conflict with the desire to maintain the best of custom and traditional land stewardship. In this paper, we explore the development of an equitable compensation approach that applies the principles of marriage value (or synergistic value) to recognise the reliance that island communities have on customary fishing grounds. Waterside tourism ventures are a marriage between a hotel development and associated infrastructure on the land, and the need to access and use the adjoining lagoon or ocean for recreation activities. Likewise, mineral exploration and development in the interior requires access to waters edge wharf facilities for export purposes, which impacts ecologically on customary fishing grounds.

We use an example where property rights over the customary fishing ground are sometimes held by traditional groupings from the interior rather than the waterfront landowning group on whose land, for example, a lease may have been granted for a resort development. Building on a detailed analysis of both the institutional arrangements and stakeholder interpretations, we combine these insights with lessons from other jurisdictions to explore and analyse five potential compensation models. We engage scenario analysis to allow the interests of the various stakeholders in a potential development to be reconciled, and this in turn allows for a discussion and elaboration on the appropriate valuation methods that can be applied, drawing on international best practice, through the integration of current International Valuation Standards.

Keywords:

Compensation, synergistic value, custom, development, International Valuation Standards

Introduction

The growing influence of globalisation and modernity is impacting on the South Pacific, most notably in Melanesia through the potential economic benefits associated with resource exploration on (or below) customary land. The developing countries of the South Pacific region, spread over 11.5 million square miles of ocean, share a combination of geographical, biological, sociological and economic characteristics. Importantly, they all have enduring, traditional systems of customary land tenure (with 83-100% held in customary ownership), that conflict with Western notions of land ownership (Hann, 1998, Paterson, 2001) .

Our focus in this paper is on the resource rich countries of Melanesia, namely Papua New Guinea, Vanuatu, the Solomon Islands and Fiji. At the time of writing, significant reserves of bauxite, copper and gold have been identified in Fiji, whilst some \$60 billion seabed reserves of nickel are promised in the Solomons. Meanwhile, the more developed exploration of minerals in Papua New Guinea is an ongoing source of conflict between customary landowners, the government and offshore exploration companies.

Our purpose in this paper is to explore how an equitable compensation model can be formulated for resource rich developing countries, like those in Melanesia, where the principles of customary land ownership are protected by Constitutions and traditions alike. Currently, the approaches taken to compensate customary landowners for the loss of access to their traditional subsistence and spiritual recognition to the land is somewhat *ad hoc*. We have previously argued that the customary nature of land ownership and control in the region does not preclude the optimum use of land – in its many forms – for development (Boydell, 2010). Rather, there is a pronounced disconnect between indigenous values and capitalist interests, which we elaborate on in this introduction. In the next section, we provide a review of the literature and law relating to compensation on native land. This provides the requisite background for our inquiry into compensation approaches, using scenario analysis to present a hypothetical (but common) compensation issue. We interrogate international valuation standards for potential solutions to the compensation challenge, and conclude the paper with a discussion on why synergistic valuation may be part of the optimal approach.

The disconnect that exists between indigenous values and capitalist interests goes beyond legal pluralism (for example, on legal pluralism see Hooker, 1975, Griffiths, 1986), as we are not just concerned with the interaction of customary and western law. Rather, our plurality extends to notions of identity. As Hughes (2003, 346) argued, modern constitutionalism clouds the issue of identity as the state cannot be merely conceived of in abstract institutional terms, as assumptions of uniformity under a coherent body of law is at odds with the social and cultural reality of these countries. However, we do share the view of the von Benda-Beckmann's (von Benda-Beckmann and von Benda-Beckmann, 2006, 12) that 'along with many anthropologists, we think that the term *law* can be used as an analytical concept'. They go on to articulate law in both cognitive terms (how things are, and why they are) and normative terms (how things could or should be). We have developed the

concepts of self and identity creation (the literal meaning of autopoiesis) further in our research on complexity epistemology (the study of emergent levels of knowing) and complexity axiology (the study of emergent levels of valuing) (McDermott and Boydell, 2011). We apply these interpretations to what we refer to as the *Plurality of Registers* when attempting to articulate the disconnect of worldviews between indigenous values and capitalist interests (see Figure 1).

What the *Plurality of Registers* highlights are discrete conceptions of knowing and valuing, with different social relationships, behaviour, permissibility, consequences – some of which are categorical (typified general rules) and some are ideological (more generalised). ‘Law in this sense is a generic term that comprises a variety of social phenomena (concepts, rules, principles, procedures, regulations of different sorts, relationships, decisions) at different levels of social organisation’ (von Benda-Beckmann and von Benda-Beckmann, 2006, 13). Simply stated, the customary value of land that is used for subsistence purposes and which retains strong spiritual ties to the ancestors whilst providing sustainable stewardship for future generations is intangible. Yet in western economic terms, which ground notions of value as economic rent, or surplus of production, the value of such customary subsistence land is effectively zero dollars. There is no problem with these different worldviews... until they meet. And where they meet, the inalienable notions of land held by the customary stewards are very much at odds with the commodification of western understandings of ownership.

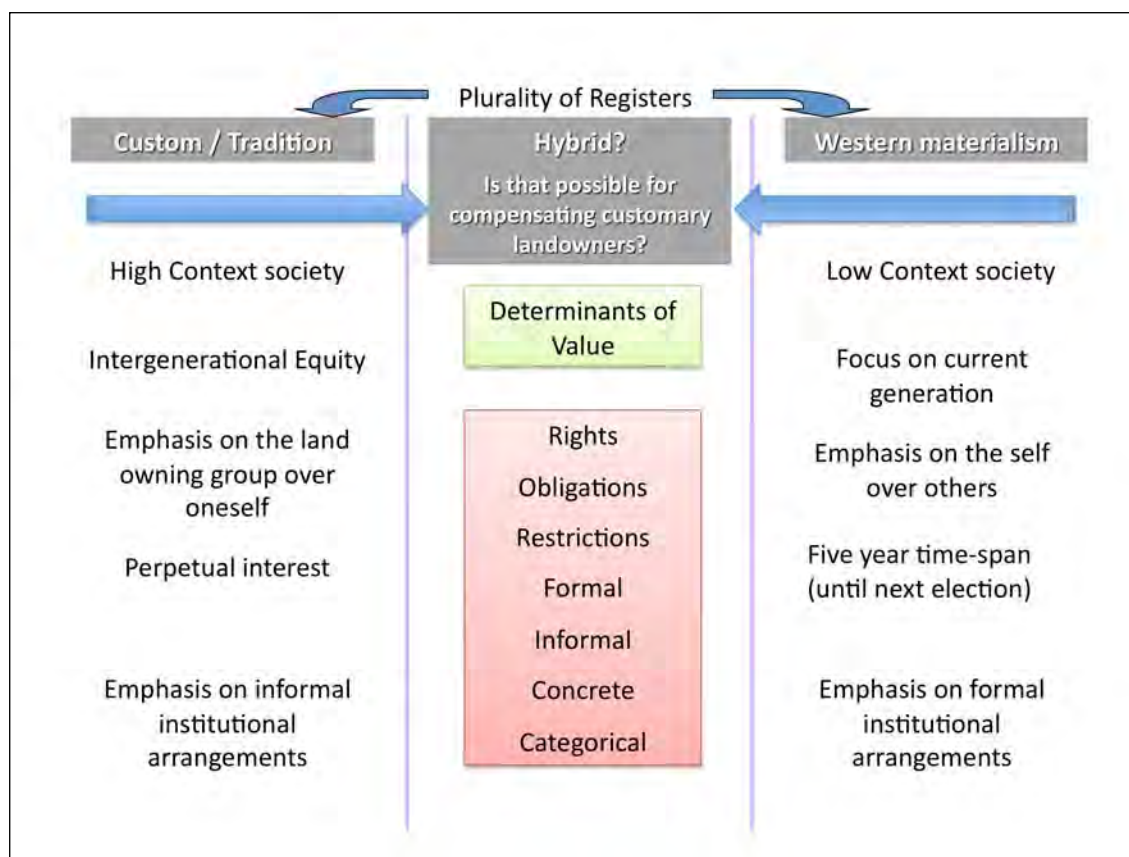


Figure 1: Plurality of Registers

(source: Boydell & Baya for this research)

These issues highlight our *Plurality of Registers* (or institutional arrangements) and Figure 1 provides a simplified graphic of these, which allows the relative extremes of custom / tradition and western materialism to be elaborated. A distinction has to be made between low-context and high-context cultures in land dealings and conflict management (Burgess and Burgess, 1997). There are major challenges to conflict management when a straightforward low-context (US, Canada, Western Europe, Anglo-Australian) approach is applied to a culturally sensitive high-context society (traditional, collectivist, honour based cultures e.g. Japan, China, Latin America, and Pacific Islands). The western approach identifies conflict as a struggle between competing interest and something to be addressed in a businesslike way. Language is explicit and the conflict is tackled head-on, adopting competitive (positional) bargaining or integrative (problem-solving) negotiation. This brash approach contrasts harshly with the high-context identification of conflict as a problem of relationships as well as interests. In such circumstances, a relationship-oriented process must encompass indirect and non-verbal communication to protect relationships and face. Accordingly, traditional societies often prefer locals to act as intermediaries, even though they may be party to the conflict and partial to one or other side, based on community trust and respect. Such individuals are seen to have a longer-term interest in enduring solutions for the greater good of the society than impartial outsiders do.

Continuing the polarity of customary and western perspectives, such differences also exist in terms of timescale. The whole notion of time is different between the two worldviews. Land ownership from a customary perspective, and for indigenous people in general, is grounded on intergenerational equity. This can be explained as guardianship - to respect the spirits of the ancestors - and stewardship – to protect the land, applying what we know understand as sustainable principles, so that it will be able to be used and enjoyed for subsistence purposes by generations still to come (Boydell and Holzknicht, 2003). In contrast, western approaches under modernity have tended to focus more on the nuclear family and the current generation, as witnessed by unsustainable land practices, negative reaction to climate change policy proposals if it is to impact on an individuals lifestyle, and the urgency with which the earths natural resources are being extracted / exploited.

In making broad generalisations, high context societies, like those in Melanesia, place emphasis on intergenerational equity, in contrast to the western focus on the current generation. This is similarly demonstrated in the emphasis of the group over oneself, whereas the western model of possessive individualism prioritises the self over others. Our ongoing work with stakeholders in the region highlights (in this context) that, in some cases, chiefs utilise custom and tradition to maintain their cultural control and powerbase, and yet are cited as misusing that power for self-interest and personal benefit. It follows that a perpetual view is adopted when the emphasis is on custom and tradition. Conversely, in the western model, the time-span is often limited to a five-year outlook; in other words liberal democracies act in such a way as to allow the incumbent government to heighten their chances of re-election, assuming a three to five year election cycle. Custom and tradition emphasise informal institutional arrangements, and these are often devalued or challenged by the power / authority of formal legal institutions that are guaranteed by the State.

The conundrum is that frequently one or more stakeholders cannot comprehend the complexity inherent in the worldview of other stakeholders. In related work (McDermott and Boydell, 2011) we have attempted to identify the hierarchies of understanding between different parties (Beck and Cowan, 2003), and whilst such understanding can be abstracted theoretically the challenge can effectively mean that parties are operating at different vibrational (for want of a better word) levels such that they cannot comprehend the others perspective or worldview. The reality is that there is some overlap between the extremes we demonstrate in Figure 1. It is this overlap between worldviews that we have to address if we are to seek equitable compensation when, supported by governments relying on their constitutional right to mineral resources, mining interests seek to exploit the resources in, on or under land that has been held by custom owners.

Discussing property rights (be they customary, constitutional or mining) is made more complex because discourse on property rights has emerged within a broad range of disciplines. These include, but are not limited to, archaeology, anthropology, ethics, sociology, history, psychology, law, geography, biology, philosophy, economics, and planning. The most influential Western theorising about property is underpinned by what Hann (2007, 290) refers to as the ‘standard liberal model’, yet property is ‘much broader than the liberal tradition recognizes, and that the political, economic and social functions of property are in continuous flux’. Many of these disciplines draw heavily on legal traditions, and in particular have been influenced by Henry Maine’s (1861) metaphor of ‘a bundle of rights’. The importance of the ‘bundle’ metaphor is that it highlighted the common circumstance that different individuals or groups may hold differing rights, obligations and restrictions over the same parcel (or piece) of land. The understanding and articulation of property rights, obligations and restrictions influence property relations in all human societies (Boydell and Searle, 2010). As Cole and Grossman (2002, 318) highlight, ‘divergent conceptions of property rights can lead to differences in analysis and to confusions in cross-disciplinary scholarship’. Caution needs to be taken when research into property rights, like our own approach, strives to be transdisciplinary (Nicolescu, 2006, Max-Neef, 2005), and navigates the boundaries of diverse disciplines. As Bromley (1991) highlights, there are few concepts in economics that are more central, or more confused, than those of property, rights and in particular property rights. Yet as we demonstrate later in the paper, when we come to deal with valuing compensation, it is the valuers role to place economic value on these rights, even if such rights are indeed intangible.

Having provided an introduction and overview of the complex challenge, in the next section we provide context for the rights we propose to value by exploring compensation experience and practice from other jurisdictions.

Literature Review

There is no standard way in which the topic of equitable compensation of native / customary title is operationalised under comparative jurisdictions in the Pacific (Boydell and Baya, 2010). Existing compensation regimes in Melanesian States, with localised variation of application, share similar common law origins: one founded on the sanctity of property, forbidding deprivation of property rights without fair and just compensation. Common law influences include

landmark developments in the area of native title jurisprudence amongst the indigenous peoples of neighbouring New Zealand and Australia, with similar progress from Canada. These developments are augmented by advances in a number of provisions of international instruments that obligates island States under International Law, such as *The Declaration on the Rights of Indigenous People of 2007*¹ relating to central matters such as customary title. Collectively, these obligations recognise the ownership of lands, territories and resources by their traditional owners that encompasses a wide gamut of legal relationship from property to use, including compensation (see Article 26(2) and Article 28(1)).

In the case of Australia, the *Native Title Act, Cth.* (1993) protects native title from extinguishment by adverse government action under s.48. Where it is sought to extinguish native title, this is usually facilitated by way of an *Indigenous Land Use Agreement* (ILUA). One of the few Australian decisions to discuss extinguishment simply is *Jango v Northern Territory* (2006) FCA 318 where, to demonstrate entitlement to compensation, the claimant group were required to establish as a threshold issue that they had native title rights and interests over the area at the time the compensation act occurred.

In Canada, aboriginal titles / rights are protected under the imprimatur of the Constitutional provision of s.35(1) of the *Constitution Act 1982*. In some circumstances, however, aboriginal titles / rights can be regulated and compensation may be payable for allowable acts as in *R. v Van der Peet* (1996) 137 DLR (4th), 289.

Up until the *Attorney General v Ngati Apa* (2003) 3 NZLR 643, there were effectively no native / customary title claims in New Zealand (except for potential foreshore and sea bed claims), as all customary title to land had been effectively extinguished by the end of the nineteenth century through government purchases and the investigation and conversion to freehold effected post 1862 through the Native Land Court (now the Maori Land Court).

As we elaborate in our analysis later in the paper, in the absence of agreement on international best practice, a survey of contemporary practice indicates that negotiated settlements are the preferable compensation mechanism. Negotiated settlements are used in Canada, New Zealand, Australia, Papua New Guinea and Fiji. Whilst the process and outcomes may take different legal forms in each jurisdiction, they have in common diverse approach towards compensation packages in which lump sum payment is only one of several ways of delivering redress. This allows for a flexible approach of tailoring recipient needs to be met, through facilitating for intergenerational equity, environmental and resource decision-making powers, employment and cultural acknowledgement amongst others (see for example the \$2bn deal between Rio Tinto and five aboriginal groups where only \$3,500 p.a. will be paid to individual customary owners, the rest being in terms of scholarship, infrastructure, employment opportunities:

¹ Declaration on the Rights of Indigenous Peoples, UN GA 2007, see: <http://www.ohchr.org/english/law/ccpr.htm>

<http://www.abc.net.au/news/stories/2011/06/03/3234490.htm?section=business>). Such compensation packages add time and complexity to the legal arrangements.

As our synergistic valuation approach elaborates later, it is important to also consider native title rights to the offshore and sea-bed, which have been litigated in a number of common law jurisdictions such as Australia, Canada and New Zealand. Similar rights has also been enunciated pertaining to the First Nations Peoples in the United States per *Native Village of Eyak v Trawler Diane Marie Inc.* (1998) 154F 3rd 1090(9th Cir). As the doctrine of native / customary title functions as a recognition system, each jurisdiction has a different legal test that claimants must satisfy in order to show that they have native title rights and interests. Once established the question of compensation for extinguishment or infringement of rights and may arise.

The New Zealand Court of Appeal decision in *Attorney General v Ngati Apa* (2003) determined that the Maori Land Court has jurisdiction to investigate customary title to the foreshore and sea bed, a process that could result in a conversion of the title to freehold title. This confirmed that Maori customary/native title to the foreshore and sea bed has not been extinguished. Whilst the decision did not determine the nature and content of the customary / native title right, the legislative response by Government to the decision acted to define the content of these rights. In so doing, the Government is believed to have anticipated what the nature of the rights in the foreshore might be, if litigated, prescribing legal tests for territorial and non territorial rights based largely on the Canadian experience married with some Australian law (Boydell and Baya, 2010). As such, the threshold of proof was set higher than in any Commonwealth jurisdiction - thus failing to accord any status to the customary owners. The Act was replaced in 05 September 2010 by the *Marine and Coastal Area (Takutai Moana) Bill* specifically acknowledging the need to consider culturally appropriate test for the recognition of customary/native title rights. Clause 63 specifically acknowledges customary marine tenure as an exclusive possession right to foreshore and sea bed and is an in alienable interest in land.

Canadian doctrines of aboriginal rights and titles have been largely influenced by the operation of s.35(1) of the *Constitution Act* of (1982), which recognises and affirms existing aboriginal rights as unextinguished at the time of its commencement. To the extent that extinguishment of rights and interests can occur prior to 1982, the test is one of clear and plain intention to extinguish as in *R. v Badger*. There is little substantive litigation on extinguishment as the overall purpose of s.35 saw the need to protect the distinct cultures and recognise their prior occupation of North America reconciling this with sovereignty of the Crown. This results in a distinctive body of jurisprudence with the overall purpose of reconciliation in mind. A recent decision by the BC Supreme Court in *Ahousaht Indian Band and Nation v (AG) Canada* [2009 BCSC 1494] asked the Court specifically define the content of their Aboriginal title only to the extent necessary to establish harvest rights and sell fisheries resources incident to that title. Whilst this action encompassed an area below low water mark and extended into the Pacific Ocean, it did not asked the Court questions of title that could potentially give rise to an exclusive right, but instead asked of a

determination of a lesser right of the recognition to fish and the extent of its exercise in the area (see para 499.)

Australian native title in the offshore have been the subject of a number of major court decisions but this has largely influenced by the definition of native title in section 223 of the *Native Title Act 1993* (Cth.) [NTA]. Since the decision of *Wik Peoples v State of Queensland* (1996) 187CLR1, clarification on extinguishment and jurisprudential development has largely been dominated by the *inconsistency* model where its application was carried through in *Yarmirr v Northern Territory* [2001]HCA56 enunciating that where the continuing recognition of native title rights and interests to sea country was inconsistent with the common law itself, the common law prevails.

In the later case of the *Lardil People v State of Queensland* [2004]FCA298 the claimants asserted *inter alia*, ownership of seas, the sea bed, and the sub-soil below the sea bed and resources of the sea in their respective territories. The judge found that the concept of ownership held by the applicants was not one based on common law concepts of real property. Rather, it was a concept born out of the connection of peoples to each of the elements through their spirituality (see paras 115,147). As native title was earlier interpreted by the NTA in *Ward v Commonwealth* [2000]FCA191 requiring each individual native right and interests to be identified, this statement would mean that indigenous relationship to country including sea country must be translated into individual rights and interests. The NTA requires that the relationship between a community or claimant group and the land is to be expressed in terms of rights and interests in relation to that land. This means that a relationship that is essentially religious or spiritual must be translated into law. This would invariably require the fragmentation of an integrated view of reordering of affairs into rights and interests, which are considered apart from the duties and obligations which go with them (see para. 173).

The *Ward* judgment further observed that it is not useful to state native title rights in a broad way given the limitations pursuant to its definition at common law under s.223 of NTA and subject to common law rights of navigation, fishing and the international law right of free passage (para. 171). Nor was the non-inclusive right to occupy, use and enjoy the waters and land appropriate, because at common law the notion of possession and occupation involve notions of control and access. Applying earlier decisions in *Yarmirr*, the *Ward* judgment found that control of access to the land and waters of the inter-tidal zone and the territorial seas as a right of exclusion even though as part of the traditional law, could not be recognised at common law. It is important to note that this decision is not a determination, that rights and control of the foreshore cannot be part of native title in the foreshore, rather the findings reinforces that they cannot be recognised by the common law in Australia because of the scope of native title definition under the NTA.

Further, the decision in *Akiba v Queensland* [2010]FCA643 saw some accommodation in that the claimants sea territory was viewed quite different in character than most of the mainland claimants and this difference impacted on

the way the jurisprudence was to be applied. It was noted that the islander claimants in this instance were seamlessly attached and culturally associated to the claimed area that there is no sea-land dichotomy. Further it was emphasised that in determining the nature of customary title rights and interests of the claimants it is necessary to examine them from the perspective of the claimants 'because rights and interests of the islanders are those possessed under their traditional laws and customs, they must be at from the perspective of the claimants', see *Neowarra* at 364. The decision is important in that it makes it clear that offshore rights can include rights of a commercial nature.

As to the rights claimed *per se*, it was also emphasised that the description of what is theirs, what belongs to them, what they are entitled to, are for the above reasons fundamental to the ascertainment of those rights and interests. These, as it was observed, must be sourced in the society's laws and customs and such rights and interests do not for their vitality require recognition by someone other than the person who asserts them (Sundberg.J., para. 500). Particular rights found were, (i) the rights of access to remaining and use their marine areas, and (ii) the right to access resources (including sea water) and to take for any purpose resources from those areas (which include the right to trade in resources) [at para 540].

Issues of offshore native title are not addressed in Papua New Guinea to the extent that the nature of rights and interest therein are not properly articulated for the interpretation of the Courts (Tom'tavala, 2010). Whilst there is assistance by way of s.8 of the *Native Customs Recognition Ordinance* (1963) providing Courts to take into account customary considerations in relation to (i) the ownership by custom of rights on, in, over or in connection with the sea or the reef or in, on, or on the bed of the sea or rights of fishing and, (ii) the ownership by custom of water, or of rights in, over or to water. Further, Courts are not strictly bound by rules of legal procedure and hearsay rules in this regard, per s.2 and with consideration that must also be given to the weight of public interest, under s.3.

As reported, the determination of Court in leading cases relating to offshore native title claims is difficult to sustain given that any pre-existing customary laws on which the claim is premised cannot be easily identified. Whilst the reported cases were premised on what is genuinely believed to be customary property, the end game of achieving compensation was not realised given the absence of a framework of rights and interests that the Court could rely on (see *Ene Land Group Inc v Fonsen Logging (PNG) Pty Ltd* [1998] PNGLR 1).

Given the absence of a comprehensive compensation policy that clearly specify the nature and extent of the compensable rights and interests, any mining development is bound to run into problems given that customary owners believe that they own everything above and below the land, including the minerals. Often, friction arises between the customary owners on one hand and the developer on the other, with the former feeling that fair compensation has not been paid (McLeod, 2000). Fiji has had a mixed history in this regard, in that it recognised that it had no comprehensive system of compensation and

commenced work towards a policy in 1999. This resulted in the development of a *Compensation Policy for Fiji's Mineral Sector* in 1999, that was to be submitted to Cabinet for final legislative approval - some twelve years later this approval has still not eventuated.

The definition of compensable damage and compensation was a key consideration in the derivation of Fiji's compensation policy, including the award of damages for any loss in value or damage to land, water, foreshore or other resources as well as rights arising from prospecting, exploration and mining activities, to landowners, occupiers and the surrounding communities, in monetary or non monetary forms (Republic of Fiji Islands, 1999). This draft policy is explicit in listing all possible damages, including the loss of cultural rights. However, it failed to translate the possibilities of compensable rights and interests that are intangible but inherent to the body of culture of the landowning unit that forms part of their traditional estate.

Given what has transpired, landowners are back at the mercy of compensation regime pre August 1999. The most notable development since then has been loss of royalty payments to the landowners, which is now paid to the State by the Department of Mines as a result of a *Mining Decree* issued in 2010. Currently Fiji has three major mining projects underway and several other significant initiatives ranging from prospecting to fully operational schemes. Due to the lack of a comprehensive mining compensation policy, compensation for the land based aspects of the mines has been largely inconsistent, due to the *ad hoc* nature of the negotiations. Like most of the Pacific Island States, compensation thus far has been largely limited to surface damage and leasing of surface land for mining or access purpose.

The *Mining Act* 1992 in Papua New Guinea (PNG) is where the principle elements of the national mineral policy can be found, in conjunction with other legislation relating to, for example, Income Tax, Water and Health. In brief, mineral operations in PNG are always caught between the 'public interest' of the State and the interest that customary law concedes to the landowners relating to surface lands (James, 1997). As State ownership rights over minerals comes into conflict with landowners surface rights governed by customary law, the compensation provisions are an attempt to conduct a good working relationship between the landowners and the State.

Where the State intervenes to compulsorily purchase land for mining tenements, landowners must be compensated as must those landowners indirectly affected by the exploration. Regarding the heads of consideration for compensation, the *Mining Act* mandates that landowners must be fully compensated for damages to land relating to deprivation of surface use, loss of earnings, disruption to agricultural land and the like. At first glance this appears reasonably comprehensive, given the history of mining and hard learnt lessons by both the PNG government and the people. However, the approach favours a disjoint of surface and underground tenure, thereby quashing any intangible flow that is provided through its fusion.

Mining in the Solomon Islands accounted for 30 percent of its GDP at its peak before closure of its major mine in 1999, and will probably make a similar contribution for the next several years if restored to its former operating level and augmented by nickel exploration. Administered under the *Mines and Mineral Act* 1990, the issue of compensation is peppered through s.32-35, ranging from the use or compulsory acquisition of land relating to mining, surface rentals and the acquisition of surface rights. Royalties are considered in s.45. Although there have been three amendments to the Act, compensation provision wording is general in nature, vesting authority in the (hoped for) diligence of Government officials. Market value of surface lands is precisely described so as not to include the price of minerals underground, with heads of compensation limited to value of improvements, compensation for loss of trees and crops, and severance and disturbance. Compensation calculations for access rights are similarly routine, with the identification of the right landowning groups to be identified as a matter of priority, although compensation should not pay regard to the value of mineral underneath their land.

Whilst there is no intangible valuation consideration in the current compensation provisions, the Solomon Islands have the perfect opportunity to develop an exemplary mining policy given the current national rebuilding process may provide a chance for legislative reform of its main economic sectors.

Vanuatu has latent potential for mining according to the National Investment Policy (Government of Vanuatu, 2005). As there is currently no mineral extraction happening in Vanuatu, this provides an optimal opportunity for policy makers to formulate an equitable pro-development compensation model for its mining industry, to increase the contribution of private enterprise to economic development.

Research Methodology

This research reported in this paper forms part of an ongoing investigation into land resource compensation issues in Melanesia, which is a sub-project of our wider transdisciplinary collaborations on compensation, institutional arrangements and land trusts, and the financial management of inalienable customary land in Australia and the South Pacific.

Collectively, our research design is one of phenomenological transdisciplinarity, which implies our goal is to build models to connect theory to observed reality, allowing us to inform potential policy outcomes. 'Transdisciplinarity concerns itself with what is between the disciplines, across the different disciplines, and beyond all disciplines' (Nicolescu, 2006, 143). Methodologically, this research adopts what Creswell and Tashakkori (2007) refer to as a paradigm perspective. Our approach incorporates a breadth of sociological analysis, legal discourse, ecological and cultural sensitivity, and financial management activities. To achieve this we integrate an eclectic combination of research modes into history, law, social inquiry, theory, practice, and beliefs, with the attitudes of finance, finance providers, capital users, government organisations, NGOs, resource exploration companies, and indigenous property owners. These insights support

our analysis of the existing institutional arrangements and provide important data that assists in the development of our integrated compensation model.

The paradigm perspective that we engage for our compensation research has its genesis in the classic definition of mixed methods research of Greene, Caracelli, and Graham (1989, 256), who defined mixed methods designs as ‘those that include at least one quantitative method (designed to collect numbers) and one qualitative method (designed to collect words)’. The application of this innovative approach has enabled us to combine the legal discourse (words) surrounding indigenous property rights in the resource exploration context with the financial implications (numbers) pertaining to those rights in developing a compensation matrix.

As we highlighted in the previous section, there is a different scale between the extent of identified mineral resources in the four Melanesia countries that we have focused on, just as there are different physical land masses, land trust or incorporated land group development, genealogies and institutional arrangements. In some countries we have been able to undertake more fieldwork and community engagement, whereas in others our emphasis has either been with government agencies or NGOs. It is a work in progress, but having developed a compensation model we are testing its efficacy not just on mineral exploration, but also on resort development and other infrastructure schemes. In certain countries our involvement has extended to policy advice on the implementation of our suggested compensation modelling. This approach has enabled the researchers to assess the functionality of existing compensation policies, have broad access to government information and undertake extensive stakeholder analysis before offering recommendations on appropriate institutional processes that can be harnessed to assist in evolving change.

Findings and Discussion

Some of the agreement processes from other countries (e.g. Australia, New Zealand and Canada) outlined in our literature review are too complex for Melanesian needs. They point, however, to a trend towards framing agreements that are not designed to specifically compensate indigenous groups for extinguishment of customary title. Instead, they emphasise a structure of long-term relationships between indigenous groups and the Crown or State, including sharing of resource revenues and participation in decision-making affecting their lands. In part, this is the result of either the recognition of customary rights through court processes, or the anticipation by governments of such recognition. In this context, our subject countries have different levels of institutional arrangement. For example, Fiji has evidenced ownership for over a century and has had a Trust structure in place since the 1940s. In contrast, Papua New Guinea has some examples of Incorporated Land Groups but no centralised record system. Similarly, the Solomon Islands have only recently started evolving trust structures, and there are only two examples in Vanuatu (the Mele and Ifira Trusts, on the urban fringe of Port Vila). What is evident internationally, is that compensation has moved beyond a strict monetary sum,

to a more complex tailored package of rights, almost always embedded in a contract, which is given statutory ratification.

We have analysed four compensation approaches, which we discuss in more detail in the following subsections, and then incorporate these into a hybrid model.

1.1 Model A – tailor compensation to the exact rights of custom landowners

Such an approach requires some kind of recognition system as a precursor to determining compensation, most likely a common law or statutory native title system.

Pros

- Tailors the compensation to the exact rights held – possibly providing a more nuanced quantum of compensation;
- It allows for western commodification of rights (which some Stakeholders seem to want); and
- It is likely to result in a lump sum compensation figure. Lump sum compensation avoids many of the complexities introduced by diverse (multi-criteria) compensation packages (e.g. how do you legally implement / enforce indirect payments?).

Cons:

- Sits very uncomfortably with those countries with a continued recognition of rights such as Fiji ;
- Complex;
- The establishment of rights on a case by case basis is costly, requires human resources and capacity that these Melanesian countries do not currently have;
- As a doctrine, native title (e.g. as applied in Australia) tends to exclude cultural, social and environmental factors, and can be a very blunt tool. Standard native title law will not encompass the rich nature of customary rights and hence will undervalue the non-physical facets of the relationship of holders to their land or marine rights;
- This model does not allow for a meaningful transfer of profit or wealth sharing; and is likely to result in a single lump sum monetary figure, rather than a diverse compensation package.

1.2 Model B – assume a common set of property rights prevail and tailor compensation to these

Native title claims, be they derived from the common law or statute are lengthy, expensive, and require specialists in the form of lawyers, anthropologists and historians. It is doubtful that Melanesian countries have the current capacity to enter into a recognition process. Where land is compulsorily acquired under Anglo-Australian legal frameworks, apart from the package of compensation (heads of claim) derived from the addition of the (unimproved) land value, value to the owner, special value, injurious affection, disturbance and severance, a

number of states provide for an additional amount which is a judicial discretion know as *solatium*.

Solatium is a discretionary payment to acknowledge hardship, inconvenience, trauma or other unspecified loss caused by the resumption. In a number of negotiated agreements applied to extinguish native title (for mining activities and related infrastructure) in Australia, the concept of solatium has been applied to what can be called Special Indigenous Value (SIV). Sheehan (2010) suggests that there is a strong argument that SIV should be adopted by the compensation assessor as a relevant head of compensation, drawing on its concepts of special value to the owner and solatium. In considering an award of solatium, circumstances such as the length of time the claimant has occupied the land, the inconvenience likely to be suffered by reason of removal from the land, and the period of time the claimant would have been likely to continue to occupy the land may be considered, although hitherto awards have tended not to extend to factors like emotional stress arising from the compulsory acquisition.

The focus in the Australian examples is on 'extinguishment' of native title. This is a controversial concept in Melanesia, where customary land is seen as inalienable. Rather the situation is more aligned to damage, disturbance, and loss of access and loss of connection (notionally for a time constrained period rather than in perpetuity).

Sheehan (2010) suggests that in negotiated agreements it is necessary to ensure the compensatory framework for native title is correct, so working within existing case law and statutory constructs is compelling – but disregards the pre-eminence of custom in Melanesian constitutions. Moreover, Sheehan places reliance on Unimproved Capital Value (which can often be more easily assessed on the basis of market evidence in Australia than in Melanesia, where there is effectively no market for inalienable customary land). As the Pacific Islands Forum Secretariat recommends, 'Administratively determined Unimproved Capital Value based returns to customary land must be avoided. Although these may seem uncomplicated, they do not facilitate a fair return to landowners' (PIFS, 2008, 17). In the Australian situation, where Special Indigenous Value has been treated as analogous to solatium, the largest level of judicial discretion available at present is in Western Australia, where it can be awarded at up to 10% of the total compensation sum (although there are strong views that it should be a considerably high quantum).

Pros:

- Assumes a simple base-line that customary rights are similar in all areas;
- Can include a component for cultural, social and environmental aspects (i.e. solatium / Special Indigenous Value).

Cons :

- This model does not take into account the nature of the infringement;
- It necessitates commodifying the property rights;
- It does not provide for any particular equality or distribution of resources;

- Inappropriately in the Melanesian context, it relies on Unimproved Capital Value as a component of the compensation calculation;
- It can be difficult to quantify the cultural, social and environmental aspects of the development and the discretionary allocation of Special Indigenous Value at a sum that equates to 10% of the other compensation does not adequately recompense the sense of loss; and
- The model assumes a single monetary figure, rather than a raft of compensation measures.

1.3 Model C – development driven quantification

This approach circumvents the need to determine the nature and extent of customary rights. Instead, compensation is assessed by reference to the benefits accruing to the developer, rather than the infringement on the rights of the customary owner(s). The benefits accruing to the developer are based on the 'marriage value' that is created by recognising, and combining, the interests in the various land and marine components from mine site to wharf and to the edge of the EEZ. Simply stated, a mining development has limited commercial value if there is no wharf access to export the minerals.

This marriage value is known in contemporary literature as synergistic value. The International Valuation Standards (API & PINZ, 2008, s.4.3.6, IVSC, 2010, 131) defines **Synergistic Value** (Synergistic Value may also be known as Marriage Value) as: 'An additional element of value created by the combination of two or more interests where the value of the combined interest is worth more than the sum of the original interests'.

In a development driven quantification, a standard compensation package could have a number of elements including, but not limited to:

- A financial component based on a share of the land at mine, land at wharf, and marine access marriage value, and associated synergistic value increase.
- Provisions need to clearly articulate the length of the arrangement (term), the process in the event of a change in user (such as premium for transfer based on a percentage of the increase in value between project inception and transfer), and the reversionary ownership provisions of the improvements (which should be returned in good and tenantable repair) at lease / licence expiration;
- A number of jobs for members of the various landowning and marine (or fishing ground) owning groups as well as the native landowners (number could be determined by reference to profit or some other changeable yardstick allowing for changes in business practice over time);
- The provision of housing or other community infrastructure;
- Schooling, health assistance, or whatever (to incorporate the minor cost of important trophy items that are often stated in leases over customary land, such as vehicles or boats).

Pros:

- Avoids the need to determine particular property rights;
- Provides for a diverse, flexible and index-linked compensation package;

- Encourages transfer of profits / adequate sharing of wealth;
- Can be set up to provide for intergenerational equity;
- Can distribute payments easily per year (or some other term) as occurs now; and
- Can be tailored to minimise / avoid some of the problems likely to ensue within the community when compensation is paid as a large, single, up-front lump sum (premium).

Cons:

- Much more difficult to legally implement.
- Raises questions of form (contract?) and enforcement.

1.4 Model D – negotiated agreement

Negotiated Agreements are emerging as international best practice, and are based around a negotiation that is determined on a case-by-case basis, with engagement of all stakeholders who have a legal / financial interest. This is a common Australian model. It is also a common way of doing business in New Zealand, although in that context it usually pairs recognition of rights with monetary compensation to redress past grievances. Negotiated agreements have been utilised in some resource schemes in Papua New Guinea, but are open to contestation as a result of uncertain genealogy. Negotiated agreements are confidential in nature, so there is little evidence available to reference.

Pros:

- Can lead to a quite diverse and sophisticated compensation package;
- Allows the customary rights owners to have a stake in what happens to their land – to ‘own’ the agreement; and
- Does not require precise identification of property rights.

Cons:

- Takes a long time – thereby holding up development significantly;
- Capacity is an issue, as the parties need to be fully advised and represented by independent legal and valuation practitioners, with the requisite skills to forecast future income growth and liabilities; and
- In the Australian and New Zealand application, the Crown (or State) needs to be a party, thereby complicating matters further.

4.5 Model E – the hybrid

As stated, international best practice is clearly moving towards negotiated frameworks. However, many of these are large-scale agreements, often taking years to negotiate, which embed compensation within an overall redress package. Both monetary and non-monetary forms of redress are given. The quantum of the monetary component does not always directly relate to market or non-market values of particular rights. In Australia, smaller scale arrangements are dealt with through Indigenous Land Use Agreements (ILUAs), allowing potential rights holders to contract (i.e. those who have claimed but not yet proven their native title rights), as the contracting does not depend on a precise identification of their rights. The compensation (composed of financial

and non-financial components) does not therefore reflect a market value determination of their identified rights.

We have identified that any compensation mechanism should (i) be based on a rich understanding of the nature of the property rights, including the customary owners themselves as without such understanding any new mechanism may lack legitimacy; (ii) acknowledge the experience of other jurisdictions, whilst being appropriate to the given circumstances in a particular country; (iii) be sophisticated enough to ensure an appropriate transfer of wealth from developers to customary owners; (iv) not be limited to a singular monetary sum, but rather ensure ongoing social and economic improvement for custom owners; (v) respond to capacity problems; (vi) be embedded in a legal arrangement that provides certainty for all parties; (vii) determine how compensation will be held, managed, invested, accounted and distributed; (viii) ensure any development activity is undertaken sensitively and sustainably, prioritising cultural and ecological wellbeing; and (ix) provide for inter-generational equity.

The best way to contextualise a compensation mechanism is by exploring a hypothetical example (see Figure 2). In this example, we will assume that there may be several customary landowning groups impacted from mine to wharf. Indeed it is quite common in Melanesia for customary landowners living in the interior (or highlands) where mines are often found to have fishing rights over inner reef areas, such is the nature of traditional commerce and inter-clan arrangements. Our purpose in this example is to provide sufficient background to lead in to a discussion on synergistic value and a greater exploration of our hybrid compensation model.

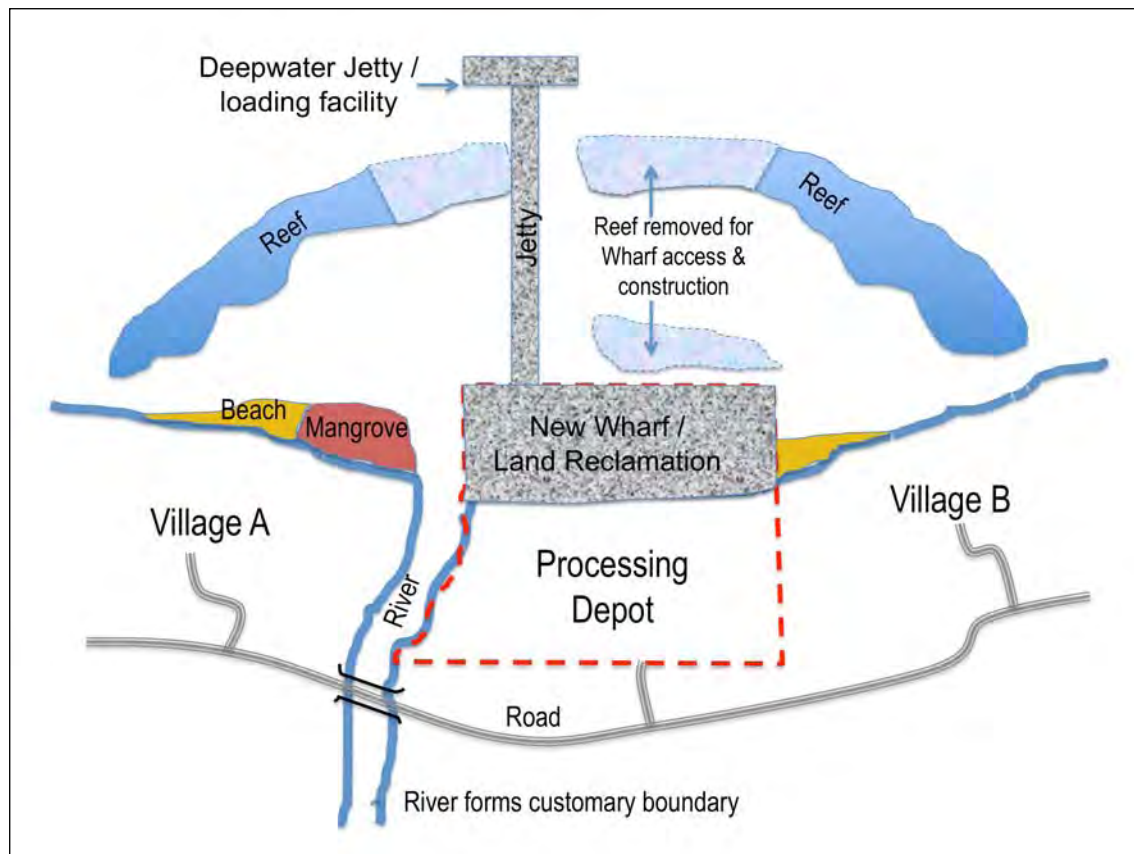


Figure 2: Wharf Scenario

(Source: Boyde & Baya for this research)

The first stage of any disturbance of customary rights is to undertake a stakeholder analysis (see Boyde, 2008 for more discussion on this approach to stakeholder analysis).

Who are the potential beneficiaries:

- In terms of the marine and inner reef areas, these could be the custom owners of village A and village B, as well as those from other parts of the country with rights over marine and inner reef areas;
- Members of village B in terms of remuneration from the lease for the depot;
- Members of village B in terms of remuneration from indirect economic gain (employment at several levels). There is potential that members of village A will also benefit in the same way, but such provisions are unlikely to be written into the lease;
- This therefore creates a conflict between relating the land lease arrangement to the compensation for marine areas. So, village A should get both indirect and direct economic gain – and this is why there is a need for acknowledgement for the 'marriage value' (synergistic value) between the land component and water component. What this in essence means is that it is inappropriate to enter into a lease over the land without integrating access rights (and wharf construction rights, reef

destruction compensation) to marine component, as fragmentation leads to social problems. Alternatively phrased, determining the calculation of compensation for the marine area has to acknowledge that remuneration from the land lease component has already benefited village B. Rather than changing the lease structures, you adjust the compensation to reflect that fact that there is a clear marriage value between the land interest held by village B and the marine interest jointly held by village A, village B and other rights holders;

- The Developer, and wharf / mine operator (who may also be the developer);
- Surrounding villages (other custom landowning groups)
- Public whose services may be called (food supplies through to banking ventures – i.e. local through to corporate)
- State, through tax (employee taxes, exploration licences and company taxes) and associated increase in GDP

Who might be adversely affected:

- Limitation of exercise of rights to village A & B (see next heading)
- Other members of the public who use the commons
- Fishing licence holders
- Marine environment from pollution

Who has existing rights:

- Village A
- Village B
- Any other customary interests in the waterway and marine areas
- Any existing fishing licensees

Below, we elaborate on these existing rights using a categorisation of rights model (Boydell, 2007, 117) that we have successfully engaged in a range of other projects.

Direct use: Rights to plant, harvest, build, access and similar, maybe shared rights

- Village A
- Village B
- Also, those to who the custom owners grant subsidiary and overlapping rights for fishing / sand and gravel

Indirect economic gain: For example through employment in mine/depot/wharf, transport, equipment, services and food

- Village A
- Village B
- Plus members of other custom rights holding groups

Control: Conditions of direct/indirect use, held by persons other than the user

- Village A
- Village B
- Subject to any licence, overriding of State

Transfer: Effective powers to transmit rights-by will, sale, mortgage, gift, or other conveyance

- Jointly through village A and village B in a customary sense

Residual rights: Remaining rights at the end of a term (such as lease, death, eviction), includes reversionary rights

- Jointly custom owners of village A and village B

Rights of identification (symbolic rights): Associated with psychological or social aspects with no direct economic or material function

- Primarily village A and village B
- And the wider clan group to which village A and village B are aligned in ancestral connection

Duration: Length of time property right is held, indicating profits and/or savings

- As agreed in any lease arrangement

Flexibility: Right should cater for modifications and alterations

- Developer in negotiation with village A / village B
- Plus State (should it apply overarching legislation/decrees)

Exclusivity: Inverse of the number of people with shared or similar rights, more relevant to water property

- Village A and village B, as well as remote custom rights holders, for example, for a special traditional practice over that body of water

Quality of title: Level of security that is available as tenure shifts from the optimum

- How is the titled guaranteed by the state? The state guarantees by virtue of administrative authority, per the *Yanner v Eaton* example.

Divisibility: Property right can be shared over territories, according to season, etc.

- Village A and village B
- And developer
- Or State if they require

Access: Entry/ admission into the marine area

- Village A and village B
- The State
- Any existing fishing licensees
-

Withdrawal (extraction): Extraction of resources by owner despite leasing property

- Village A and village B
- The State (if seabed)
- Those to whom the custom rights holders grant withdrawal rights

Management: Be able to make decisions on how and by whom a thing shall be used

- Village A and village B, but ideally through a particular individual who has authority to speak for the custom owners
- Environmental Management overseen by the State

Exclusion: Disallowing others from entry and use of resources

- Village A and village B
- The State

Alienation: Transfer of an interest (right) in property to another, in perpetuity

- Village A and village B jointly
- Or developer on application to transfer current interest or create a subsidiary interest

Who is likely to be voiceless:

- Individual members who are not in the majority – so there is a need to make sure that everyone who has a right to speak has spoken (including young/old, male/female), so absentees may have limited rights
- Role of absent members (who may send remittances)
- Neighbouring custom landowners
- Historical associates and those who have connection
- General public who use the area (other than through formal planning approval channels)

Who is likely to resent change and mobilize resistance against it:

- Absent members, who may romanticise how the village 'used to be' with the passage of time
- Other custom owners seeking to entice a particular exploration company to use their land for processing, depot or wharf facilities
- Other members of the public who use the commons
- Fishing licence holders

We now need to integrate this analysis into the valuation considerations. There is a large body of international literature on economic valuation and resource management (see for example the comprehensive set of links provided by the World Resources Institute: <http://www.wri.org/project/valuation-caribbean-reefs/references>), and ecosystem valuation (see <http://www.ecosystemvaluation.org/links.htm>). Much of the resource valuation literature takes a *Total Economic Value* approach, where values are allocated to use values (direct and indirect) and non-use values (option value, quasi-option value, bequest value and existence, or psychic, value). These approaches are used by several of the contributors in Ahmed et al. (2005), and applied in the Fiji context by Korovulavula et al. (2008). The valuation techniques engaged in these use and non-use approaches are (as with the VFT) those applied by economists (as opposed to valuers), and include: Effect on Production; Replacement Costs; Damage Costs; Travel Costs; and, the Contingent Valuation Method. These have been variously applied on a range of international situations, with varying success. We consider that, because of the inputs required and the outputs desired, they all fall short of addressing valuation for land resource compensation in a Melanesian context.

We argue that the synergistic value approach, a valuation method more familiar to the valuation profession than mainstream economists, has more to offer in the context of land resource compensation in Melanesia. This marriage value approach takes a more holistic approach, engaging with the economic benefits that are gained from providing a mining infrastructure in multiple locations with access inner reef and marine areas (or, for example, providing a mineral exploration company access to reclaim an area for a wharf facility with associated jetty). It has the ability to be adapted and expanded to also include items that relate to both the positives (e.g. partnership, employment, service sector and food supply, environmental conservation and cultural heritage), as well as the negatives (e.g. potential loss of access, environmental contamination, sedimentation, eutrophication, reef degeneration, loss of amenity / privacy, loss of cultural heritage).

The quantum of compensation will need to be determined on a case-by-case basis, with the synergistic value between the mine, mining infrastructure, depot/wharf and the marine area forming a main component on which to base the negotiated agreement.

In Table 1 we summarise, by way of example, the breadth valuation approaches that should be engaged in addressing the compensation issues to be negotiated in respect of our scenario. In this regard, we use as a basis for the terminology the 2010 Exposure Draft of the International Valuation Standards (IVSC, 2010) – and recommend that the forthcoming 2011 version be utilised once it is published. The tabulated compensation issues that are included (in Table 1) are not necessarily exhaustive, but are grounded on a synthesis of the literature on the sustainable management of land and reef areas as well as stakeholder evidence from our ongoing fieldwork. The table is for demonstration purposes only, and should be adapted as needed to fit the circumstances of the geographic location of the proposed scheme, and the proximity of associated physical and social factors.

The valuation components that are derived through this process will produce a much clearer indication of the overall compensation quantum. This figure, which the present value of the loss / infringement, should then be dealt with as a compensation package. This package should have regard for the benefits accruing from the scheme (if any), such as employment opportunities, food and service provision, training, and the current package of notionally goodwill items (such as village benefits, medical fees, schooling, donations and material items e.g. boats / vehicles).

This analysis highlights that the most comprehensive valuation is provided by the synergistic value approach. We discuss this finding and outline how we propose to field test our model in the concluding section.

	Cost Approach	Income Approach	Direct Market Comparison	Depreciated Replacement Cost	Synergistic (Marriage) Value	Relief-from-Royalty method	Premium Profits Method	Excess Earnings Method	Fair Value	Special (Indigenous) Value	Going-Concern Value	Discounted Cash Flow	Risk Replication Method	Marine Resource Inventory
Marriage of interests between the land and marine areas	X	X	X	X				x	X	X	X			
Loss of access, if any (taking)		X		X				X	X	X				
Removal of mangrove, if any (taking)	X	X		X	X	X		X	X	X				
Removal of reef, if any (taking)	X	X		X	X			X				X		
Removal of sand / shale (taking)	X	X		X	X			X				X		
Loss of mangrove habitat (damage)	X			X				X				X		
Increased vulnerability through lost nutrient filtering / flood control / storm buffer / shoreline stabilisation / microclimatic stabilization / biodiversity maintenance / education and research / bio-prospecting / carbon sequestration	X		X	X				X				X		
Environmental contamination from resort waste, dumping and spillage (damage)	X		X	X				X				X		
Sedimentation (damage)	X		X	X				X				X		
Eutrophication (damage)	X		X	X				X				X		
Reef degeneration (damage)	X		X	X				X				X		
Construction contamination risk (damage that can be addressed through the EIA bond)	X		X	X				X				X	X	
Reduction of fish stock (damage)	X	X	X	X				X	X	X		X	X	
Potential loss of income from possible restriction on fishing access (damage)		X	X	X				X	X	X		X		
Loss of amenity / privacy (damage)				X				X				X		
Truncation of cultural association, and diminution / impact on cultural heritage (damage)				X				X				X		
Loss of direct cultural and spiritual connection (loss of Special Indigenous Value)				X				X				X		
Loss of ability to exercise cultural and spiritual connection (loss of Special Indigenous Value)				X				X				X		

Table 1: applying IVSC approaches to Land Resource Compensation scenario

Conclusion and Further Research

This research has identified the complexity of dealing with development on customary owned land in Melanesia. After demonstrating the lack of alignment between customary and western worldviews, we explored examples of compensation arrangements (particularly those impacting indigenous landholdings) from a number of countries. Having articulated our phenomenological transdisciplinarity approach, the international context allowed us to explore four approaches to compensation. We

evolved these into a fifth approach, a hybrid, that we analysed through the stakeholder interests of a hypothetical wharf facility on customary land for mineral exportation. We discussed econometric approaches to valuation briefly, before engaging the diversity of approaches in the International Valuation Standards to our scenario. This analysis confirmed that the synergistic valuation approach has the potential to provide the most equitable compensation for land resource development schemes in a Melanesian context.

What remains to be done is to test this ‘equitable pro-development compensation model’ – our hybrid – on a number of live development situations in the region. We are currently in discussion with customary landowning groups, NGOs, a trust and government departments on how we might operationalise our model, in both a policy and practice context. We are also testing the concepts on land professionals in the Melanesian region through a series of workshops, as well as through an international symposium.

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Place-Making & Well-being

by Ian Wight

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This paper was submitted as Draft Chapter 18 – Part IV: Design, Policy, Well-being and Place, for the Durhan Conference on Well-being and Place, October 2010, with the title ‘Place, Place-making and Planning: An Integral Perspective with Well-being in (Body) Mind (and Spirit)’.

Integrating Well-being and Place by Design

What is so special, so uncommon, about well-being and place, not only on their own terms but – perhaps especially - in combination? Why might we want to go out of our way (our normal way of doing and seeing) to honour this specialness? And how might we best do so? Well-being and place have in common an essential wholeness, goodness and togetherness - resisting easy deconstruction, abhorring insensitive reduction, and confounding simplistic quantification. They transcend individual disciplines and professions; they are – above all – integrations of pretty much all we hold dear – the good, the true and the beautiful. They range wide and deep; they implicate our whole being – body, mind, soul and spirit.

One, place-making, is perhaps more means than end, the other, well-being, more end than means – but they are indubitably linked; we know this at our core, from everyday - and extraordinary – experience. But it does seem to require a shift in perspective to fully see and feel, and validate, all this. They have a primacy and potency that demands we make this effort, in service to our selves – individually and collectively, if we are not simply to survive but to thrive, if we are not doomed to languish but to flourish. Well-being and place cannot simply be studied as objective ‘its’ – they are an integration of integrations, in flux, as dynamic enactions. The concern needs to be with the enacting that is place-making and with the enacting of well-being (as whole-making) – ongoing productions both, that might just be amenable to some enlightened planning, policy and design. But how? At the very least, it is suggested, we will need to take a more integral approach.

An integral perspective, most recently associated with the work of Ken Wilber (1994, 1996, 1997, 1998, 2000a, 2000b, 2006, 2007) - a current exponent of one of several lineages of integrationist thinking (Molz 2010), attempts to transcend and include many perspectives not normally conjoined. Driven by its own ‘wholing’ and ‘placing’ impulses, it is rooted in a concern to integrate objective **and** subjective realms, in their individual **and** collective dimensions (Crittenden 1997, Esbjorn-Hargens 2009). It also embraces multiple lines of development, such as those associated with different strands of well-being, and attends to different levels of development, such as the distinction in well-being circles between lower and higher flourishing (Taylor 2007, Vernon 2008).

Place serves well to ground such theorizing, as an integration venue *par excellence*. Yet viewing place itself through an integral lens also expands notions of place, including an enhanced understanding of its changing status through time - from its origins in pre-modernity, through marginalization in modernity, and partial rehabilitation in post-modernity (Wight 2002, 2005, 2006, 2008). The underlying dynamics at work become more apparent, and less easy to ignore.

Well-being may be conceptualized as a product of integrally-informed place-making, engaging body, mind and spirit - the hand, head and heart of some formulations (e.g. McIntosh 2008). Place may be conceptualized, in integral

quadrant terms, as the integration of physicality, functionality, community and spirituality. If planning and the related policy and design can be re-conceptualised as integral place-making, they may come to play a more significant role in delivering and sustaining well-being – a fundamental public policy concern.

This chapter seeks to tease out aspects of the inter-relationship of place, place-making and planning, with well-being in mind – but also with regard for body and spirit, for enacting that is embodying and inspiring as well as mindful. It represents an attempt to explore integral theory in action, in service of more fully harnessing the combined potential of well-being and place. Beginning with some ‘auto-poiesis’ that seeks to ‘place’ this author at this time, the presentation then attempts to ground well-being in place, through an integral perspective. The inter-relationship is pursued with a view to evoking a sense of an emerging planning – more conducive to embracing well-being, that can also be viewed as consonant with a refreshed consideration of the policy and design contexts. The presentation then moves to address well-being more directly, attempting an integral embrace, in an admittedly more preliminary and speculative manner – but informed in large part by the conference experience. This paves the way for a specific consideration of place-making and well-being (as whole-making) in combination, leading to a closing consideration of how they might be better ‘meshed’ in practice, through an emerging social technology – termed ‘meshworking’, which has seeming application not only in planning, but also in the realms of policy and design.

Auto-Poiesis: A Personal Placing

An integral perspective honours the first-person perspective, as much as the second- and third-person perspectives. Our ‘I’ cannot be repressed, especially where well-being inquiry is concerned. It may help the reader to know that well-being has only recently appeared on the horizon of my own interests. Place, by contrast, has been foundational and fundamental for as long back as I can remember exercising, and then actualizing, my intellect. Place for me is primal, and potent; timeless – and never more timely. My emerging sense of the place/well-being nexus is one that happens to privilege place, but in a way that I feel embodies, ensouls and inspirits well-being; I hypothesise well-being as a manifestation of implacement (Schneekloth and Shibley 2000). But the place I have in mind is much more than simply geographical or locational; it is integral, in the sense of including while transcending the pre-modern, modern and post-modern notions, or ‘senses’, of place. It is also emerging – developing and evolving – with an inherent dynamic; a verb as much as a noun, always in the process of being made and remade, in pursuit of an ever-greater sense of the good (and the true, and the beautiful). Could such integral place-making be synonymous with well-being as a socio-spiritual construction? Can they inspire one another, and generate synergy – for planning, policy and design to harness?

More pragmatically, I approach this project as an applied geographer and as professional planner. While some of my early geography interests were more spatial, my focus is now very much ‘placial’. I have in the past practiced planning

as the allocation, regulation and re-arrangement of space, but I currently advocate planning as place-making. Over the past decade or so, I have shifted increasingly to an integral framing of my professional and academic endeavours. This presentation builds on earlier work exploring the application of integral theory to planning, and place-making as applied integral ecology (Wight 2002, 2005, 2006, 2008).

It was – for myself at least - particularly heart-warming, and intriguing, to note (in the original conference call for presentations) the observation that, in recent years ‘the targets of policy have expanded beyond the purely material and economic to embrace more subjective dimensions of human flourishing’. There was an indicated anticipation of multiple perspectives needing to be incorporated, across individual and collective scales of analysis. I viewed this as a possible open-ness to an integral perspective, especially as one response to the expressed concern that ‘the complex ways in which place and well-being interact remain relatively under-researched and under-theorised’. Could integral theory and its method (integral methodological pluralism) be of particular service?

It should probably be stressed that the ‘place’ in view here (and possibly also the ‘well-being’ in view) is probably a good deal more capacious than that envisaged by the conference organizers, despite their own commendable efforts to be comprehensive, balanced and inclusive. Spatial containers and analytical scales can be too limiting, where integrally-conceived notions of place and well-being are being invoked. For example, an integral perspective naturally and necessarily includes a regard for spiritual considerations as part of ‘the subjective dimensions of human flourishing’. I wondered before-hand whether spirituality would get addressed at the conference, and – if so – where and how? I left the conference wondering, among other thoughts: was spirituality the ‘elephant in the room’... i.e. a huge missing dimension? [It will be interesting to check the index for this volume, for any references to the spiritual or spirituality]

In this presentation ‘place’ is consciously and deliberately conceptualized as the integration of physicality, functionality, community and spirituality; and it is given an enacted/enacting form – as place-making. Well-being is also interpreted, following Vernon (2008), as much more than happiness, or even a meaning-filled life. Instead, consciously and deliberately, it is regarded as including the transcendent, the mysterious and – ultimately - a loving spirituality; and it is given a dynamic, spiraling form, as ‘whole-making’. Together, in combination, they involve a full engagement of body, mind and soul, potentially manifesting a palpable *poiesis*.

Grounding Well-being in Place: The Integral Perspective in Action

Although there are several lineages of integral thinking (Molz, 2010), the integral approach employed here is rooted in the work of Ken Wilber (1994, 1996, 1997, 1998, 2000a, 2000b, 2006, 2007; Wilber et al 2008) which represents his ‘integral’ phase, sometimes rendered as ‘Wilber-4’. At its simplest, an integral approach is ‘comprehensive, balanced, and inclusive... not leaving anything out’ (Lundy 2010). It mainly attends to considerations related to four primary

perspectives - the four **quadrants** of knowledge, to several **levels** of development - connoting increasing complexity, and to multiple **lines** of development - each involving stages of evolution or emergence [Additional considerations include those of **state** (as in states of consciousness) and **type** (such as personality or gender), but these are not engaged here].

Applications of the integral approach in the context of well-being and/or place have just begun to appear recently, on such themes as applied integral ecology (Wight 2005), consciousness and healing (Schlitz et al 2005), human flourishing (Dacher 2006), social identity development (Quinones-Rosado 2007), whole systems health care (Schlitz 2008) and public health promotion (Hanlon and Carlisle 2010; Hanlon et al 2010a, 2010b; Lundy 2010). There is always the challenge of introducing the integral framework to new audiences; it entails large claims that warrant a large contexting (McIntosh 2007), but with limited space it is often the case that only the lightest of tastes can be offered, in hopes that appetites may be whetted for further independent exploration. The following introduction borrows heavily from one of the most recent applications (Lundy 2010) who notes that:

The growing global success of the Integral approach lies in its capacity to address the full complexity of human experience in an increasingly complex world... The Integral map makes room for all forms of action and inquiry, and the evidence they generate... a map of reality that incorporates both subjective and objective dimensions of life, in individuals as well as in collective contexts. And it is a map of reality that accounts for human development throughout the lifecourse (Lundy 2010, 46).

The main elements of the Integral map, for the purposes of this presentation, are those also highlighted by Lundy – quadrants, levels and lines:

QUADRANTS call our attention to four unique dimensions of any experience... The Integral model takes into account subjective experience as well as objective experience, and pays equal attention to the individual and the group or community... demonstrates how these four dimensions are interconnected and irreducible (46).

Visualise then a simple 2 by 2 matrix, created by the intersection of an interior/exterior horizontal axis and an individual/collective vertical axis. These are the four ‘quadrants’ of the integral context.

<u>Upper-Left Quadrant (UL)</u>	<u>Upper-Right Quadrant</u>
<u>(UR)</u>	
"I"	"IT"
Interior-Individual	Exterior-Individual
Subjective	Objective
Intentional	Behavioural
<u>Lower-Left Quadrant (LL)</u>	<u>Lower-Right Quadrant (LR)</u>
"WE"	"ITS"
Interior-Collective	Exterior-Collective
Inter-subjective	Inter-objective
Cultural	Social (Systems)

Shifting from quadrants to levels, Lundy characterizes the latter as follows:

LEVELS of development call our attention to patterns of human growth and change: The Integral model pays attention to human development, acknowledging patterns by which development unfolds throughout the lifecourse, from birth through old age. The patterns are mapped vertically as stages of development, or 'levels'. An important Integral insight is that healthy development is a core attribute of healthy people and healthy communities, and that each in turn influences the health of the natural environment (46-47).

One of the major examples of 'levels' in some integral analyses derives from Spiral Dynamics, an application of the developmental psychology of Clare Graves, popularized by the work of Beck and Cowan (1996). It focuses on basic macro-values, rendered as V-memes, that manifest in individuals and collectivities, most notably cultures and other large-scale systems. It features a 'never-ending spiral' (Roemischer 2002) of V-memes, colour-coded for simplicity of communication, beginning with beige (associated with survival), successively encompassed by more complex V-memes, that effectively transcend and include earlier V-Memes (see detailed illustration below). The first six levels are identified as constituting a 'first-tier' macro-level of existence, generally associated with surviving or simply subsisting. A 'second-tier' of existence has been identified as succeeding the first-tier, with an anticipated rolling out of a new series of V-memes, associated more with 'being', with comparative thriving and flourishing.

Level	Colour	Popular Name	Thinking	Organizing Code	Driving Principle
First Tier vMEMES (Subsisting)					
1.	Beige	Survival Sense	Instinctive	Survival Band	Instinct
2.	Purple	KinSpirits	Animistic	Tribal Order	Safety
3.	Red	PowerGods	Egocentric	Exploitive Empire	Power
4.	Blue	TruthForce	Authority	Authority Structure	Order
5.	Orange	StriveDrive	Strategic	Strategic	Enterprise
6.	Green	HumanBond	Consensus	Social Network	People
Second Tier vMEMES (Being)					
7.	Yellow	FlexFlow	Ecological	Systemic Flow	Process
8.	Turquoise	WholeView	Holistic	Holistic Organism	Synthesis
(Based on workshop and conference presentation materials produced by Don Beck)					

The integral approach is regarded as largely 'second-tier', engaging yellow and turquoise levels in Spiral Dynamics terms. However, it specifically includes the 'first-tier' memes – the relationship is one of 'transcending while including'. Earlier V-memes are associated with less complexity, but are also deemed more fundamental, than later-emerging V-memes. By contrast, each first-tier V-meme is exclusive in orientation, disparaging or denying earlier V-memes; there is an

in-built resistance to an integral approach. The 'extra-ordinariness' of second-tier is associated with an extraordinary change and challenge in life conditions; the 'leap' from first- to second-tier is considered equivalent to all the change represented by the span of all six first-tier V-memes. It represents a massive change in world-view and, literally, in world-consciousness.

Some of the nature of this massive change is conveyed by another, simpler, three-level version of the Integral model, focusing on the stage-by-stage progression of human development from *self-centric* (often known as ego-centric) through *socio-centric* (or ethno-centric) to *world-centric*. As Lundy elaborates:

Each marks a developmental level in which our capacity for care and concern becomes increasingly inclusive, beginning with 'me' at the self-centric stage, expanding to include 'us' (i.e. people like me) at the socio-centric stage and, finally, 'all of us' at the world-centric stage. With each evolving stage we expand our capacity to take deeper and wider perspectives into account (49).

An integral perspective is particularly associated with a world-centric, or greater, perspective-taking capacity. It also engages other more evolved or emerging perspectives, occasionally expressed, for example, as post-conventional, trans-personal, or post-formal. And it is associated with a level of cognitive development identified as 'vision-logic' thinking. These distinctions relate mostly to developing stages within particular 'lines' of development - comparable to the 'multiple intelligences', in the work of Howard Gardner (2006, original 1993), which also figure as a key element of the overall model.

LINES of development call our attention to the multiple areas in which change and growth occur and can be actively supported: The Integral model acknowledges that human development unfolds in relatively independent areas or 'lines' - cognitive, values, morals, needs, self-identity, emotions, interpersonal, etc. An individual may be highly developed in some areas, and less so in others. Becoming 'developmentally attentive' as individuals, as organizations, and as communities, we actively support healthy development in each of these areas (Lundy 2010, 47).

What is mainly being advocated in this chapter is a more explicit consideration of well-being and place in integral terms - attempting to incorporate a regard that ranges across all the quadrants, and all relevant levels and lines, to better capture the full dimensions of the concepts. The following effort in this direction mainly focuses on place, placemaking and planning - taking off rather directly from some previous work (Wight 2002, 2005, 2006). A similar treatment of well-being is offered in a later section - albeit more tentative and speculative at this stage. This particular volume of conference proceedings may enable a fuller exposition in due course.

In terms then of Wilber's integral scheme, 'place' may be conceived - most comprehensively and inclusively - as spanning exterior and interior, collective and individual, in exquisite balance, manifesting extra-ordinary 'co-related-ness'. It is thus ideally **all-quadrant**. Place merits consideration as a key venue for the integration of 'It/Its' and 'We' with the 'I' of the beholder - in both material form and non-material consciousness. Place may also be conceived as **multi-level** as

well as multi-quadrant. It has both primacy and potency - integrating past, present and future. It is submergent and emergent, a common thread through the 'network', referencing the concept of the Great Nest of Being (Wilber 1996, 1998). It is always in flux, in development, being made and re-made, to better ground and situate the development of individuals and collectivities. Its basic development structure is nest-like or spiral-form, including - while transcending - less-developed, less complex stages, yet always anticipating more developed, more complex stages - an evolutionary never-ending-ness (Roemischer 2002).

In terms of what may be emerging currently at the leading-edge of cognitive development, place may be situated, within Wilber's scheme, around the transition from late formal cognition to early vision-logic; in other words, place is on the verge of going 'post-formal' - a manifestation of a consciousness that is increasingly aware of itself, an emergent becoming, with an attention to its intention. This 'post-formality' - going beyond a past privileging of the exterior, concrete, physical - provides the main context for logically envisioning the currently emerging form of planning as integral place-making. Wilber actually observes a range of post-formal (vision-logic) cognition:

These post-formal stages generally move beyond the formal/mechanistic phases (of early 'formop') into various stages of relativity, pluralistic systems, and contextualism (early vision-logic), and from there into stages of meta-systematic, integrated, unified, dialectical, and holistic thinking (middle to late vision-logic). This gives us a picture of the *highest mental domains* as being dynamic, developmental, dialectical, integrated (Wilber, 2000a, 22).

The more developed conceptions of well-being, as higher flourishing (Taylor 2007, Vernon 2008), may be envisaged as reflecting a similar 'staging'. Higher flourishing has the feel of second-tier; lower flourishing - and manifestations such as happiness science (Ricard 2003, Layard 2007) or positive psychology (Seligman 2003) - being more obviously in the realm of first-tier. The 'higher' transcends and includes the 'lower'.

In what 'sphere' will this integral placemaking, and 'whole-making', thrive? Transcending while including the physio-sphere and the bio-sphere, the **noosphere** (Wilber 1996) is about to be engaged in a hitherto-unprecedented manner as a critical operative context; increasingly, this will be the developing sphere of planning as placemaking (and effectively as conducting well-being, as whole-making). Feelings, art and spirituality - as defining qualities for the all-quadrant/all-level notion of place developed from Wilber's integral perspective - will similarly rise in planning consciousness. These qualities are not prominent in contemporary planning; to the extent that they remain foreign to planning, planning should expect to be regarded as foreign to most individuals. Much more of a place-making perspective may help to bring planning home to such people, or at least reduce the present disconnect.

Spiral Dynamics, discussed earlier, also represents a potential major bridge between Wilber's thought and contemporary planning: it helps to place different 'plannings' in a developmental perspective. For example, from *red* command-and-control, to *blue* master planning and zoning, to *orange* strategic planning, to

green communicative action, to - it is speculated - *yellow/turquoise* ecological/wholistic 'second-tier' place-making and whole-making. To the extent that Spiral Dynamics can achieve an integral wholism, it may help usher in a planning that is in greater synch with place-making, particularly as the second-tier V-memes take deeper root in collective consciousness.

Wilber made much of Spiral Dynamics in his past work, in part because it helped to advance his case for the constructive postmodernism that then underpinned his integral approach:

In the terms of Spiral Dynamics, the great strength of postmodernism is that it moved from orange scientific materialism to green pluralism, in a noble attempt to be more inclusive and sensitive to the marginalized others of rationality. But the downside of green pluralism is its subjectivity and relativism, which leaves the world splintered and fragmented.... And however important these multiple contexts are for moving beyond scientific materialism, if they become an end in themselves, they simply prevent the emergence of second-tier constructions, which will actually reweave the fragments in a global-holistic embrace. It is the emergence of this second-tier thinking upon which any truly integral model will depend - and this is the path of constructive postmodernism (Wilber, 2000b 172).

Here also we begin to glimpse the possible context for a more integral, constructively postmodern, second-tier planning - with place-making in mind, literally and figuratively, individually and collectively. Perhaps most fundamentally, Wilber's perspective helps situate the better inter-relating of place, place-making and planning as 'a post-modernity project' - or perhaps more accurately, a post-post-modernity project.

To what extent can planning be considered to be developing and evolving, and occupying new worlds - such as the post-post-modern and the post-formal? Planning may be abstractly conceived as a linking of thinking and acting (Friedmann, 1987). It is forward-thinking and intervention-oriented. It can take many forms, depending on the time/space setting and ruling life-condition problematique. It is possible to imagine it as always evolving, in terms of the level/stage of consciousness manifested. For example, we may now be advancing on a period of post-conventional 'vision-logic' planning - as distinct from a planning rooted in more conventional concrete/physical (conop-) or more formal instrumentally-rational (formop-) thinking.

Planning, at its best, has always been driven by an impulse to improve, to better, to do (more) good, to serve well-being in all contexts. At its core it is a **linking** endeavour - linking appropriate knowledge and understanding with desired actions or good intentions. Planning as we know it - and especially in its current professional form - was born in modernity; mature professions and rational planning are possibly among the strongest markers of modernity. Planning has certainly aided socio-cultural evolution, but not without its biases and predilections. It has had a space fixation; it has privileged the application of the sciences (over the application of the arts and the humanities); it has focused on the physical, especially land and its use, or the environmental; and there has been a strong statutory bias (privileging the *status quo*). Its linking integrating essence often seems to have been missed in the heat of action. Modern(ity)

planning has been essentially a linking of 'first-tier' thought with a differentiating agenda and a segregating impulse, dominated by a concern with the 'IT' and 'ITS' worlds; it has been anything but integral.

Planning (and policy and design) - it now seems - needs to more consciously become a part of a post-post-modernity project, linking 'second tier' thought with an integrating agenda and (as will be expanded upon shortly) a 'kosmopolitan' impulse, employing (at least until it is inevitably super-ceded) the method of an all-quadrant/all-level integral approach - what Wilber might render as 'Spirit-in-Action'. Such a planning might be well-served by a renewed consideration of the central place of place - but an explicitly post-conventional (not pre-conventional) notion of place, rooted in a world-centric vision-logic (rather than a nostalgic revival of ego-centric mythic/magical images and symbols). An integral planning, operationalised as post-conventional place-making, is thus 'logically-envisioned' as a necessary part of the post-post-modernity project increasingly promoted by integral thinkers.

In a planning context this underlying evolutionary interest can be interpreted as going right to the heart of the process in and of planning. Intervention-wise, it is interpreted as reflecting a wholeness-seeking imperative, involving the building of systems within systems within systems - but within the context of an integral embrace (as distinct from exterior-privileging systems theory). It also opens up a key sense of the evolving place of place - in this inner/outer meshing Kosmos (beyond Cosmos) that is starting to become consciously aware of itself; the context for a shift from the merely cosmopolitan to the explicitly 'kosmopolitan'.

After making a strong - essentially anchoring - appearance in pre-modernity, place seems to have become a casualty of sorts of **both** the success of modernity in achieving the differentiation of (what Wilber describes as) the Big Three (Self, Nature and Culture), **and** of modernity's failure in achieving their integration. Modernity consigned place to a comparatively ignominious fate (Casey, 1997), but it may now be making a comeback of sorts, as part of the constructive post-post-modernity integration project that an integral approach presages. A progressively post-conventional notion of place could well anchor its constructive postmodern rehabilitation, and continue the thread through the whole evolutionary spiral.

Place can be considered to incorporate qualities essential to meeting basic and not-so-basic human needs; it is in a sense inseparable from being human. Yet place has too often too easily been dehumanized as simply an 'it', as an objective - often spatial - identifier, in what Wilber labels 'Flatland'. What is made of place in such a reductionist context is necessarily limited, and limiting, in terms of planning; at best it might mark a progressive modern planning - but one that only goes so far. It is testimony to the value of directly exploring a more expansive perspective on place, as anything but a mere 'it', as centrally including consideration of the actual **making** of place, in all its dynamics, as a fruitful manifestation of the **integral** approach - as the integration of 'It' and 'We' with the 'I' of the beholder.

Placing Well-being in an Integral Embrace

Well-being may be conceptualized as, at the very least, a by-product – if not direct product - of the kind of integrally-informed place-making articulated in the previous section. If planning can be enacted as integral place-making, it cannot but play a more significant role in engendering greater well-being. But what if well-being itself is considered more directly through an integral lens? An integral well-being perspective may also prove as generative as the integral place-making perspective, with large dividends for related planning, policy and design.

With the quadrants in mind it is possible to appreciate that much of the official and scientific discourse treats well-being simply or mostly as an ‘it’ – as something ‘out there’ (rather than ‘in here’). It privileges an objective exterior perspective, to the detriment of the subjective and inter-subjective. With regard to the levels, some important differentiations begin to emerge – such as between settling for a focus on happiness or striving to also embrace something much grander, such as meaning, or mystery, or love. The distinction between lower and higher flourishing begins to make sense as a possible reflection of ‘first-tier’ happiness-like concerns versus ‘second-tier’ well-being, broadly - and deeply - conceived. And the commendable efforts to tease out different dimensions of well-being (e.g. psychological, emotional, physical, spiritual etc.) can be seen as an effort to distinguish different multiple ‘lines’ of development associated with well-being.

Reaching for a more ‘wholistic’ view, well-being evokes a highly generative interpretation through an integral lens. Conventional etymology needs to be bypassed – ‘the state of being comfortable, healthy or happy’ (encountered in many dictionaries) falls far short of the meaning being reached for. The more appropriate root word from an integral perspective is ‘whole’, which can be seen to encompass ‘well’ – and much more besides. This reframing more easily invokes whole-system conceptualizations, including such schemes as the Medicine Wheel (Quinones-Rosado 2007). It also suggests a basic living, life-affirming, orientation in favour of ‘wholing’, of seeking ever-greater, ever-more-exquisite, wholeness – in ourselves, in our relationships, and in our environments. Think of ‘wholing’ as a deeper and wider form of ‘healing’; it is the action verb to the well-being noun. Its enacting becomes a form of ‘wholing’, of making more whole, of ‘whole-making’ - seeking always to conduce, extend and embed wholeness as wellness, or thriving as flourishing - the ‘wholing’ practice yielding well-being.

This notion of well-being as ‘wholing’ or ‘whole-making’ takes us well beyond happiness, for example, as the ‘be-all-and-end-all’. Additionally, this interpretation engages our need for deep meaning, beyond everyday life. It also encompasses the sense of being part of something bigger, more transcendent, mysterious, but loving – the spiritual dimension of wellbeing (Vernon 2008). Within an integral perspective there is room for the magical and mythical, as well as the rational and the mystical. The focus is on well-being, not ill-being; the

framing as ‘wholing’ recognizes the developmental and evolutionary dynamic, in ever-seeking to become ever-more whole.

Combining Place-making and Well-being (as Whole-Making)

By way of a recap, in this presentation place-**making** (Schneekloth and Shibley 1993, 2000; Wight 2002, 2005, 2006) has been privileged over a focus on place per se; what is key is the making, and re-making, by the people in and of a place – whatever the context/scale. The **making** of place, rather than place per se, is very deliberately stressed here, to embody the application/practice emphasis. There is a considerable literature on ‘place’ but much less on ‘placemaking’. Early formulations may be traced to Australia (Dovey 1985; Winikoff 1995). Pioneers in North America were Lynda Schneekloth and Robert Shibley (1994, 2000). Place-making is mostly about collective action on common concerns in a concerted fashion. What’s more, the emphasis is on the making, and the remaking – taking action together, building momentum... always complete, but never finished. It involves a positive trajectory, towards the good, the true and the beautiful – healing as it goes, in the sense of ‘wholing’, providing the overlap with well-being.

However, the root notion of ‘place’ is also considered to represent much more than space, or space/time; it is much more than geography; it simultaneously engages the physical, the functional, the communal and the spiritual; and it is a dynamically evolving notion. An integral sense of place - and its making – transcends, while including, the best aspects of pre-modern, modern and post-modern ‘senses’ of place. The making includes common-meaning-making, and much more, depending on the altitude of development.

As we have seen in the previous section, wellbeing can also be given a special interpretation when viewed through an integral lens, but this raises the question of how such a special formulation – especially the meshing of place-making and well-being - can be actualized. Combining placemaking and well-being, in integral terms, invokes meshworking - a very new notion, partly a product of the early integral wave, but with its roots in brain science (Hamilton 2008, Ch. 10; 2010). It is built on the more familiar ground of networking, but meshworking takes networking to an almost unrecognizable new level. The attraction here is its response to the challenge at the heart of an integral approach – achieving uncommon ‘integratedness’ in real-time. It provides the context for operationalising any trans-disciplinary, trans-professional, trans-sectoral endeavour – for those so inclined to seek such communion. Truly an integral age approach, it is inherently ecological, as well as being highly participatory (Torbert and Reason 2001), solidly biased in favour of conducting collective action, following the raising of the collective consciousness of all the players in an issue. Think of meshworking as ecological interconnectedness ‘personified’, in a complex collective collaborative context.

To the extent that all of this can be contained, the associated integral container would have the appearance of a primarily horizontal place-making (rooted in the

quadrants, valuing the balancing of interior and exterior) and a primarily vertical well-being (rooted in the levels/lines, valuing the interaction of individual agency and collective communion). The latter (well-being) feels like its origins are in the perennial philosophy, the Great Chain of Being (Wilber 1996; 1998); the former (place-making) helps to reframe the Chain as a 'Nest'. The meshworking is the integral interaction, the integrated enaction - a catalyzing agent on a grand scale.

Meshworking Placemaking and Well-being

The underlying planning, policy and design challenge may therefore be expressed in terms of meshing place-making and well-being (as whole-making). An explicitly integrally-informed 'meshing' may be characterized as meshworking, a form of second-tier integral collaboration – well beyond mere cooperation or first-tier networking. This will take many – scientists, professionals, citizens - well outside their comfort zone, in part because it also necessitates them consciously going well **inside** them-selves. An integral engagement of well-being and place-making entails engaging the ineffable, within the realms of consciousness, as much as it entails engaging exterior concrete form. It is an inner work project, engaging not just the mind, but body and spirit.

The project may be characterised as 'enaction inquiry' – advanced action research, blending some first-, second- and third-person inquiry, to unearth relevant subjective and inter-subjective knowledge, to complement the otherwise dominating objective knowledge (Torbert et al 2004). This was the focus of the presentation given at the conference, beginning with some first-person self-inquiry. Participants were invited to investigate two lines of questioning. Thinking of their experiences over the recent past, the questions posed were:

- i) When do you know you are well, are – in fact – a well being? and,
- ii) When do you know you are in your place – your prime, thick place?

After some individual reflection on their responses, dyads were formed to facilitate a simple second-person co-inquiry, seeking points in common – about well-being and place, and/or their relationship. A final plenary sharing aimed at some third-person synthesis of points having potentially wider general significance. This included the challenge, together, to consider any possible 'elephants in the room' – something that we (all) might have been missing, or avoiding. Conferring was enabled; some communing was achieved; a common place was convened, however short-lived; well-being was enhanced – we left a little more 'whole', individually and collectively. It is such scope, and depth, of inquiry that is essential to do full justice to any engagement with well-being and place-making.

My own efforts to enact the sentiments associated with an integral perspective have been mostly focused on efforts to re-frame planning as place-making, to break its space-fixation, to move well beyond a concern with simply land and its use – to effectively implicate it in the much larger project of conducting well-being, as whole-making. The efforts have included programming a national

planning conference (CIP 2008) on the theme of 'Planning by Design in Community – Making Great Places'. It entailed an effort to better integrate planning and design, through place-making, and through a grounding in community. Problematising a space focus, in favour of a shift to a place focus, it was speculated that planning as place-making might have something to do with people and planners co-designing space-place transformation. The programming reflected an integrally-informed view of places (especially in contrast with spaces) (Wight 2008).

Following the 2008 conference programming, during an academic leave in the UK, I began to notice the prominence of well-being in much public and professional discourse. I sought to explore coupling my long-established interest in place-making with my new interest in well-being. This Durham conference presentation marks my first effort to connect the two, from an integral perspective. At first I was challenged to understand the essence of well-being. It had a different feel from my sense of place-making. My early journaling indicates a time when I was forced to conclude, in comparison with place-making, that: 'well-being... just is... it's subjective, it's inter-subjective... NOT made, NOT constructed'. Then I encountered Mark Vernon's *Wellbeing* (2008) and began to sense some integral connections, especially at the level of 'higher flourishing... the larger perspective in life':

It is prior to lower flourishing because it informs and shapes the humdrum. It provides a sense of intrinsic meaning or overall direction or deeper purpose. It originates not in daily activities but in ethics, spirituality or religion... It is not just a concern with the piecemeal constituents of a good life, but a love of the good itself and a search for that good in life... It is characterized as a transcendent commitment, that if not imagined as belonging to another world is felt as a pull towards something that is deeper than or beyond the concerns that an individual would otherwise have for himself or herself... higher flourishing has the magnetic allure of what is good in itself. It is about the spirit level (Vernon 2008, 6-7).

I came to be guided by Vernon's insights on the essence of well-being; like myself, he sought to put the spiritual dimension into play – almost front and centre:

... if our well-being depends in some way on that which is beyond us – or at the very least draws us to a state of purpose or serenity as if from the outside – it is by definition in large part unfamiliar, unusual, or unknown. It emerges as something shown or revealed, not told or made. It is an experience not a rule; although informed by rationality it outstrips rationality (Vernon 2008, 12).

The 'well' in well-being goes back to the original notion of 'whole', when whole very much referenced body, mind, soul and spirit. Here is some dignified pre-modernity that deserves to be very much preserved, and sensitively integrated into today's thinking and acting. The coupling with place-making, and an integral perspective, helps to render well-being as a form of 'whole-making', and it is in this combination that we might all find our post-post-modern calling, our co-mission-ing. Paraphrasing Martin Luther King:

I have a dream, of professions – and an academy – of servant-leaders, as a community of well-beings, striving above all for the well-being of all, in well-loved places: whole beings, in whole places, tending not just to inanimate matter, but to all that matters – in body, mind, soul and spirit.

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