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Rules versus Standards in Developing Countries
The Case for Clear and Precise Legal Norms on Eminent Domain Power

A. Introduction

We relate the law and economics discussion on precise legal rules versus broad and information-intensive legal standards to the impact of law on economic development and to economic and political features of low and middle-income countries in general and to taking law in particular. We review the differences between rules and standards, proceed to their economic consequences and relate their different features to political conditions that may influence the choice between them. Next, we relate our findings to taking law in developing countries, where clear rules often serve the purpose of the law better than standards. The literature on precise legal rules versus imprecise legal standards shows a trade-off between the benefits and adverse effects of the two types of legal norms. Rules are cheaper to administer and require fewer trained civil servants than standards but may become inflexible, sticky and dysfunctional over time if technical or social condition change. Rules, which legitimize administrative acts of the government are better suited to protecting citizens' rights against the state than standards. In relation to developing countries, the literature shows that the lower a country's income and institutional development, the more the optimal balance between rules and standards should lean towards the former. We summarise the general findings of this discussion and relate them to the law of eminent domain power as a special case. We describe how the perspective on eminent domain power has been shifting since the 1950s, when development economics regarded the powerful planning state as the most important agent of economic development, to present day views, which are dramatically different and in which "land grabbing" has become paradigmatic of misguided economic development. We support clear and precise rules regulating eminent domain power. The rationale for such rules is pervasive as they cut into individual rights. But for many developing countries additional reasons for precise rules of taking law exist.

B. The debate on rules versus standards as applied to developing countries

Kaplow (1992) introduced the categorization of legal norms as either rules or standards. Rules are crystal clear legal commands.[1] They are blueprints for action and allow for mechanical legal decisions. Standards, by contrast, are complex and often mission-oriented norms with a vagueness resulting from a wide range of possible interpretations.[2] A per se norm in competition law is a rule, a rule of reason in the same field is a standard. A speed limit for motor vehicles is a rule, negligence in tort law is a standard. A fixed formula for damage compensation as in the Salic Law is a rule, awarding damages according to the differential method as in the German Civil Code rather resembles a standard. A legal norm that allows the government to expropriate land for "economic development" is a standard. A norm which allows takings for "construction of public roads" is a rule. The meaning of a rule is usually known ex-ante whereas standards only reveal their precise meaning ex post when a court resolves a legal conflict. Consequently, rules are associated with greater legal certainty than standards. Ideally under a rule the semantic content of the law is common knowledge under a standard it is not.

The validity of the categorization of legal norms as rules and standards has been challenged.[3] All legal norms are subject to interpretation, which inevitably implies legal uncertainty and imprecision, as the example of a speed limit in a residential area shows: In Germany, a physician rushing to an emergency can break the speed limit without violating the law. And this exception is not written in the law but derived from interpretation. The same holds for someone driving a woman in labour to hospital or speeding to warn a truck driver that his load is about to come loose. It does not, however, hold for a driver who speeds for the health or life of a pet. In these cases, courts must apply tests of reasonableness and proportionality and cannot take a mechanical decision based on a clear rule.[4] The courts will often deviate from a seemingly crystal clear rule if they regard the outcome as severely inappropriate. For example, the German law of obligations precludes compensation for non-pecuniary damages – a clear rule it would seem. Yet the German Supreme court struck down this rule in cases of

[1] Kaplow, L., 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke LJ 557.
[2] Diver, C., 'The Optimal Precision of Administrative Rules' (1983) 93 Yale LJ 65.
[3] Casey, A. & Niblett, A., 'The Death of Rules and Standards' (Coase-Sandor Working Paper Series in Law and Economics No. 738, 2015).
[4] Transportation of a pregnant woman after contractions began. (Oberlandesgericht Düsseldorf, Beschluss vom 22.02.2015, Az. 5 Ss (OWI) 411/94 - (OWi) 211/94 I); emergency visit of a medical doctor. (Oberlandesgericht Hamm, Beschluss vom 03.10.2001, Az. 1 Ss OWi 824/01). Warning of a truck driver whose load was unsecured. (Oberlandesgericht Köln, Beschluss vom 17.05.1994, Az. Ss 169/94 (B) - 93 B) Necessary emergency surgery of a surgeon in a hospital. Bayerisches Oberstes Landesgericht, Beschluss vom 01.10.1990, Az. 1 Ob OWi 331/90)

infringement of privacy, awarding damage compensation even if the infringement entailed no financial damage.[5] So the judiciary changed the meaning and scope of a seemingly clear rule. Similar developments can be observed in contract law. A crystal clear contract can be interpreted widely or narrowly by judges who may or may not insert implied terms of fairness. Also, a vague legal term such as "good faith" or "negligence" need not mean that the law in question is also vague as courts give such terms precise meaning and internal structure over time and thus bestow precision onto initially vague norms (Ott/Schäfer 1997).[6] In general, a natural language text cannot guarantee fixed designators and syllogistic deductions. However, none of this calls into question the usefulness of the distinction between precise legal rules and imprecise legal standards – even though we are left with some fuzziness at the margins.

C. Costs and benefits of rules versus standards

I. The costs of specifying, adjudicating and administering norms

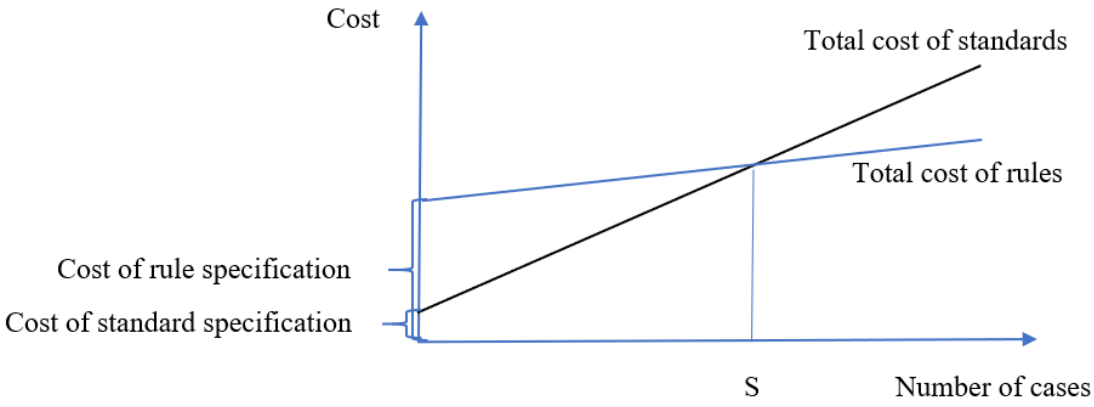
The costs of establishing and maintaining a body of law consist of the fixed costs of norm specification, e.g. drafting and issuing a statute, which are independent of the number of legal cases, and the variable costs of adjudication and/or administration. A legal statute consisting of imprecise standards clearly economizes on the costs of norm specification at the expense of high costs of norm application and adjudication, whereas a statute consisting of precise rules entails high costs of norm specification but lower costs of adjudication. The total costs of the law equal the sum of the costs of norm specification and the unit costs of norm application multiplied by the number of cases.[7] This can be illustrated as follows.

[5] 1958 (BGHZ 26, 349)

[6] C. Ott and H.B. Schäfer (1997) "Negligence as untaken precaution, limited information, and efficient standard formation in the civil liability system" International Review of Law and Economics 17(1):15-29.

[7] Ehrlich, I. & Posner, R., 'An Economic Analysis of Legal Rulemaking' (1974) 3 JLS 257

Total Costs of Rules and Standards



The costs of norm application consist of several subcategories. An administrative officer takes a decision which affects a citizen. If based on a rule, the decision is easy and cheap to take. The citizen can accept the decision or reject it and take action against the state. If the rule is clear, the quota of court cases which cause additional costs and the cost of adjudication are lower than with information-intensive standards. Since the cost of applying a precise rule, the quota of court cases and the cost of legal action are all lower than with imprecise standards, the average cost of applying the law must also be lower. Therefore, if the number of cases is low, it pays to economize on the costs of norm specification; conversely, if the number of cases is high, it pays to economize on the costs of norm application. In the figure above, the total costs of rules are lower than those of standards if the total number of cases remains below S, and vice versa for numbers of cases above S.

Minimizing total costs should be an important consideration in the choice between precision and generality, which is the choice between rules and standards. For instance, promulgating the standard to avoid unreasonable and unnecessary pollution as in the Norwegian Pollution Control Act[8] is extremely easy and does not generate any initial cost at all. However, the practical application of the standard will generate significant costs for agencies and judges. In the case of precise rules, the relative size of costs is reversed. Adjudication costs are low because legal decisions are less complicated and require less information. Furthermore, the

[8] "The Act shall ensure that the quality of the environment is satisfactory, so that pollution and waste do not result in damage to human health or adversely affect welfare, or damage the productivity of the natural environment and its capacity for self-renewal." Pollution Control Act, www.regjeringen.no/en/dokumenter/pollution-control-act/id171893

citizens are more certain whether they are complying with the rule and therefore in a legal dispute are more likely to settle out of court. The higher degree of legal certainty also reduces the incidence of legal disputes as such rules are more often self-enforcing because parties are incentivized to settle the case out of court in the shadow of the law.

Rules with high costs of norm specification but low costs of norm adjudication generate lower total costs if the number of cases is high. In those areas of the law where the optimal norm changes quickly over time because of rapid social, technical or economic change, standards are more likely to be the efficient solution. Allowing for reinterpretation, they afford more flexibility than rules, which are rather inflexible and can usually only be changed by fresh legislation. Conversely, in those fields of the law where conditions are stable, and the number of cases is high, rules are preferable.

While many other factors also play a role, according to this normative conclusion, the total costs of the law have a strong impact on the optimal choice between rules and standards. In traffic law with its large number of cases, speed limits and the associated administrative fines are in place on most roads despite the administrative costs of specifying a suitable limit for each road and neighbourhood. By contrast, for a home owner with a duty to protect others from falling trees in his garden, there is no comparable level of precision in the legal norms; instead, the courts determine the due level of care in a civil liability case after the accident.[9] This differing level of precision in the regulating norms is best explained by the different number of cases in the two accident categories.

II. Considerations of social justice and access to courts

Minimizing the total cost of norm specification and norm adjudication is important, but other normative aspects come into play, too. While the costs of norm specification are paid by the state, i.e. the tax payer, most of the costs of adjudication – court fees and lawyers' fees – are borne by the parties. Thus, the choice between rules and standards determines to what extent either the parties or the taxpayers are burdened with the costs. A simple per se rule prohibiting the sale of merchandise below the purchase price causes much lower court costs and lawyer fees than a rule of reason for this prohibition, whose adjudication is information-intensive and often depends on costly research financed by one of the parties. Therefore, precise rules with low costs of adjudication and legal fees incentivize the parties to go to court or to negotiate in

[9] For instance, Oberlandesgericht Düsseldorf (judgement of July 23, 2013 – 9 U 38/13) in a case of damage sustained from a falling oak tree.

the shadow of the law. The outcome of a legal conflict is more easily foreseen, which widens the settlement range. Conversely, vague standards with high costs of adjudication and legal fees deter the parties from going to court and obstruct a fair out of court settlement in the shadow of the law.

High costs of adjudication especially deter consumers, employees or citizens (from action against the state). Administrative acts often cut into the interests and rights of individuals. Precise rules, which reduce the costs of seeking justice, then facilitate access to administrative courts. And the administrative courts in turn require little information for their decisions. Such considerations can thus suggest clear rules even in cases where the combined costs of rule specification and adjudication call for standards. If efficient substantive administrative law requires broad standards on the basis of which regulatory agencies conduct cost-benefit-analyses when setting standards of health, safety, security or accounting, precise rules may still be preferable due to the easier access to justice. This consideration carries more weight the lower a country's income.

III. Risk aversion makes rules more beneficial

A standard assumption in economics is that individuals are risk averse. They prefer a certain income to the same expected income or wealth with a positive standard deviation which can make wealth or income higher or lower than expected. As legal rules carry legal certainty and legal standards uncertainty the latter increase the standard deviation and variance of the wealth of a nation. Therefore all other things being equal rules must be preferred over standards as they reduce variance of income and wealth. This point was made by Weiss, who relates it to the poor.[10] It is however a general observation and a general consequence of risk aversion. There are of course many instances in which standards perform better than rules leading to a trade-off between higher expected wealth as a consequence of standards and a more certain wealth as a consequence of rules.

[10] Uri Weiss, "The Regressive Effect of Legal Uncertainty" (December 2005). *Tel Aviv University Law Faculty Papers.* Working Paper 30.

IV. Costs and benefits of rules and standards and the training of civil servants

A country's average level of expertise of judges and civil servants tends to correlate with its per-capita income. Poor countries will likely have fewer well-trained judges, civil servants and experts with a good understanding of the legal and societal problems to which a body of law is directed. In economic terms, the stock of human capital, i.e. the accumulated investment in the education and training of civil servants, is low and more concentrated among the few highly trained. In such countries, a law which requires subtle understanding and reasoning might overtax the capacities of many civil servants and judges. General standards are fact-intensive legal norms that require fact finding, data processing and relating the facts to the teleology of the law. The decision process is lengthy and fraught with potential mistakes, avoiding which will require all the expertise and training of the decision-makers. With poorly trained judges and administrators, legal standards then lead not only to relatively high variable costs of applying the law but also to more mistakes, with adverse effects on society. This gives rise to a tendency to concentrate the scarce human capital at the top of the legal system for the drafting and amending of precise norms whose adjudication or administration is relatively easy.[11] This tendency applies not only to the organization of the legal system but also to hierarchical public and private organizations in general.

To illustrate: Suppose the president of a public company sells a valuable asset to another firm, which he owns. If the price is too low, the sale will convert the company's wealth into his personal wealth. U.S. law allows such a sale but puts a lower boundary on the price. The president has a "fiduciary duty" to acknowledge his ownership of the other company and to purchase the asset in an "arms-length" transaction. Fiduciary duty is clearly a general standard, not a precise rule. Its application provokes disputes about many facts. A good decision in such a dispute requires a well-educated and sophisticated judge. The same applies to the "business judgment rule" in corporation law, which protects shareholders against managers trying to gamble at their expense. Instead of a general rule, the law could impose a precise standard. It might forbid the aforementioned asset sale altogether or forbid that managers start a different business within the company. Any unsophisticated judge could apply such a rule using relatively few facts and knowing next to nothing about business practices.

[11] H.B. Schäfer (2006) "Rules versus standards in rich and poor countries: Precise legal norms as substitutes for human capital in low-income countries" Sup. Ct. Econ. Rev. 14: 113-134. Faure, M., 'Environmental Rules versus Standards in Developing Countries: Learning from Schäfer' in Eger, T. et al, Internationalization of the Law and Its Economic Analysis (Gabler 2008).

Russia's current corporate code was drafted by two American law professors who tried to design a self-enforcing law using precise norms. [12]They included a rule according to which shareholders must elect at least one member of the management by supermajority. The aim was to ensure that one board member enjoys the support of outside investors, so that he will protect their interests against insiders and, if necessary, inform the public. This structural device is simpler than attempting to enforce substantial rules to protect outside investors, such as the rules of fiduciary duty or a business judgment rule.[13]

The Russian civil code of 1994 provides another example. Its contract law is more detailed than the German civil code (BGB). It provides explicit and separate rules not only for classical contracts but also for the sale of energy, companies and buildings, for leasing of machines and for R&D contracts. Agency for international commercial transactions requires written form.[14]

Judges in Europe and America became increasingly flexible in interpreting contract law over the course of the 20th century. Laws that were initially treated as precise rules came to be regarded as general standards. For example, common law courts in early 20th century America refused to consider unfairness in the price terms of contracts; by the end of the century, their opposition had weakened. However, this general tendency is not uniform. Judges in London have a reputation for interpreting business contracts literally, compared to judges in Frankfurt or New York. Many believe that this difference has given London a competitive advantage in the financial services industry. In this respect, judges in developing countries should emulate London rather than Frankfurt or New York. [15]Poor countries should not embrace flexible business law too quickly. Weak legal systems should tilt their laws towards precise rules and away from general standards.

Another example relates to the right of parents to name their children. Contemporary legal standards in some countries hold that a child's name can be any word but must not impede its wellbeing. A good decision on this matter requires expertise on the factors that influence the wellbeing of a child and how these factors should be applied to a first name. Historically,

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[12] Black, B. & Kraakman, R., 'Corporate Law from the Scratch' in Frydman, R. et al, Corporate Governance in Central Europe and Russia: Insiders and the State (CEU 1996).

[13] B. Black and R. Kraakman (1996) "A Self-Enforcing Model of Corporate Law" Harvard Law Review 109(8): 1912-1982; B. Black et al. (1999) "Russian Privatization and Corporate Governance: What Went Wrong?" …

[14] Russian Federation: Agency Law for Russian Federation (2016) http://www.mondaq.com/russianfederation/x/519712/Contract+Law/Agency+Law+of+Russian+Federation+FAQs

[15]

several European countries including France obliged parents to pick a name from a closed list. This rule still applies in Portugal.[16] It makes little demands on the registration officer. However, the costs of maintaining a list that takes account of changing preferences are high.

IV. Rules curb disloyalty and corruption

Poor decisions on the part of judges and regulators can result not only from insufficient training but also from a lack of independence or from corruption. This is another reason to prefer rules over standards in many low-income countries. Decisions which violate rules are more easily observed and criticized than decisions which violate information-intensive standards. A critical press, civil society organizations or internal controllers will have more trouble criticizing a public decision based on the subtle interpretation of a legal standard than one which violates a clear rule. If, in violation of a rule forbidding him to do so, a manager sells the company's products to himself and gets away with it, that situation is much more easily observed than if the manager were entitled to such sales but were bound by fiduciary duties. In the latter case, the court or anyone criticizing the manager would have to compare the contract price to the market price, which may not be easy to ascertain. To criticize a wrong decision based on a "fiduciary duties" norm is harder than to criticize a decision that disregards a clear prohibition. If a statutory law permits the taking of private land by the government for the purpose of "economic development", an illegal act of taking that contributes not to economic development but only to the interests of the politicians in power can pass bureaucratic and judicial scrutiny more easily than if the taking law must specify precisely the public purpose for the taking. [17]

Already around 400 BC, the Greek philosopher Plato observed the relationship between rules and standards on the one hand and the loyalty and skilfulness of judges on the other hand when discussing whether damage awards and penalties should be based on fixed formulas like a predetermined amount of precious metal that leave no discretion to courts or whether they should be determined by the judges themselves:. "I may reply, that in a state in which the courts are bad and mute… then there is a very serious evil, which affects the whole state. … If the state for which (the judge) is legislating be of this character, he must take most matters

[16] The Portuguese Ministry of Justice provides a list of approved and banned names, which is updated regularly. www.irn.mj.pt/IRN/sections/irn/a_registral/registos-centrais/docs-da-nacionalidade/vocabulos-admitidos-e

[17] I. Somin, Overcoming Poletown: County of Wayne v. Hathcock, Economic Developing Taking and the Future of Public Use (2004) Mich. St. L. Rev. 1005 (2004) 1006-1024. Somin observed that taking decisions based on the legal target of "economic development" are "justifying nearly unlimited power to condemn private property…", p.1006.

into his own hands and speak distinctly. But when a state has good courts, and the judges are well trained and scrupulously tested, the determination of the penalties or punishments … may fairly and with advantage be left to them."[18]

Let us sum up the findings on the relationship between rules or standards on the one hand and the expertise and loyalty of judges and administrators on the other hand. The application of precise rules requires relatively little information. This has three advantages with particular relevance to developing countries. First, the parties have less to dispute about, which makes dispute resolution quicker and cheaper. Second, when the application of the law relies on fewer facts, disguising bribes is harder, so corruption is riskier. Third, precise standards demand less sophistication and education from those who apply the law. While legal education is often lacking in poor countries, it may also constitute a bottleneck in times of transition. For example, in the 1990s, Russian judges knew little about the functioning of a public company in a market economy. All their training and experience came from Soviet times. Therefore, a rule-based type of corporation law was the right response.

However, precise standards are often inflexible and out of touch with real-life problems as lawmakers cannot possibly anticipate all the circumstances in which a rule can have unintended consequences. A precise rule that gives good results now may return bad results later. To continuously update the precise rules to keep track of social and economic change requires repealing old rules and enacting new ones, and generally a lot of effort.

D. What drives the actual choice of legal rules and standards?

I. Evolutionary pressure towards better law

Much work on rules and standards focusses on the conditions that make either type of norms socially superior to the other in terms of costs and benefits. This scholarship proposes policy recommendations rather than explaining what causes the mix of rules and standards in an existing body of law. The explanatory value of this literature is limited to the assertion that a socially inefficient law will tend to generate evolutionary pressure to reduce costs by either changing the ratio of rules to standards in a body of law or by changing the feature of single legal norms in the direction of becoming more like rules or standards. This tendency will be

[18] Plato, Laws, Book IX. http://classics.mit.edu/Plato/laws.9.ix.htm

especially pronounced in those areas of the law in which there is little dissent about the policy targets of the law among citizens, between citizens and the state and between the administration and the judiciary. However, the explanatory value of this assertion breaks down if the relevant political actors have conflicting views.

Next, we present some findings which indicate that governments may prefer rules if they want to limit the decision-making power of the courts. Governments might however prefer vague standards for administrative laws to allow themselves discretion in administrative acts, at the expense of their citizens' rights and interests. For instance, in taking laws there is a natural tendency for governments to specify in vague terms both the legal rationale for taking, as in "economic development", and the level of compensation, as in "fair" or "just".

II. Diverse countries prefer rules over standards in constitutions

In empirical law and economics, it has become common practice to use the comparative length of the text of a body of law such as a constitution or a statute to gauge the degree to which the text is rule-based or standard-based. Precise legal norms with exceptions and exceptions from exceptions are lengthier than mission-oriented standards. In empirical, cross-country legal studies, a long legal text regulating a given problem is therefore used as a quantitative proxy for a more rule-based law. When the relevant political players do not agree on the political aims of a law, a compromise must be fixed in detail, which lengthens the text. Based on this observation, the literature has produced a number of empirically confirmed hypotheses.

Constitutions[19] differ dramatically in length even though they serve the same purpose everywhere. Other things being equal, multi-ethnic countries like many former British and French colonies have relatively long constitutional texts. The need to achieve a compromise between ethnic and religious groups leads to lengthy and detailed documents. The same holds for countries with a sophisticated separation of powers and a high degree of democracy. Authoritarian countries tend to have short constitutional texts, seemingly following Napoleon's advice that a constitution must be "short and vague".[20] All constitutional texts in Northern Africa and the Middle East support this hypothesis, being significantly shorter than others. It is therefore not surprising that in a sample of 135 constitutional texts, India had the

[19] S. Voigt (2009) "Explaining constitutional garrulity" International Review of Law and Economics 29(4): 290-303.

[20] cited in J. Limbach (2009), Kritische Loyalität üben, Das Parlament No. 20.

longest constitution, which is 20 times longer than that of Tunisia. Constitutions grow longer the more unequal a country's distribution of income and wealth, as inequality undermines the level of trust among the political actors. Further evidence suggests that countries with rich natural resources are more likely to suffer civil unrest, which raises the need for longer constitutions. All in all, the level of trust within a society and the degrees of democratization and separation of powers can explain the extent to which a constitutional text consists more of rules or of standards, as proxied by the length of the text.

III. Choosing rules to strengthen the executive branch

Rulers prefer legal rules over standards regardless of their comparative cost-benefit relation if they want to avoid transferring power to judges. A telling example is the General State Law for the Prussian States of 1794, one of the first codifications in Europe and a comprehensive body of civil, criminal and public law. At the time, the Prussian judges and civil servants had already achieved some level of independence from their rulers' erratic interventions.[21] But king Friedrich II, who initiated the law and supervised its authors, wanted no power for the courts and – in his own words – aimed to "simplify" legal norms, to remove "the whole caboodle of subtleties" and to make "the corps of solicitors superfluous".[22] At 19.000 sections, the extremely long law is intended to leave as little room as possible for judicial interpretation and to determine every case ex ante by crystal clear rules.

Similar motives to prefer rules over standards applied in Czarist Russia. Before World War I, the Russian civil code, which was influenced by German civil law, lacked a good faith principle, which is used with ample discretion in many civil law countries when the rule-based contract law leads to absurd or grossly unintended consequences. In the late 19th century, German courts began using the principle to develop and change parts of the law of obligations. By contrast, to constrain their competences, the Russian judges were denied such discretion.[23]

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[21] R. Koselleck (1967) "Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848". Klett-Cotta.

[22] translated from D. Willoweit (1995) "Die bürgerlichen Rechte und das gemeine Wohl, das rechtspolitische Profil des Allgemeinen Landrechts für die preußischen Staaten", in D. Willoweit (ed.), Gemeinwohl, Freiheit, Vernunft, Rechtsstaat. 200 Jahre Allgemeines Landrecht für die Preußischen Staaten, Mohr Siebeck, p. 1.

[23] F. Tischendorf (2014) Das russische Zivilrecht wird modernisiert. https://international.ruw.de/riw-news/nachrichten/Das-russische-Zivilrecht-wird-modernisiert-14138 Tischendorf writes that the good faith principle was introduced only with a law reform in 2013 and of fundamental importance.

IV. Power of courts and ease of fresh legislation affects the choice of rules and standards

The preference for rules over standards is not limited to authoritarian regimes. In modern democracies, a high level of precision in legislation can reflect the desire of the executive and legislative branches to curb court power. Cooter and Ginsburg (2003)[24] argue that a principal-agent problem between the legislature and the courts exists, which can be alleviated either by reducing court power through fresh legislation which replaces judge made law from Supreme Court rulings or by means of precise legal norms that reduce the scope for interpretation. Parliaments can uplift the norm generating character of Supreme Court decisions by changing the law. If this is easy, courts have an incentive to abstain from interpreting the law in a manner which agonizes the legislator and provokes fresh legislation. Cooter and Ginsburg observe however that the scope for legislative bodies to enact laws and reverse court decisions depends on the federal structure and the party system. Such changes are most easily achieved in countries with a single chamber parliament and a two-party system with only one party in power. For such change to occur in a multiparty system, all median voters of the ruling parties would have to object to the Supreme Court decision and agree on new legislation. Therefore, court power is lowest in a two-party system with one ruling party and one chamber, and greatest in a system with many ruling parties and multiple chambers. Their view is tentatively supported by the comparative length of legal texts in the EU, which transform directives into national law.

V. Totalitarian states may prefer standards if the judiciary is not independent

The motivation of governments and parliaments to limit the decision space of courts with clear rules is however not universal – it applies only if the judiciary is independent. Totalitarian states, which control all aspects of society and make the judiciary their malleable instrument, have also used used vague standards and general clauses to overcome the formality of the law altogether. After the Russian revolution, the Soviet administration subjected contract law to its ideological aims using blanket clauses (Reich 1972):[25] "Soviet jurists in the 1920ies drafted an interim codification based on the principle of abuse of rights. A dissemination of general clauses (social purpose of the law, respect of social/economic

[24] B. Cooter and T. Ginsburg (2003) "Leximetrics: Why the Same Laws Are Longer in Some Countries than in Others" University of Illinois, College of Law; Working Paper LE No. 03-012, June.

[25] N. Reich (1972). "Sozialismus und Zivilrecht". Frankfurt: Athenäum.

interests) was meant in order to give a politically inspired judiciary the tools to control and, when necessary, reverse, the formality of the statute".[26]

VI. Rules in public law constrain state power

Rules reduce the power of independent courts. This however does not imply a general interest of the executive and parliament in precise norms. On the contrary, a state whose regulatory laws interfere with individual interests, entitlements and constitutional rights might prefer standards and vague norms to expand the decision power of its administration. Standards enable regulatory agencies to take swift and far-reaching choices and liberal decisions based on cost-benefit-analyses or other methods of weighing interests, yet they also invite misuse of state power if governments are self-interested and imperfect agents of the society. Without constitutional checks on the executive and parliament, there is a natural tendency to expand state power by using standards rather than rules for regulatory law. Legal orders can react to this by limiting the administrative power to weigh interests and forcing the legislature to pass precise rules if the law infringes individual interests and rights. The ideal means to achieve this will differ from country to country.

The German constitution (Grundgesetz) requires legal clarity (Normenklarheit) and legal definiteness (Bestimmtheit) of any sub-constitutional regulatory law that affects rights. State intervention in rights is possible for legitimate policy aims such as national security, public health, consumer protection and the environment if the intensity of the intervention corresponds to the level of precision of the infringing rules (Regelungsdichte).[27] This should delimitate the authority of the administration and enable lower administrative courts to check with little information whether an administrative act affecting individual rights is compatible with the law. If a legal norm does not pass this test, the constitutional court will uplift the norm for being too vague. German public law scholars continue to discuss whether this test works well, whether it can even achieve its goals or whether it sometimes becomes dysfunctional when binding the government too much. A much-discussed example in German public law is the general clause of safety standards according to "the state of science and technology", which may be regarded as either too vague or necessary for a regulatory agency

[26] G. Ajani (2002) "Formalism and Anti-formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law" Global Jurist Advances, 1-10, p.1.

[27] Maunz/Dürig/Grzeszick VI. Rn. 105-106, beck-online. This implies a prohibition of delegation from parliament to the administration. Parliament must regulate the essential points in the law and cannot shift the decisions to the administration. See especially the decision by the German Constitutional Court on this matter. BVerfGE 49, 89, 126 ff. (insb. Rn. 12, 68, 70 ff.).

to impose reasonable product safety levels. Even just an outline of this discussion would be beyond the scope of this paper. Suffice it to mention that an important and undisputed effect of the constitutional test of legal clarity is to incentivise the government and parliament to be precise when enacting regulatory laws that affect individual rights. This in turn allows lower administrative courts to take decisions based on little information when deciding about the legality of an administrative act. This greatly reduces the cost for citizens filing a case against the government.

E. Changing views on eminent domain power

The coercive taking of private property – mainly of land and mostly of agricultural land – is a legal instrument in all countries. Takings cut into private property, conceptually an absolute right which protects the owner against anyone else including the state. In most countries, property is also a fundamental human right[28] and not a privilege to be given and taken by a ruler, even though the term "eminent domain " (from medieval Latin "dominium eminens" meaning "supreme lordship") in common law countries points to tribal and feudal origins of property rights for land and the prerogative of a duke or king.[29] The economic rationale for takings evolves from hold-up positions, which arise if the government or a private investor requires a large and contiguous piece of land for a project like a railway or a production site, land which is currently owned by many individual parties. In such a situation, a voluntary sale of each lot is often not possible or unreasonably difficult. Therefore, constitutions allow takings for the public welfare or public purposes if fair compensation is paid. In many developing countries, taking may occur without due procedure, with ample discretion for the bureaucracy, by outsourcing the taking decisions to private firms, without temporary relief, without constitutional review and in return for compensation far below a damage award in civil law cases. This is not to mention the cases of outright land grabbing, where individuals whose legal entitlements are ill defined are displaced without any compensation at all – a problem which is beyond the scope of this paper.

An important economic reason for taking laws and practices that gave ample discretion to developing country administrations was the influential theory of state-led economic

[28] Property is a human right in all 47member countries of the Council of Europe. India is a counterexample: Private property is not included in the list of fundamental rights stipulated in Part 3 of the Indian constitution.

[29] No such origin in tribal land law can be found in classical Roman law, which became formative for civil law countries. In republican and imperial Rome, the taking of land was an "ultima ratio" used only after intensive efforts to buy the land. At the zenith of his power, Emperor Augustus shied away from takings for public buildings in Rome. Herber (2015), p. 5.

development, which dominated development economics from the 1950s to the 1980s. From the 1940s onwards, many newly independent African and Asian countries, as well as several Latin American countries, implemented various types of socialism and planning. It was in this political environment that development economics emerged as an academic discipline. In the 1940s and 50s, many of its most prominent scholars taught that developing countries needed state leadership of the economy.[30] These theories maintained that a market economy might be good for rich countries but that in poor countries, free markets would create so many deviations from the workable market model that the state should lead the economy. Development theory diagnosed a whole Olympus of market failures in poor countries, ranging from increasing returns to scale and natural monopoly via unbalanced growth to the necessity of a state-led big push. Moreover, such market failures were also attributed to linkages that is positive spill overs between firms not internalized by prices as well as dualistic economies with wages differing from the opportunity costs of labour. These considerations fuelled the demand for a strong government hand to plan the economy. In a planned or mixed economy, the legal protection of private property is inevitably weaker than in a market economy. The state must have planning capacity and the taking of private property by the state must be relatively easy to promote economic development. This view contributed to "property" being removed as a fundamental right from the Indian constitution in 1978.[31]

Development economics was also influential before the rise of public choice economics and institutional economics, both of which look at state action with a critical eye and analyse state failure in the same vein as they analyse market failure. It was a widespread view that government is an agent for salutary change, not motivated by profits or self-interested, and that agencies and offices need ample discretion to handle selfish landowners. While development economics is now no longer the dominant paradigm pertaining to developing countries, the legal structures supporting a planned or mixed economy are still in place in many developing countries.

However, the last three decades have seen a dramatic shift in public opinion. The focus of attention is no longer the "selfish property owner" but rather the individual displaced by the

[30] The economist and Nobel laureate Gunnar Myrdal captured the spirit of development economics in the 1950s as follows: "The most important change in state policies in underdeveloped countries is the common understanding that they should each and all have a national economic development policy… Indeed it is also universally urged that each of them should have an overall, integrated national plan. All underdeveloped countries are now attempting to provide themselves with such a plan, except a few that have not yet been reached by the Great Awakening." G. Myrdal (1957) "Economic Theory and Underdeveloped Countries". London: Duckworth.

[31] N. Wahi (2016) "The Fundamental Right to Property in the Indian Constitution", in: The Oxford Handbook of the Indian Constitution, ed. by S. Choudhry, M. Khosla and P.B. Mehta, Oxford University Press.

grasping hand of the state. [32]Cernea (2000) has estimated the number of people who lost their homes by the use of eminent domain power in the 1990s at 90 to 100 million. In some countries, large infrastructure projects such as dams, ports and airports have displaced almost 1 per cent of the population, especially in China and Africa.[33] It is estimated that in the four decades after the country's independence, 20 million people were displaced in India (Cernea 2000).[34] Yet the shift associated with the sustainable development paradigm from state-led growth to a decentralized market economy entails pressure to change the laws of eminent domain in favour of stronger private property protection and stronger requirements for the legality of takings in the public interest.

F. The case for rule-based taking laws in developing countries

I. Easier and cheaper access to courts

Since taking cuts deeply into a personal and fundamental right, the legal basis for the administration to expropriate land should be as precise as possible without questioning the rationale for takings. This reduces the administration's leeway and scope for arbitrary decisions. It also renders the decisions of administrative courts simpler, less information-intensive and thus cheaper, reducing the obstacles to act against the state. While these two rationales for precise taking norms apply in all countries, the argument carries even more weight in poor countries. The affected parties are often small farmers with little income. As argued before, the choice between rules and standards influences – in opposite directions – the costs of norm adjudication, which are borne largely by private parties, and the costs of norm specification, which fall on the taxpayer. Taking law in the shape of rules rather than standards gives greater incentives to poor people to fight against wilful government decisions as the legal fees will be relatively low. This argument is further enhanced if we consider the so-called and much discussed "urban bias" of development politics. In developing countries, the rural population is large and therefore difficult to organize, much like consumer interests. Urban interests are better organized and represented in the political system. Publicly administrated wealth transfers from the traditional sector to the modern sector and from the rural to the urban population are therefore a pervasive feature of political systems in many

[32] I. Somin, The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain, Enlarged Edition, University of Chicago Press 2016

[33] A. Azuela and C. Herrera (2007) "Taking Land Around the World: International Trends in the Expropriation for Urban and Infrastructure Projects" Lincoln Institute of Land Policy, Working Paper, p. 2.

[34] M.M. Cernea (2000) op. cit., p. 2

developing countries.[35] Farmers are particularly vulnerable in this public choice constellation and require protection against systematic government discrimination.

II. More cases of taking

We saw above that the economic rationale for rules rather than standards increases with the number of cases. Statistics on takings are almost non-existent because takings are decided locally, and the statistics are not aggregated to the national level.[36] Yet we may be certain that developing countries feature a much greater number of expropriation cases than rich countries, for two reasons: Firstly, population growth in rich countries is much slower on average, which means there is less needing to adapt the infrastructure – railways, ports, airports, utilities, universities etc. Secondly, many low and middle-income countries, notably China and India, have faster per capita income growth, which also leads to more taking decisions for public and private projects. With more instances of taking in developing countries, the fixed costs of norm specification are spread over more cases, so – other things being equal – rule-based taking laws are to be preferred.

III. Precise rules reduce incompetent and corrupt taking decisions

The advantages of strict rules discussed above apply to many developing countries. Taking decisions based on vague norms like "economic development" require expert knowledge of cost-benefit-analysis or other economic expertise about weighing interests, which judges in developing countries often lack. It is more cost efficient to concentrate this scarce expertise in the design of precise but still reasonably efficient rules than to try to enable all administrative courts to take good decisions based on vague standards. Also, administrative courts are often not fully independent of state influence. While telephone justice as in totalitarian countries, where public officials instruct judges, is in fact rare, we do see more subtle types of influence in many countries. Law enforcement may be in the hands of local governments rather than courts, leading to delayed enforcement if the government does not agree with the court

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[35] D.J. Bezemer and D. Headey (2008) "Agriculture, Development and Urban Bias" World Development 36(8): 1342-1364; M. Lipton (1977) "Why poor people stay poor: urban bias in world development" Cambridge: Harvard UP; H.B. Schäfer (1982) "Landwirtschaftliche Akkumulationslasten und industrielle Entwicklung", Springer. The urban bias against agriculture, which was first criticized by the French physiocrat François Quesnay, has persisted since the times of mercantilism in predominantly agricultural countries. Paradigmatic examples include communism under Stalin, Peronism in Argentina, the government of Nkrumah in Ghana, and many other African countries, which systematically priviledged urban life through cheap food prices, export taxes on agricultural products and many other discriminating state interventions at the expense of traditional agriculture. Ruthless takings and land grabbing are widespread contemporary examples of the urban bias.

[36] A. Azuela and C. Herrera (2007), op. cit.

decision. Judges may be removed from a case by a political decision, they may only be appointed for a limited term or their pension may be questioned. A local government might deny low-cost housing to a judge. [37]In such an environment, rules have an obvious advantage over standards because judicial non-compliance with rules is easily observable whereas non-compliance with standards is not. A critical press and organizations of the civil society can react to court decisions that violate precise rules. The use of rules can therefore serve to offset the tendency for governments to capture administrative courts.

Similar arguments in favour of precise norms apply when judges are corrupt. Superior officials and inspectors, the public and civil society organisations can observe violations of a rule more easily than a deviation from the loyal interpretation of a standard, so corrupt judges are more easily named, shamed or punished.

IV. Some proposals for clear and precise taking law in developing countries

a. Expropriation only after serious attempts to buy the land

Without involuntary land acquisition, public projects would consequently be biased away from the areas of most dispersed ownership due to hold ups. Taking laws should still require that serious efforts are made to buy the land at market value and that the coercive transfer of ownership remains the state's last resort. Methods that at least partially preserve the voluntary character of the transaction include a bid for the land that becomes effective if a supermajority of the owners accept.[38]

b. Expropriation only for clearly specified purposes

Following the rationale of choosing rules over standards in the taking laws of developing countries, the law should clearly define the public benefit from takings. This recommendation would entail dramatic changes in many countries. For instance, the Chinese state can easily remove land use rights. The public interest is defined neither in the Chinese constitution nor in statutory or case law, which gives the government "virtually unlimited power for taking farmland for any purpose".[39] In some countries like in South Africa, takings are possible for

[37] World Bank, World Development Report 2002, Building Institutions for Markets, Ch. 6, The Judicial System, pp.116.

[38] In India a reform of the Land Acquisition Act in 2013 included a consent clause. Takings for private use require a consent of 80 per cent and for private public partnerships of 70 per cent of landowners.

[39] International Review, Center for International Law, Newsletter, New York Law School, 2012, 14(2), Eminent Domain Laws around the World, Taking Property for the Public Good, pp. 7-19, p. 15; Peter Yuan Cai, In the Shadow of Pandora: China's Expropriation Law, East Asia Forum (Feb. 6, 2010), www.eastasiaforum.so

the purpose of social justice.[40] In the USA, the courts tightly control eminent domain power but accept the widely defined standard of taking for "economic development". The Supreme Court in the much-discussed case "Kelo v. City of New London" held a taking to be constitutional as it was part of a general plan of economic development and raising local tax income. By contrast, the German Constitutional Court demands that the public interest for taking be accurately defined in either federal or state law – a municipal zoning law or any other municipal statute will not suffice in this regard. This norm makes sense from a public choice perspective because it is especially local public choice constellations that tend to drive taking decisions that serve not the public interest but rather the local politicians. The constitutional court has two instruments of control at its disposal. If the rationale of the taking decision cannot be found in either a federal or a state law, the taking is unconstitutional. Any rationale must be clear, specific and exact, and it must describe a severe public interest. Undisputed public interests that justify taking include the construction of power lines, railway tracks, canals, roads, public airports and, with some further specifications, also schools and sports facilities. The creation and preservation of jobs is disputed; its constitutionality as a rationale for taking would largely depend on the scale of the expected benefits. Higher tax income cannot not justify takings from a constitutional point of view,[41] which makes sense since higher tax income per se is not in the public interest.

Sometimes it is difficult if not impossible to formulate the rationale of certain takings in an abstract and yet precise way. German constitutional law then requires that the rationale be provided by a specific law and thus ensures that the taking decision is not based on a mere bureaucratic act but on a majority decision by a democratically elected parliament. An example is a taking law in favour of Airbus Industries in Hamburg, which sought to extend the factory runway to accommodate the future A380 model passenger jet. At the time, there was no legal basis for a taking for a privately rather than publicly used airport. The Hamburg state parliament then passed a specific law for the taking of land for the benefit of the Airbus Corporation, describing in detail the expected positive effects on the economy of the city state. The courts subsequently accepted the taking decision on the basis of this law.[42]

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40 International Review, ibid. p.16.

41 Taking for fiscal reasons is unlawful in Germany. W. Leisner (2010), "Eigentum, Handbuch des Staatsrechts", Vol. 8, 386.

42 Taking Law for the expansion of the factory airport in Hamburg-Finkenwerder (Werkflugplatz-Enteignungsgesetz) of February 18, 2004

Reforms of taking law in developing countries may well benefit from the example of the constitutional requirements to define with precision and clarity any rationale for taking in sub-constitutional statutory laws in Germany. It is worth noting that the constitutional protection of property against taking appears to be stronger in Germany than in the USA. According to its constitution, Germany is a "democratic and social federal state" (Sec. 20, 1 GG), whereas the word "social" does not enjoy that status in the USA. It is therefore noteworthy that taking decisions must be based on precise legal rationales given in statutory laws. This would exclude "economic development", which legitimizes a taking in the USA. It would also exclude "increasing tax income" because this is not per se in the public interest. Property protection against eminent domain power seems to be more libertarian in Germany than in the USA.

c. Transparent and fixed formula compensation

A large literature shows that compensation for land takings in developing countries often falls short of the fair market value of the land and rarely covers other damages such as the non-financial harm of losing one's home.[43] The formulas for compensation are often not clear, mentioning fair compensation, just compensation or adequate compensation in different legal texts.[44] The term "fair market value", which is related to the Hull formula in international law, is a muddy standard, leaving open whether it denotes the market price, the discounted future income stream or the book value. It also leaves open the time of valuation, especially before versus after the announcement of the taking. In developing countries, the observed market price is often lower than the actual market price as side payments to save taxes are common.

Some developing countries have introduced flat rate compensation without proof of damage in parts of tort law. Given the specific problems with the law in many low and middle-income countries, this seems a step in the right direction. In India, Art. 140 of the Motor Vehicles Act of 1998 grants flat rates in case of death and permanent disablement. The Act also includes fixed formulas for funeral expenses, loss of consortium, medical expenses, pain and suffering and loss of income. This was explicitly introduced to avoid drawn-out litigation and delay in

[43] Y.-C. Chang (2013) "Private Property and Takings Compensation, Theoretical Framework and Empirical Analysis", Edward Elgar; A. Azuela and C. Herrera (2007), op. cit.; International Review, ibid., p. 15; Peter Yuan Cai, op. cit.; R. Singh (2012) "Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward" Economic and Political Weekly 47(19): 46-53.

[44] H.B. Schäfer (2017) "Taking Law from an Economic Perspective with Reference to German Law" in I. Kim, H. Lee, & I. Somin (eds.), Eminent Domain: A Comparative Perspective (pp. 8-37). Cambridge: Cambridge University Press; N. Birch (2010) "Comparative Compensation" in W. Schill, International Investment Law and Comparative Public Law, Oxford Scholarship Online, 2-31.

payment for victims and their heirs who are in need for quick relief. Fixed formula compensation is also granted for instance in Brazil, where a set solatium for grief is paid.

In taking law, too, precise formulas for damage compensation can offset poor judicial expertise and make the procedure less information-intensive and costly. For instance, the non-pecuniary damage of a displaced homeowner could be fixed by a formula that takes into account wage rates and the number of years the person has lived in the neighbourhood, similarly to golden handshakes for dismissed employees. Fixed formulas could also be used to evaluate the land. Notwithstanding their unreliability, they would allow speedy decisions and could do no harm if courts used them as a default rule, leaving the affected party free to accept them or insist on a lengthy and information-intensive decision procedure to determine the damage award.

d. Specific taking rules for private and profit-oriented investors

The hold-up problem necessitates takings even in favour of private and profit-oriented firms. This applies especially in and around the rapidly growing cities and megacities in developing countries. Yet the specific features of such takings for private beneficiaries call for specific legal norms.

- A private entity that benefits from an act of taking is fundamentally free to utilize the property received in any way it pleases – which is not the case if the 'taker' is a public body bound by administrative law and by the stated purpose of the taking in the public interest. Therefore, expropriation laws which enable an involuntary transfer of property to a private investor should include safeguards that the specific public purpose that justifies the taking is indeed met.

- For the taking to be lawful, the state should be obliged to show (and convince a court) that the private investor can be trusted to use the land in pursuance of the specified purpose. The required commitment could be achieved by a contract between the investor and the state with penalties to be imposed if the investor fails to use the land in the specified manner. Such rules would probably have prevented the much debated Kelo taking in the USA, where homeowners were evicted but the development company subsequently lacked the financial resources for the planned investment.[45] The author has visited sites in India which the

[45] I. Somin (2016) "The Grasping Hand, Kelo vs. the City of New London" Chicago University Press; I. Somin (2007) "Controlling the Grasping Hand: Economic Development Takings after Kelo" Supreme Court Economic Review 15(1): 183.

government took for the benefit of private investors but which then lay idle for years. A few simple rules of eminent domain law would suffice to avoid such wasteful outcomes.

- Also, as I have argued in a paper with Ram Singh, there are strong economic arguments that compensation for takings in favour of private profit-oriented investors should exceed the usual "fair market value" of the real estate. The fair market value covers neither the non-financial damages, nor the damages from interference with any ongoing or future contractual arrangements pertaining to the property, nor any number of other damages. Only full damage compensation will prevent economically inefficient takings, i.e. ensure that the new owner values the land more highly than the old owner.[46] Only then will the new owner be interested in the investment, as Calabresi and Melamed have shown in their well-known proposition. This beneficial effect of full compensation is neither guaranteed nor probable if the new owner is not a private investor but the state. The state pursues its own interest, much like any actor. Yet the state maximises not wealth but other metrics, for instance votes. Consequently, the level of compensation cannot incentivize the state in the same way as a private investor. For a simple bright line rule, one might envision that the compensation payable by a private acquirer must exceed that to be paid in case of public use by a certain factor greater than one.

e. A brief note on the proportionality principle and substitutes

Whenever the state infringes a personal or a fundamental human right, the questions arise as to what the limits of state power should be, when its exercise is legitimate and which role courts should play to check it. The gold standard of a legal principle enabling courts to check state power is the so-called proportionality principle. Originally invented by German administrative courts to check police power and further developed by the German Constitutional Court, the principle made an international career. Among other countries, the Supreme Courts of Canada, Israel and South Africa and all constitutional courts in Europe rely on it, while the USA do not. The principle is also routinely applied by the European Court of Justice, The European Court of Human Rights and the appellate body of the World Trade Organization.[47] If a state acts in pursuit of a legitimate policy target for which land taking is necessary, for instance building a slip road to the highway, and if all the legal

[46] For an analytical exposition, see H.B. Schäfer and R. Singh (2017) "Takings of Land by Self-interested Governments, Economic Analysis of Eminent Domain Law" forthcoming in the Journal of Law and Economics. See also H.B. Schäfer (2017) "Taking Law from an Economic Perspective with Reference to German Law" in I. Kim, H. Lee, & I. Somin (eds.), Eminent Domain: A Comparative Perspective (pp. 8-37). Cambridge: Cambridge University Press.

[47] B. Schlink (2012) "Proportionality in Constitutional Law: Why Everywhere But Here?" Duke Journal of Comparative & International Law 22: 291.

requirements discussed so far are met, the proportionality principle can still enable a court to declare the decision illegal and void. The principle comprises 3 tests.[48]

First, if the administrative act which infringes a right has no positive effect whatsoever on the statutory policy target it is unlawful. Taking land for expanding a grocery store in a subway station into a large shopping mall would be illegal if the legal rationale of grocery stores in public stations is to give travellers easy access to provisions and thus to improve public transportation services because the transformation into the shopping mall does not contribute anything to the policy target. A second test is the necessity test. A taking of land for a university campus would be illegal if the campus can be erected at less interference with personal rights, e.g. if the government already owns enough land nearby or if the campus could be built on half as much land. A third test is a cost-benefit-test. A taking decision for constructing a slip road can be unlawful even if it contributes to the policy target of improving public transportation and even if it constitutes the mildest possible intervention and is therefore necessary to realize the project. Still according to this test a second slip road in a small city with trivial benefits for car drivers might not justify large infringements to many landowners.

The proportionality principle has proved to be a powerful legal tool to check the ruthless exercise of government power worldwide. Yet it has a major shortcoming in the context of our discussion: It is almost a textbook example of a legal standard, rather than a legal rule. Its application requires extensive information often through expert opinions in the court room and subtle understanding and expertise on the part of the judges, who must be independent, loyal and knowledgeable. Like a luxury car that will not run well on poor roads, applying the proportionality principle if the conditions are not right may lead to unwanted effects. Therefore, we hesitate to propose the application of the principle in its present form to developing countries across the board. However, the rationale of the principle can certainly be exploited for takings decisions in developing countries. Expert commissions could establish how much land is necessary to realize a school, college or university and how the compensation has to be fixed. Such expertise could be made binding for takings decisions. Travelling in developing countries, one cannot help noticing oversized campuses populated by all kinds of private shops, residential houses and even private hotels. The proportionality

[48] BeckOK Grundgesetz/Axer GG Art. 14 Rn. 107-116, beck-online.

test would have avoided such outcome. Yet other, more rule-based methods of achieving proportionality may also be available.