

Understanding the Law of Takings: Considerable Points for Exercising and Resolving Disputes

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Abstract

The purpose of this article is to give an overview of the law of takings, also known as ‘eminent domain law’ or ‘expropriation law,’ and noteworthy related points when exercising and resolving disputes. The law of takings is a special field that is encompassed by both public law and private law, and can be considered to be a boundary between public law and private law. In a general view, public law governs the authorization and process of taking over private property, while private law demands a balance of valid reasons, public interest/use requirements, and justified compensation for the loss and damage of the property incurred by such a taking. Therefore, when there is a taking dispute, these laws and their interrelations and components become fundamental subjects for discussion, consideration, and decision-making.

I. Introduction

The law of takings is special in the field of legal studies. Its specialty rests on two interlinked fields, namely public law and private law, or we can say that the law of takings is a boundary between public law and private law. Public law consists of constitutional law and administrative law, while private law consists of property law and economic interest.

In the law of takings, public law and private law serve different purposes. Constitutional law is the baseline norm for authorizing the taking power, and administrative law provides the due process of taking – decision and action. While property law governs substantial objects of taking – land, house, construction, ownership, and its economic interest which refers to property interest and the right to property development. When exercising the taking power, the objects of property law and its economic interest will be affected. The loss of property and damage to its economic right will occur. Therefore, private law demands the balance of compensation over the loss and damage incurred by such a taking.

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When there is a dispute over taking, all features and relevant elements of these laws are raised for discussion, consideration, and decision-making. This article will illustrate the features of the law of takings and intertwined relations and components that should be put forward for discussion, consideration, and decision-making when exercising a taking power and resolving disputes.

When thinking of taking power, there are three fundamental laws interweaved for consideration such as property law, due process of law, and expropriation law itself. The features and elements of these laws are carefully considered when deciding a taking dispute. The following article will demonstrate the features and relevant relations and components of property law, expropriation law, and due process of law for consideration when exercising or resolving a taking dispute.

1. Property Law

As mentioned above, the law on takings affects property law, especially the right to ownership and its economic interest. It will cut off the right to ownership and the economic interest of property. Owners will no longer own and develop their property for economic interest; those are taken away from property owners. However, they are paid back with just compensation caused by such a taking.

Just compensation is a justified cause to owners whose property is taken away. Just compensation is the market value of taken property at the time of taking (Brown and Williams, 2010). However, not all property owners, in practice, receive just compensation or the market value of the lost or affected property. This can vary depending on land tenure – ownership over immovable property.

Unclear ownership over land can lead to underestimated just compensation when exercising a taking. This happens a lot in developing countries where a majority of land tenure remain unregistered. However, understanding the concepts and criteria of land ownership, either registered or unregistered, is critical for protecting oneself against the underestimation of compensation and arbitrary taking. This section will cover the legal means of ownership acquisition in contemporary practice.

a. Means of Ownership Acquisition In property law, ownership acquisition of an immovable property is essential to receive various rights related to that property and be protected by law. Immovable property refers to the land, construction, and other improvements affixed to that land and construction. In property theory, there are three main means to legally acquire ownership over an immovable property: (1) possession, (2) adverse possession, and (3) legal acquisition (Powell, 2006).

Possession is a primary principle to acquire ownership of an immovable property. This principle is applied to land where is not registered yet, which is regarded as the first possession. This concept dates back to the seventeenth and eighteenth centuries during the era of the Enlightenment, when John Locke raised this conception for discussion (Posner, 2000; Mossoff, 2003; Fraley, 2011). According to Locke's concept, a possessor could acquire ownership over an immovable property by occupation and labor (Christman, 1986). In this context, if a man occupied an immovable property and worked on it, he would become the owner of that occupied property within a fixed period of time determined by law. In this sense, occupation and labor on an immovable property led a man to ownership acquisition of such an occupied immovable property (Mossoff, 2009).

In contrast to the principle of possession, ownership acquisition of an immovable property can be made by the principle of adverse possession. Adverse possession has a similar means as possession; namely, the occupation over an immovable property (Clapacs, 1994). However, adverse possession is applied to registered immovable property and benefits the latter possessors against the registered property owner (Hogg, 1915; Clarke, 2005; Williams, 2009). Under a typical rule of adverse possession, if a landless man occupies a registered property in good faith within a fixed period of time by law, he would acquire ownership over such an occupied immovable property when the prescribed period was completed (Williams, 2009; Davis, 2011; Cherek, 2012).

Besides these principles, ownership acquisition over an immovable property is made by legal acquisition. Legal acquisition refers to the legal means of immovable transaction from one owner to another by purchase, gift, will, or exchange of property (Nozick, 1974; Posner, 2000; Reed, 2004). For instance, if one wants to acquire ownership of an occupied land, one must negotiate and buy it from the previous land occupant via a purchase agreement and register this land. Then, one will become the legal owner of that purchased land.

Today, among the three ownership acquisitive means, ownership acquisition by possession and adverse possession remains relatively less in developed countries where the land is registered, if comparing to the developing countries where the majority of the land is not yet registered. Most developing countries have largely applied ownership acquisition through land possession and adverse possession within a fixed period. Cambodia, for example, has largely applied ownership acquisition through land possession within a fixed period of five years under the 2001 Land Law (Article 30). The 2001 Land Law does not authorize adverse possession over registered land (Article 35). However, this principle is authorized under the new Civil Code of 2007, which authorizes the adverse possession over registered immovable property to be made within ten or twenty years based on the integrity of land possessors (Civil Code of Cambodia, 2007, Article 162).

In sum, if one follows any pattern of ownership acquisition as mentioned above, he or she will become the legal possessor or owner of that property. Their possession or ownership will be protected by law against arbitrary taking, and he or she has a bundle of rights over that property. The next section will illustrate the bundle of property rights when one acquires ownership over an immovable property.

b. Bundle of Property Rights When one becomes a possessor or owner of an immovable property, he or she is equipped with a bundle of property rights (Veseth, 1982; Lametti, 2003; Meyer, 2009; Baron, 2013). The bundle of rights refers to various rights related to immovable property. The bundle of property rights can be divided into two forms: (1) the right to own property and (2) the right to use the property for economic development.

First, the right to own property is a principal right when one becomes a possessor or owner of an immovable property. In property theory, one has an exclusive right to that property when he or she owns it. These rights include the right to management and disposal of his or her property at will (Gould, 1980; Clark, 1982; Christman, 1986; Penner, 1996). He or she can develop or improve his or her property and transfer it to others. Second, the right to use property for economic development is secondary right after the right to own it. Normally, an owner can use his or her property for an economic gain such as a lease or mortgage (Sax, 1971.) Besides these, he or she can sell the whole property for monetary exchange for livelihoods (Kirk, 1988; Frank, 1993; Cole and Grossman, 2002). These are economic rights stemming from property rights.

All those rights are also stipulated under Cambodian property laws. However, the protection of those rights depends on the actual status of land tenure. Land tenure is divided into two

forms – possession and ownership under Cambodian law. Possession refers to an occupation of land less than five years with or without possession certificate, while ownership refers to an occupation of land more than five years with or without ownership title.¹ In practice, the status of ownership is stronger protection than that of possession, especially in the exercise of expropriation law, and owners are entitled to more compensation than possessors (Hem, 2015).

Despite the different status and protection of land tenure under Cambodian property laws, there is a remarkable common point between both. Possessors and owners have equal rights to use their property for economic interest and development. Under the Cambodian property laws, both possessors and owners can transact their immovable property freely (2001 Land Law, Article 39).

In short, property law authorizes a possessor to occupy an immovable property within a statute of limitation and if he or she satisfies the legal requirements, he or she can acquire ownership over such a possessed land. Possessors or owners of a land have a bundle of rights related to their properties which is protected by law. They can use their properties and related rights for economic interest and development.

II. The Law of Takings

In property law, a property owner presumptively has an exclusive right over his or her property. However, the use of his or her property must be complied with law. Furthermore, his or her property can be taken for social development under the law of takings if public interest is required. As a result, the concept of the exclusive right no longer exists for property owners. This section will demonstrate the features of the law of takings.

1. Background on the Law of Takings

Exercise of property taking has a long history (Bauer, 2003; Sturtevant, 2006; Jackson, 2010). Historically, the power to take property was in the hand of the sovereign (Ely, 1992; Bauer, 2003; Sandefur, 2006). The sovereign long enjoyed this privilege in appropriating property from people for its own use without the consent of property owners (Jackson, 2010 and Bauer, 2003).

However, such an exercise attracted academic attention through the work of Hugo Grotius, the Dutch jurist, in 1625 (Tresolini, 1954; Mossoff, 2003; Boyce, 2007). Grotius wrote a treatise,

¹ See: Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 2002; Circular on Procedural Implementation of Sporadic Land Registration, 2004; 2001 Land Law, art. 30.

De Jure Belli et Pacis, in which he named the exercise of property taking by the sovereign as the power of eminent domain, (*dominium eminens*) (Cormack, 1931; Tresolini, 1954; Boyce, 2007; Jackson, 2010; Hockett, 2012; Salvas, 2012). According to Grotius, the exercise of eminent domain was only for public benefit while an affected property owner was entitled to compensation (Lenhoff, 1942; Tresolini, 1954; Harrington, 2002; Goho, 2008; Manfredo, 2008).

Since the inception of eminent domain power, this concept has been widespread to various nation-states. Most nation-states have adopted this concept into their legislations, mostly with the constitutional backing (for example, the US, Japanese, or Cambodian constitutions). Various terms are coined to refer to the power of eminent domain. Most popular terms are used in most jurisdictions such as expropriation, appropriation, compulsory purchase, compulsory acquisition, or condemnation, while the simple one is taking (Knetsch and Borcharding, 1979).

For instance, Cambodia also adopted the power of eminent domain in its post-war Constitution in 1993 (hereinafter called the 1993 Constitution). Article 44 of the 1993 Constitution provides '[t]he expropriation of ownership from any individual shall be exercised only if the public interest is required as prescribed by law and pay fair and just compensation in advance' (Cambodian Constitution, Article 44). This clause is fundamentally enshrined in the 1993 Constitution and authorizes to take private properties for public use, while affected property owners are entitled to just compensation accordingly.

2. Restriction of the Law of Takings

Although a variety of terms is used for the eminent domain power in various jurisdictions, the concept of eminent domain is relatively uniform. A constitution confers eminent domain power to government to take property for social interest and development. However, the constitution typically constrains government exercise of this power (Merrill, 2000; Turnbull, 2002; Nadler and Diamond, 2008). A constitution typically authorizes a government to be able to take property only if it serves public use, while affected property owners are provided with due process of law and paid with just compensation (Nadler and Diamond, 2008).

These restrictions are to protect the property owner from arbitrary takings and to control rent-seeking by developers and others (Scheiber, 1973; Walston, 2001; Cavazos, 2011). The government, together with an authorized private developer, could invade private property rights arbitrarily if there are no such restrictions (Kelly, 2006). Therefore, the constitutional taking

clauses are seen to protect private property rights from arbitrary takings rather than allowing government to exercise such a power (Fawcett, 1986; Hart, 1999; Block, 2001).

Likewise, the Cambodian 1993 Constitution follows this pattern and imposes restrictions on exercising the taking power. The 1993 Constitution authorizes the taking of private property only if it serves public use and follows procedures stated by law, while property owners must be paid fair and just compensation in advance.²

In short, the law of takings authorizes the taking power. The exercise of taking power is allowed and justified when public interest or public use is required, and property owners are paid with just compensation for the loss and damage to their property and its economic rights. Under the theory of the law of takings, if the public interest or public use is not required, the exercise of taking power is not authorized.

III. Due Process in the Law of Takings

Apart from the constraints of public use and just compensation requirements, the constitution obliges the government to respect the due process of law for affected property owners (Haley, 1979). The constitutional due process clause provides that no taking of private rights is made without prior notice and a hearing for affected citizens (Emerson and Wise, 1997; Hudson, 2010).

The constitutional due process clause has minimal requirements that limit the government's law, regulations, decisions, or actions, and they must not be unnecessary, unreasonable, capricious, or arbitrary, which lead to the taking of private rights (Stoebuck, 1980; Cunningham, 1981; Easterbrook, 1982; Kelso, 1984). These requirements are the foundations for the judiciary to review the governmental decision or action that does not comply with constitutional clauses of due process, just compensation, and public use requirement (Haley, 1979; Mandelker, 2000; Byrne, 2007).

Due process of the law of takings undergoes two administrative stages. The first stage is the procedure before dispute occurs, which is referred to in this article as the pre-dispute mechanism. The second stage is the procedure for maintaining due process and fair treatment between parties when disputes occur, which is called the post-dispute mechanism.

² In this sense, the 1993 Constitution requires to have a separate procedural law governing land expropriation. See: Constitution of Kingdom of Cambodia, Article 44.

The due process of the law of takings, by its nature, requires the government to guarantee and provide both administrative stages to affected property owners prior to the forced exercise of expropriation and relocation. The following section will demonstrate a number of procedural aspects and protections in each administrative stage.

1. Pre-Dispute Mechanisms

The first due process of expropriation law is a pre-dispute mechanism. A pre-dispute mechanism is a procedure to prevent disputes from happening and appearing in later redress forum. The pre-dispute stage refers to the implementing stage of expropriating authority or a delegated developer. In this sense, the expropriating authority or delegated developer is the responsible body for maintaining due process with the affected citizens in the pre-dispute stage.

Land taking results in relocation and the loss of property rights, leading to dissatisfaction and frequently, to protests. The law of takings requires the expropriating authority or delegated developer to provide some safeguard aspects to affected property owners that expropriators must follow to avert disputes (Hudson, 2010).

Pre-dispute safeguards in most jurisdictions are roughly as follows: First, the government must announce and notify about the necessity and development project, which causes the taking of private property, to affected landowners in advance (Emerson and Wise, 1997). Second, the expropriating authority or delegated developer must conduct a social and environmental impact assessment of development project and affected citizens (Westbrook, 1999). Third, the expropriating authority or delegated developer must appraise the value of affected property on market price base (Turnbull, 2002; Powell, 2006; Epstein, 2012). Fourth, the expropriating authority or delegated developer must negotiate the appraised price with affected landowners on market value between willing buyer and seller without duress (Chang, 2010).

Such a procedural mechanism is to prevent disputes and treat parties equally under the pre-dispute stage. However, if there is a protest against expropriation, violation of due process, or disagreement on compensation, the dispute will appear in the redress forum. This will lead to the second stage of due process protection by the redress institution under the framework of expropriation law.

2. Post-Dispute Mechanisms

The post-dispute stage refers to a hearing mechanism, which is guaranteed for affected citizens. The due process at a post-dispute mechanism requires to have a meaningful hearing, which

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consists of the rudimentary requirements such as timely and adequate notice, an opportunity to confrontation and cross-examination, the right to have counsel, and the right to an impartial decision-maker (Friedman, 1981).

Most jurisdictions arrange a hearing for a taking dispute in an administrative or judicial redress mechanism. For instance, America arranges a hearing mechanism in judicial redress, while Japan and Cambodia arrange a hearing in administrative redress first before proceeding with a judicial recourse, as the last resort (Hem, 2015).

A taking dispute comprises two types of disputes. It could be either an administrative dispute or a civil dispute, or both (Hudson, 2010). If affected citizens challenge the constitutionality of taking, violation of due process of law, or administrative decision and action; in this context, court (administrative judges) will have jurisdiction to address the issue. However, if affected landowners disagree on ownership and compensation, a jury or committee of civil, property, or financial experts will resolve this type of dispute.

With respect to land taking, an expropriating authority or delegated developer cannot receive a consensus from affected property owners to give in their properties for a development project. Some property owners will, inevitably, disagree and object to the expropriation project. Therefore, the constitution protects those property owners from the arbitrary taking of their property. In this sense, the constitution requires to have an appropriate hearing for objecting citizens (Mandelker, 2000; Lawrence, 2002). In this regard, a hearing must be made under an independent resolver, who stays far from the conflict of interest. Such a doing is to maintain due process of law for both parties and makes affected citizens able to accept the resolution (Claeys, 2006).

In the Cambodian context, the due process of expropriation law is guaranteed under the Cambodian 1993 Constitution and laws. The 1993 Constitution requires a taking to be made only if it is followed by procedures prescribed by law (Article 44). In addition to the constitutional requirement of due process protection, the 2001 Land Law further provides a strong protection for affected landowners from arbitrary forced eviction and relocation.

Article 35 of the 2001 Land Law prohibits authority from exercising arbitrary forced eviction only if it receives an eviction order from the court (Article 35). In this sense, a forced eviction cannot be made without a judicial hearing and decision in the Cambodian context. Moreover, Article 36 of the same law further protects would-be evictees that if the execution of judicial eviction order causes turbulence, such an execution must be suspended (2001 Land Law). In

this context, Cambodian laws provide safeguard protections to affected citizens from arbitrary taking and eviction.

Apart from the procedural safeguard, the 1993 Constitution confers citizens the constitutional right to challenge against a state or state authority over any breach of law and file a claim for remedy if they suffer from unfair treatment from a state authority or incumbent (Article 39). The 1993 Constitution obliges the government to thoroughly consider and resolve such complaints (Article 38). Above all, the 1993 Constitution empowers only the court to have jurisdiction to decide such a complaint (Article 39). Citizens are equal before the law and receive judicial defense through court recourse (Articles 31 and 38).

In addition to these, a new law on expropriation was adopted and promulgated in 2010 (hereinafter called '2010 Expropriation Law'). The 2010 Expropriation Law provides procedures and mechanisms for expropriation committees, compensation assessment, and grievance redress committee for exercising a taking and resolving dispute. However, none of these have not been established yet (Law on Expropriation). The process of these mechanisms is under a separate sub-decree, which is so far in a draft. In practice, an ad-hoc commission is created for project-to-project base, and there is no uniform practice in Cambodia (Hem, 2015).

In short, the exercise of land taking demands due process in the pre-and-post-dispute stages for affected property owners; otherwise, such an exercise violates the procedural law, and it is subject to judicial review. In the law of takings, the maintenance of due process at pre-dispute stage is crucial for avoiding disputes and backlogs at post-dispute stage.

IV. Conclusion

This article illustrates the considerable features for exercising the law of takings and resolving its disputes. The exercise of taking power must take the property law into consideration and follow the due process of law; otherwise, it is considered an illegitimate exercise of such power. From the perspective of private law, the possessor is authorized to occupy an immovable property within a period of time; he or she can acquire ownership over such an occupied property. A property owner receives a bundle of rights related to property and protection protected by law.

From the perspective of public law, the taking of private ownership is authorized. However, such an exercise can be made only if it is satisfied with the public use requirement, while affected citizens are paid with just compensation for the loss and damage of properties. Above

all, property owners are protected under the due process of law. In this sense, affected property owners are provided with due process at both pre-dispute and post-dispute stages. If taking does not follow this, it will violate the procedural law and fundamental rights of affected property owners protected by law, and it will be subject to court review.

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