# Table of Contents

**Preface** 5

1. **Rethinking Public Interest in Expropriation Law: Introductory Observations** 15
   *Leon Verstappen*
   1.1 The Law, Good Governance, and Expropriation 15
   1.2 The Basic Requirements and Interpretative Challenges 16
   1.2.1 Questions of Scope 17
   1.2.2 Questions of Context 21
   1.3 Public Purpose 23
   1.3.1 Terminology and Interpretation 23
   1.3.2 Public Purpose in the Context of Good Governance 26
   1.3.3 Public Purpose and the Determination of Fair Compensation 29
   1.4 Urgent Need to Reconceptualize Expropriation 34
   1.5 Conclusion 35

2. **Public Interest in Takings Cases in Italy and France: The Constitutional and Human Rights Dimension** 37
   *Sabrina Praduoux*
   2.1 Introduction 37
   2.2 The Right of Property at the Interface between National Legal Traditions and the ECHR 39
   2.3 Putting the Public Interest Requirement into Context: Scope and Meaning of the Protection of Property Rights 41
   2.4 Looking for the Meaning of Public Interest through the Lens of Courts 43
   2.5 Questioning the Public Interest of Takings: Which Standard of Judicial Review? 49
   2.6 Conclusion 55
3  The Poverty of Precedent on Public Purpose/Interest:  
    An Analysis of Pre-Constitutional and Post-Apartheid 
    Jurisprudence in South Africa  
    Hanri Mostert  
    3.1 Introduction  
    3.2 Background  
    3.2.1 Anomalous Relationship between Statute and Constitution  
    3.2.2 Origins of the Binary Formulation  
    3.2.3 Deliberate Vagueness of the Definition  
    3.3 Public Purpose/Public Interest in South African Expropriation Law  
    3.3.1 Precedent under the Expropriation Act and Its Predecessors  
    3.3.1.1 Public Purposes: Different Applications  
    3.3.1.2 Apartheid as a Public Purpose  
    3.3.1.3 The Poverty of Pre-Constitutional Precedent  
    3.3.2 Precedent from the Constitutional Era  
    3.3.2.1 Public Purposes/Public Interest in the Expropriation 
    Context Since 1996  
    3.3.2.2 Public Interest and Social Justice  
    3.3.2.3 The Poverty of Post-Apartheid Precedent  
    3.4 Conclusion: Rethinking Public Interest

4  “Somewhat at Sea”: Public Use and Third-Party Transfer Limits 
    in Two US States  
    John A. Lovett  
    4.1 Introduction  
    4.2 Why State Law Matters  
    4.3 Michigan  
    4.3.1 Thomas M. Cooley and the Origins of Michigan’s Constitutional 
    Limitations on Public Use  
    4.3.2 Poletown: General Motors and Justice James L. Ryan  
    4.3.3 Hathcock: Resurrecting Cooley and Ryan  
    4.3.4 Distinguishing Hathcock and Constitutional Codification  
    4.4 Louisiana  
    4.4.1 The Post-Kelo Constitutional Amendments  
    4.4.2 Failed Test Case and Constitutional Revision  
    4.4.3 Evading Third-Party Transfer Limits – Feudal Tenures to the Rescue  
    4.5 Conclusion

5  Reviewing Expropriations: Looking beyond Constitutional 
    Property Clauses  
    Rachael Walsh  
    5.1 Introduction  
    5.2 The Preference for Means-Ends Scrutiny in Expropriation Law
Table of Contents

5.3 The ‘Public Interest’ in Irish Expropriation Law
   5.3.1 Constitutional Background
   5.3.2 Urban Renewal
5.4 Property Values beyond Articles 40.3.2° and 43
   5.4.1 The Lack of ‘Internal’ Guidance
   5.4.2 The Directive Principles of Social Policy
   5.4.3 Inviolability of the Dwelling
5.5 Conclusions

6 In the Shadow of Zimbabwe: Public Interest, Land Reform, and the Transfer of Property in South Africa
   Heinz Klug
   6.1 Introduction
   6.2 A History of Land and Agrarian Reform
   6.3 The Role of Law
   6.4 Land, Law, and Poverty Reduction
   6.5 Claiming Land and Protecting Property
   6.6 Expropriation and the Issue of ‘Willing-Buyer, Willing-Seller’
      6.6.1 A Southern African Context
      6.6.2 Protection of Property and the Law of Expropriation in Post-Apartheid SA
   6.7 Conclusion: The Expropriation Bills of 2008, 2013, and 2015

7 Reclaiming Property: Changes of Purpose or Non-Realization of Public Purpose after Expropriation
   Jacques Sluysmans & Nikky van Triet
   7.1 Introduction
   7.2 The Netherlands
      7.2.1 General Overview
      7.2.2 Criteria
      7.2.3 Prescription
      7.2.4 Who Has a Right to Restitution/Compensation?
      7.2.5 Compensation Issues
      7.2.6 Conclusion
   7.3 Belgium
      7.3.1 General Overview
      7.3.2 Criteria
      7.3.3 Prescription
      7.3.4 Who Has a Right to Restitution/Compensation?
      7.3.5 Compensation Issues
      7.3.6 Conclusion
9.2 Three Reasons to Examine the Democratic Legitimacy of the Public Purpose
9.3 Democratic Legitimacy
  9.3.1 Legitimacy
  9.3.2 Democracy
  9.3.3 Democratic Legitimacy
9.4 The Dogmatic Structure of the Public Purpose Requirement
9.5 The Basis for Expropriation: An Act of Parliament
  9.5.1 Democratic Legitimacy and the Act of Parliament
  9.5.2 Application to Examples
    9.5.2.1 German Law
    9.5.2.2 South African Law
    9.5.2.3 English Law
9.6 The Expropriation Authority
  9.6.1 Democratic Legitimacy and the Expropriation Authority
  9.6.2 German Law
  9.6.3 South African Law
  9.6.4 English Law
9.7 Democratic Legitimacy and Participation in the Expropriation Procedure
  9.7.1 Transparency
    9.7.1.1 German Law
    9.7.1.2 South African Law
    9.7.1.3 English Law
  9.7.2 Access to the Expropriation Procedure
    9.7.2.1 German Law
    9.7.2.2 South African Law
    9.7.2.3 English Law
  9.7.3 Form of Participation
    9.7.3.1 Participation Mechanisms
    9.7.3.2 German Law
    9.7.3.3 South African Law
    9.7.3.4 English Law
    9.7.3.5 Comparative Remarks
9.8 Democratic Legitimacy and the German Binding Land-Use Plan
9.9 Conclusion

10 The ‘Land Assembly Districts’ Solution to Third-Party Transfers
  Michael Heller & Rick Hills
10.1 Introduction
10.2 The Landscape before LADs
  10.2.1 The Defects of Private Land Assembly
10.2.2 The Defects of Expropriation
  10.2.2.1 Under-Compensation
  10.2.2.2 Unfairness
  10.2.2.3 Efficiency
10.2.3 No Easy Fixes within Existing Law
  10.2.3.1 Payments above FMV
  10.2.3.2 Judicial Review
10.3 An Outline of LADs
  10.3.1 Formation Rules
    10.3.1.1 Who Initiates the LAD?
    10.3.1.2 Who Oversees LAD Formation?
    10.3.1.3 Negotiations to Final Vote
    10.3.1.4 The Vote
  10.3.2 Jurisdictional Rules
    10.3.2.1 Blight v. Uniqueness
    10.3.2.2 Auctioning Off the Neighborhood
    10.3.2.3 Dissenting Owners
10.4 How LADs Protect Property and Democracy Values
10.5 Land Adjustment and LADs
10.6 Conclusion

11 Fundamental Premises of Land Expropriation in Poland
  Magdalena Habdas
11.1 Introduction
11.2 The Constitutional Notion of Expropriation
  11.2.1 Historical Overview
11.2.2 Expropriation in the Current Polish Constitution
  11.2.2.1 The Object of Expropriation
  11.2.2.2 The Scope of Expropriation
  11.2.2.3 The Form of Expropriation
  11.2.2.4 The Object of the Expropriated Right
11.3 The Public Purpose Requirement
11.4 Just Compensation for Expropriation
  11.4.1 The Constitutional Notion of Just Compensation
  11.4.2 Just Compensation in the MRE
11.5 Conclusions

12 Less Invasive Means: The Relationship between Sections 25
  and 36 of the Constitution of the Republic of South Africa, 1996
  B.V. Slade
12.1 Introduction
12.2 Case Law
Table of Contents

12.2.1 Introduction 332
12.2.2 Bartsch Consult v. Mayoral Committee of the Maluti-A-Phofung Municipality 333
12.2.3 Erf 16 Bryntirion (Pty) Ltd. v. Minister of Public Works 334
12.2.4 Evaluation 335
12.3 The Relationship between Sections 25 and 36 of the 1996 Constitution 335
12.3.1 Introduction 335
12.3.2 Applying the FNB Methodology to All Constitutional Property Disputes 336
12.3.3 The Courts’ Evasion of the FNB Methodology in Formal Expropriation Cases 340
12.3.4 Applying the Two-Stage Approach to Bill of Rights Litigation to Section 25(2) Disputes 341
12.3.5 Evaluation 344
12.4 Conclusion 344

13 Expropriatory Compensation, Distributive Justice, and the Rule of Law 349
Hanoch Dagan
13.1 Introduction 349
13.2 Criticizing Prevailing Rationales for Partial Compensation 351
13.3 The Problems with Full Compensation 355
13.4 Partial Compensation and Property Values 359
13.5 Concluding Remarks 365

14 The Public Purpose Requirement in the Calculation of Just and Equitable Compensation 369
Elmien (WJ) du Plessis
14.1 Introduction 369
14.2 Negotiating a Property Clause 371
14.3 The Land Reform Programs 372
14.3.1 The Requirements for a Valid Expropriation in a Reform Context 376
14.3.2 South African Case Law on Section 25(3)(e) 377
14.4 An Alternative Interpretation of Section 25(3)(e) 380
14.4.1 Considering the Individual in a Societal Context: The German Approach 380
14.4.2 The Influence of the Changing Social and Moral Fiber of Society on the Compensation Amount: The Indian Example 382
14.4.3 Economic Reform and Measures to Achieve Greater Social Justice: European Court of Human Rights 384
14.5 Conclusion 386
## 15 When Does State Action Amount to Expropriation?

**Recent Australian Developments**

*Brendan Edgeworth*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.1</td>
<td>Introduction</td>
<td>389</td>
</tr>
<tr>
<td>15.2</td>
<td>The Complexity of Australian Expropriation Law</td>
<td>391</td>
</tr>
<tr>
<td>15.3</td>
<td>Federal Constitutional Property Law in Australia: Section 51(xxxi) of the Commonwealth Constitution</td>
<td>394</td>
</tr>
<tr>
<td>15.4</td>
<td>When Taking of Property Requires No Just Terms Compensation</td>
<td>398</td>
</tr>
<tr>
<td>15.4.1</td>
<td>Criterion 1 – Defining Property – ‘Liberally’, but Conventionally</td>
<td>399</td>
</tr>
<tr>
<td>15.4.2</td>
<td>Criterion 2 – Differentiating Takings, Deprivation, and Expropriation from ‘Acquisition’</td>
<td>403</td>
</tr>
<tr>
<td>15.4.3</td>
<td>Criterion 3 – The Acquisition of the Property in Question</td>
<td>407</td>
</tr>
<tr>
<td>15.5</td>
<td>Conclusion</td>
<td>408</td>
</tr>
</tbody>
</table>