THE USE OF EMINENT DOMAIN IN SÃO PAULO, BOGOTÁ, AND MEXICO CITY*

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Resumen: En este trabajo el autor ofrece un examen sobre las prácticas de dominio eminente (*eminent domain*) en tres de las más importantes ciudades latinoamericanas. Aborda conforme lo anterior, de manera crítica, las relaciones entre las reglas legales usadas respecto del dominio eminente y el contexto institucional en el cual son aplicadas dichas reglas, en una perspectiva bidimensional: la primera, la de las relaciones entre los poderes judicial, legislativo y ejecutivo en lo concerniente al dominio eminente, y la segunda, la distribución de autoridad con relación al dominio eminente a nivel de gobiernos nacionales, provinciales o locales. Por esta vía logra el autor un acertado análisis comparativo, contextualizando dichas prácticas de dominio eminente, con la realidad de cada una de esas metrópolis, permitiendo las inferencias aterrizadas de que carecen estudios similares.

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Abstract: In this work the author offers a rich and deep examination on the practices of "eminent domain" in three of the most important Latin-American cities. He approaches as the previous thing, of a critical way, the relations between the legal rules that concern of "eminent domain" and the institutional context in which the above mentioned rules are applied, in a two-dimensional perspective: the first one, that of the relations between the power judicial, legislative and executive in the relating thing to "eminent domain", and the second one, the distribution of authority with relation to "eminent domain" to level of national, provincial or local governments. For this route the author achieves a guessed right comparative analysis, giving context to the above mentioned practices of "eminent domain", in the reality of each one of this metropolis, allowing the inferences landed that similar studies lack.

Keywords: Eminent domain, property rights, expropriation, corruption, economic development.

Legal rules on eminent domain are at the same time rules on property rights. They may not contain all aspects of a property regime, but they allow us to see property in its most intense relationship with the state. By looking at the rules on eminent domain, we can see the sense in which the limits of property rights are the limits of government's power to impose a public interest at the expense and without the consent of the rights holder. Of course, the limits are not eternal; in recent years, a new round of debates has developed regarding the status of foreign investors' property rights in the context of free trade agreements and other international instruments. In those debates, we can talk about expropriations at the global end: we use a single legal language to discuss them, and we assume we are dealing with a prototypical property owner (the multinational corporation) as well as with an international state system that makes possible the whole story. This chapter is about expropriations "at the other end" –that is, expropriations at a local level that include urban landowners, local authorities, and judges acting within the framework of national legal systems.

We examine the conditions under which eminent domain is used in São Paulo, Bogotá, and Mexico City. Although we deal with the legal systems at the national level, we focus on those cities in particular

not only because they are the largest urban agglomerations in their respective countries (see table 1), but also because there is growing concern about the use of eminent domain in all of them.

Table 1
Comparison of Mexico City, Bogotá, and São Paulo

	Population (municipality)	Area (Km^2)	Population (metropolitan area)	GDP bis (US$ billions)	GDP (as percentage of national
Mexico City	8.720.916	1.480	19.239.910	315	20
Bogotá	6.776. 009	1.732	7.881.156	86	23,1
São Paulo	10.435.546	1.522	19.677.506	225	12,26

Source: INEGI 2005. Bogota: SDP 2007 and http://www.dane.gov.co/files/censo2005. Brasil: http://www.ibge.gov.br/home/estatistica/populacao/estimativa and http://www.ibge.gov.br/home/estatistica/economia/pibmunicipios.

Without denying the force and relevance of global trends, the case studies demonstrate that national as well as local processes have strong conditioning effects in the way eminent domain power is used. There are more differences than commonalities in the way eminent domain is changing in those cases. At the same time, to understand those conditions, it is necessary to look at three elements. The first element is eminent domain as part of a constitutional order, which includes not only the constitutional definition of property rights, but also the relations between branches and levels of government. This is especially relevant in Latin America because of what are generally known as democratic transitions that have taken place in the last decades. In particular, the new role of the judiciary has created new conditions for (and in some cases, serious limits to) expropriations in the urban context. This has taken place in very different ways in the three countries under consideration.

The second element is the actual use of eminent domain for urban purposes. The information is scarce in this respect, making it necessary to limit analysis to the individual metropolitan areas of São

Paulo, Bogotá, and Mexico City. Here, too, the three situations are so different that we can suspect any hypothesis that structural factors have determined the evolution of eminent domain as an institution in Latin American cities.

The third element refers to the legal treatment of eminent domain as expression of a legal culture. Legal doctrines that are invoked by judges, lawyers, and other operators of the legal system say a lot about the way private property and the power to suppress it are defined in a particular social context. In spite of the frequent contention that all three countries embrace the doctrine of the social function of property, such a doctrine is used in many different ways, reflecting the particular features of each historical experience.

I. São Paulo: the precatórios crisis

One of the most salient episodes in São Paulo's recent history is the financial stress on local governments resulting from compensations awarded by judges in eminent domain cases. A precatório is a judicial ruling that orders a government agency to budget necessary funds for fulfilling an obligation –in the case of expropriation, the compensation. Exorbitant compensations combined with high interest rates have put local governments in a critical situation. Many observers believe that this has weakened the power of eminent domain in Brazil.

To understand eminent domain in Brazil, it is important to look at the wider institutional landscape, which includes the 1988 constitution with new provisions to protect property rights and a strong urban planning program, as well as the leading role of municipalities in the use of eminent domain. After more than two decades of authoritarian rule, the Brazilian constitution was the result of a complex negotiation process that begun in 1986 and ended in October 1988. It is one of the Latin American constitutions that characterized transitions to democracy in the region. A whole chapter in the 1988 constitution (section 182) is devoted to *a politica urbana* (*the* urban policy)[1]. It

[1] We avoid the translation of *politica urbana* as "urban policies" (plural) in order to keep the force of the idea of a single (and coherent) set of goals regarding urban problems.

addresses three issues: town planning, property rights in the urban context, and housing rights. An unusual feature is the centrality given to urban issues in the development agenda. The main objective is no less than "the full development of the social functions of the city and the welfare of its inhabitants"[2].

Urban planning in the Brazilian constitution is more than a neutral administrative tool; it is part of the recrafting of state institutions through decentralization, and more precisely as a tool for local democracy (Saule, 2007; Gomes-de-Mendonca, 2001). According to section 182, the passing of a *plano diretor*, the equivalent to a master plan, is an exclusive power of the Municipal Council (the Câmara Municipal). Municipalities have eminent domain powers, which is rare in other federal republics in the region, such as Mexico and Argentina, where eminent domain procedures are in the hands of state-level authorities.

The most ambitious aspect of the urban chapter in the Brazilian constitution refers to the social function of property (Duguit, 1912), a doctrine that can be equated to what is more generally known as the social obligation inherent in property rights (Alexander, 2006). One of its corollaries is that the constitution specifically empowers municipal governments to require owners of undeveloped land in the urban context to promote adequate use of the land. Those who do not comply with urban plans are subject to (1) the compulsory development of their land; (2) progressive property taxes; and (3) expropriation with deferred compensation through deeds with terms of up to 10 years. In other words, the power of eminent domain can be used as a sanction against owners who do not use the land according to urban plans.

The third aspect of the urban chapter refers to housing rights. The focus of the constitution here is on providing security of tenure for dwellers in low-income settlements such as favelas; the uninterrupted possession (the use as a dwelling) of up to 250 square meters of urban land is the basis for the acquisition of rights over that piece of land (Saule, 1999, 2001).

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[2] By contrast, see the recent constitutional debates in Bolivia and Ecuador, where the main concern is the rural (and especially the indigenous) component of society.

The Estatuto da Cidade (Statute of the City), a piece of federal legislation passed in July 2001, contains the most ambitious agenda for urban reform in Latin America. It includes a wide array of legal instruments and brings together ideals of local democracy, collective rights, and strong regulatory powers in the hands of local governments. Nevertheless, when it comes to eminent domain, it only refers to the innovation of the 1988 constitution regarding the possibility of using expropriation as a sanction for leaving urban land unused or underdeveloped. This is striking because the main urban conflict during the previous decade was over ordinary takings: the crisis of the *precatórios*, a crisis that did not get an explicit response in the Estatuto da Cidade.

Turning from constitutional texts and statutes to the way eminent domain powers are exercised in practice, the image is completely different from that of the Estatuto da Cidade. Authors and witnesses agree that a crisis of eminent domain power began in the early 1990s (Haddad, Lopes-dos-Santos, & Franco, 2007). Its origins are debatable, but the results were clear, and they reached the public under the guise of a national scandal. By the mid-1990s most urban municipalities in the state of São Paulo, especially the city of São Paulo itself, faced growing financial stress due to the accumulation of debts from *precatórios*. Most were compensations awarded by judges for eminent domain cases (Maricato, 2000a; Haddad, Lopes-dos-Santos, & Franco, 2007).

Things got much worse because compensations based on questionable methods (Haddad, 2000) were combined with high interest and inflation rates[3]. Compensations reached up to 30 times the market value of the land, as in the case of Serra do Mar in Ubatuba, a green area of 13 hectares expropriated for the creation of a park (Maricato, 2000b). The best indicator of the magnitude of the problem was that these debts came to represent an enormous burden for municipalities. “Often, the value of an inflated indemnification for land expropriation equals the general budget for one or more political mandates [administrations] of a governmental jurisdiction” (Maricato, 2000a, p. 5).

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[3] For a detailed account of the components of compensations, see Lopes-dos-Santos, 2007.

By the end of the decade, it was obvious that expropriations were good business for landowners, and the notion of an "industry of compensations" became common parlance[4]. There are several interpretations of what was happening. For some, it was mainly a financial crisis due to inflationary conditions. For others, it was a question of pure and simple corruption[5]. More nuanced opinions point to the incompetence of judges (particularly their inability to penetrate the "black box" of valuations) as well as the professional weakness of legal teams at public agencies (Haddad, 2000; Lopes-dos-Santos, 2007). An interesting interpretation signals the propensity of judges in a post-authoritarian context to take every opportunity to present themselves as the defenders of citizens against the abuses of government, a kind of judicial activism that seems to be normal during democratic transitions (Ríos-Figueroa & Taylor 2006). All experts agree that this was a crisis for expropriation as an institution.

During the late 1990's, there were at least two attempts to deal with the crisis: a parliamentary commission of inquiry was created in the legislature of the state of São Paulo, and the Ministry for Agrarian Development issued the white paper "Supercompensations: How to Stop That 'Industry'" (Haddad, 2000; Maricato, 2000a). However, apart from the public awareness these initiatives may have simulated, no decision came from them except for a measure, issued by the president of the republic and the National Congress, reducing the annual interest rates for unpaid compensations from 12 percent to 6 percent (Lopes-dos-Santos, 2007, p. 125).

At a more modest level, an academic institution, the Getúlio Vargas Foundation, prepared a survey on valuation methodologies, and, more interestingly, the Center for the Support of Fiscal Judges (*Cajufa*)

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4 The 20 January 1999 issue of the popular weekly magazine *Véja* denounced the practices of unscrupulous "super lawyers" and said that the debt in São Paulo could be close to 30 billion reais (circa US$15 billion) (quoted by Haddad, 2000).

5 According to Julio Bruna, who acted as director of inurbe, an urban development agency of the city of São Paulo during the 1990s, the crisis of the *precatórios* grew out of judicial corruption and the complexities and long duration of legal procedures (personal communication, March, 2008).

drafted guidelines for valuation procedures. These studies seem to have improved the situation in recent years, although on cases that look small compared to the huge figures of the mid-1990's (Lopes-dos-Santos, 2007).

Let us now consider how the legal system has dealt with the crisis of *precatórios*. When we look at legislation regarding eminent domain in the urban context, we see the source of a profound dissatisfaction with urban law (Lopes-dos-Santos, 2007), a feeling that contrasts with the enthusiasm that surrounded the Estatuto da Cidade when it was passed in 2001. There were attempts in both the National Congress and in the São Paulo state legislature to do something about the problem, but the only effective measure was the establishment of a system to compensate private firms' fiscal debts with public debts (Maricato, 2000a, p. 38). The law of takings as such did not change. As indicated earlier, the Estatuto da Cidade regulates the innovation in the 1988 constitution that allows the use of eminent domain as a sanction for landowners' withholding their land against urban plans, but at the same time it is silent about the most pressing problem that urban administrators were facing in the same years: exorbitant compensations in ordinary expropriations.

The poorest record was (if not still is) at the judiciary: everyone seems to agree that extremely high compensations established by judges imposed an enormous social cost, at least in the urban areas of the state of São Paulo. With the available information, it is difficult to assert whether those compensations derived from corrupt practices in the judiciary or from ideological biases toward property rights. A concurring factor could have been the judiciary's desire to assert its autonomy vis-à-vis the executive after a long period of authoritarian governments. However, the courts are far from using the contributions of jurists who are offering to rethink the complex issue of how to compensate the taking of land and property (see, for example, Rabello, 2007).

On its part, the administration, particularly local governments, appears as the victim of the *precatórios*. There does not seem to be a critical account of the way it may have contributed to the crisis[6]. However,

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[6] The limited professional competence of legal teams in local government is the only factor that the literature has pointed out (Lopes-dos-Santos, 2007).

there are reasons to think that a learning process is involved here. Most of the experts who were interviewed believe that, as a result of the experience in the 1990's, administrators are now more careful about preparing necessary budgets for land acquisitions. The crucial question –the arrival of an authentic fair compensation system– will surely depend on capacity building and on healthy interaction between judges and administrators. Even recognizing that "fair" will always be a contested notion, there seems to be a great opportunity to reduce the discretionary margins within which decisions are arrived at. The challenge of Brazilian law in relation to eminent domain is enormous. As Edésio Fernandes has put it, "pointing at legal problems and denouncing unconstitutional practices is easy. The difficult part is that of constructing new arguments which prove solid and consistent, not only from the perspective of socio-political legitimacy, but also from a strictly legal point of view" (2002, p. 11).

II. Bogotá: enlightened judges and prudent administrators

Seen only through the newspapers, Colombia looks like another case of an eminent domain crisis due to exorbitant compensations. The "polo court" case, a conflict that has been widely publicized by the media, could lead to this conclusion. For almost eight years, the local government of Bogotá has maintained a legal battle against a country club that occupies a huge piece of land in a desirable central location in the city, the members of which are allegedly the political and economic elite of the country. The Bogotá government wishes to expropriate a small part of that land for the continuation of a main road as well as some 15 acres, now conspicuously a polo court, for a public park. In February 2008 the mayor announced that, should the court order an unreasonably high compensation, he would abandon the expropriation procedure. Ten of the twelve experts interviewed as part of this research think that doing so would be a serious defeat for the institution of eminent domain.

However, when one gets deeper into the way eminent domain is used as a tool for urban policies in Bogotá, the image is completely different. Certainly experts, especially planners, complain that judges award compensations that are too high in expropriation cases. But they all think that land is being expropriated for a number of urban

projects without anything like the crisis of *precatórios* that São Paulo suffered in the last decade. Projects with high popular support, such as the transport system Transmilenio[7], expand through expropriations that are never successfully challenged by land or property owners. Three factors seem to combine to produce this relatively pacific environment: a legal framework in which there is a basic coherence between the constitution, urban law, and the prevailing legal culture in the country's high courts; healthy finances that allow the local government to afford the acquisition of land; and wide social support behind the public works for which the land is being taken.

As in Brazil (and unlike in most other Latin American countries), innovations in urban law have been part and parcel of a recent constitutional change in Colombia that enjoys wide legitimacy. That is why, in principle, such innovations could be expected to have the same legitimacy as the constitution as a whole. Unlike the Brazilian case, however, there is a more fluid dialogue among the three branches of Colombia's government. Even if they may collide in expropriation cases, they share a minimum common code to deal with conflict. Whereas Brazilian judges have ignored the new legal ideas about the city set forth in the constitution and the Estatuto da Cidade, judges in Colombia take innovations coming from the legislative branch more seriously.

In 1989 the National Congress passed a piece of legislation generally known as the Urban Reform Act (*Ley 9.ª de 1989*). However, the most significant development on the legal status of urban property came with the constitution of 1991, which stands as one of the most significant achievements in contemporary Latin American constitutionalism and probably as the most accomplished balance between the principles of liberal democracy and the commitment to third generation human rights (economic, social, and cultural rights). For the purpose of this chapter, the new Colombian property regime is interesting in three aspects: the definition of property as a social function, the basic conditions for the expropriation of land, and the criteria for determining compensation.

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[7] A bus rapid transit system that has inspired other Latin American cities (Rodríguez & Mojica, 2008).

The definition of property in the Colombian constitution does not rest on the idea that property is a right. The constitutional text makes clear that private property is "guaranteed," but as the same time it states that "property is a social function that implies obligations" (article 58). For Colombian jurisprudence, this is a sea change in the status of private property that breaks with the tradition in which property rights were a major obstacle to progressive urban policies (Maldonado, 2003; Pinilla, 2003). The new constitutional compromise tries to balance the acceptance of private property with the commitment to use wealth to benefit society as a whole.

As to the rules concerning eminent domain, four points are worth stressing. First, the constitution authorizes eminent domain not only for public uses, but also for responding to a "social interest," which means it can be used to satisfy the needs of specific groups in society –the vulnerable sectors of society– and not necessarily the needs of the public as a whole. Second, in spite of the general thrust toward a more interventionist scheme regarding urban property, the 1991 Colombian constitution states, as a general rule, that expropriations require previous compensation as well as a judicial resolution (*sentencia judicial*). Not the administration but the judiciary, in principle, makes the decision to take land.

At the same time, the constitution provides for administrative expropriations: "Legislation may determine cases in which expropriations can be carried out by the administration. They may be challenged before administrative courts, even regarding the compensation"[8]. Although Colombian lawyers seem to agree that this administrative expropriation has an exceptional character, it has been used in Bogotá successfully and in a regular way in recent years.

Third, local governments are empowered to undertake eminent domain procedures. This is important because, up the late 1980s, municipal authorities were not elected, but were appointed by the national government. Thus, decentralization came hand in hand with

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[8] This is not a literal translation. The original in Spanish is "*En los casos que determine el legislador, dicha expropiación podrá adelantarse por vía administrativa, sujeta a posterior acción contencioso administrativa, incluso respecto del precio*".

democratization[9]. Local governments did enjoy eminent domain powers before that, but the fact that they were now elected gave this power a new meaning, the more so because expropriations can now be undertaken by the administration.

However, the most interesting innovation in the 1991 constitution refers to the fourth aspect: the way it deals with the issue of compensation. Obviously, as a constitutional text, it cannot go into the complexities of valuation techniques. But at the same time it does not surrender to the only apparently easy solution of market value. Instead, it gives administrators and judges the difficult task of fixing the compensation, "taking into account the interests of the community as well as those of the affected party" (article 58). It is difficult to find a modern constitution that sets forth in such a direct way the basic tension implied in the task of fixing a compensation for the taking of property.

In 1997 Congress approved new legislation amending the 1989 Urban Reform Act. This new legislation (Act 388 or *Ley 388*) developed the principles regarding urban development in the 1991 constitution and established a variety of instruments to implement urban policies. Act 388 sets forth the procedure for administrative expropriations with the intention of allowing local governments to acquire land in a more expedited fashion. This does not necessarily mean an arbitrary procedure, as the act also provides for legal remedies before an administrative court and a one-month term during which the administration may negotiate the conditions of the purchase with the owner. Another salient element of Act 388 is that, in order to avoid windfall gains for landowners, the compensation is not to include the increment of land values due to the announcement of the project.

The constitutional and legal framework is clear enough regarding both the substantive and the procedural aspects of eminent domain. What happens in practice is much more difficult to assess. In Colombia, as in most countries, it is not possible to find systematic information about the use of eminent domain. What follows is the result of a se-

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[9] For the place of decentralization in the Colombian constitution, see Trujillo-Muñoz, 2007.

ries of interviews with a dozen practitioners and academics who are directly involved in eminent domain practices in Bogotá.

The first finding is that eminent domain is widely used in Bogotá. Civil servants who work with expropriation cases believe that judges tend to award compensations that are too high, but they all agree that, almost without exception (the polo court case being one of them), expropriation procedures are brought to an end successfully. In other words, no public project is canceled because of legal obstacles to the use of eminent domain.

Another important fact is that a very high proportion of expropriation procedures end with voluntary agreements. Some 85 percent of the 2,061 properties procured by IDU (the municipal agency responsible for the Transmilenio project) between 2003 and 2007 had such agreements[10]. To some experts, that means that valuation practices within local government are arriving at high land prices.

To others it means that most people do not know their rights, tend to accept whatever the government has to offer, and miss the opportunity to obtain higher compensation by going to court. This refers particularly to homeowners in low income areas.

These interpretations point in opposite directions regarding the level of compensation a question that should remain open until more systematic empirical research is carried out at local level. No matter what the reason, the fact remains that an extremely high proportion of eminent domain procedures end up in voluntary acquisitions, which means that procurement of land does not seem to be a major obstacle for urban projects, at least in Bogotá. Even if eminent domain power works only as a threat, it appears to be alive and well in that part of Latin America.

Two elements have contributed to making land acquisitions successful in Bogotá –a good financial situation, largely derived from an aggressive property tax policy in the 1990's, combined with the privatization of several public enterprises– which gave local governments resources to undertake ambitious urban projects, such as the

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[10] This information was not available before the survey. It was delivered to us in the context of a right-of-information procedure conducted by CLAUDIA ACOSTA.

Transmilenio, that are part of an effort to "retrieve" the city. That is why the expropriation of land for such projects is widely recognized as legitimate.

Maybe the most important innovation in the last years is the use of administrative expropriation, which was provided for in the 1991 constitution. Since 2003 it has been the main mechanism for procuring land for the Transmilenio. Affected owners who want to challenge administrative takings have the right to go to an administrative court rather than a civil court. It is too soon to evaluate the impact of this new option. An interesting point about the way administrative takings are working in practice has to do with the negotiation period. There is no real bargaining regarding the compensation because administrators are reluctant to modify the established appraisal; they fear being seen as arbitrary or corrupt[11]. So they simply hand the appraisal down to the affected owner and wait during the one-month period to see whether the owner accepts it.

Another interesting feature in the practice of eminent domain in Colombia is the fact that while judges enjoy considerable discretion in the award of compensations, they never question the purpose for which the land is taken. As in Brazil, a *Kelo v. City of New London* problem is most unlikely to arise. Even if there is not an explicit prohibition, judges consistently defer to the administration regarding the substantive justification of an expropriation. (Mexico differs greatly in this respect).

In the context of a generally successful policy of land procurement, the conflict around the polo court remains an exception. As interesting as it may be as a contest between local government and the economic elite of the country, it is far from being an average case. Whether it will have an influence on future cases or legislative processes remains to be seen.

The most relevant aspect of eminent domain in Bogotá has to do with legal culture. Unlike almost every other Latin American legal system, the Colombian system has been able to deal with the different

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[11] Anticorruption laws and policies in Latin America have had unintended consequences, including that civil servants become paralyzed in order to avoid doing "good things that look as bad ones," as the Spanish adage goes (Pérez-Perdomo, 2006).

views on the hard subject of eminent domain. This refers particularly to the way the high courts have dealt with tensions between conflicting interests and their legitimacy (Uprimny, Rodríguez, & García-Villegas, 2003). Through remarkably well-articulated rulings, they have developed strong arguments for the implementation of the social function doctrine of property. This goes beyond the mere statement of grand legal concepts, as can be seen in the establishment of criteria to determine compensations. In a now-famous 1074/02 ruling in 2002, the Constitutional Court established a distinction between three different functions of payment for takings: reparation, restitution, and compensation[12]. This distinction recognizes the situation of homeowners when they are being deprived of the only place they have to live. The idea that they have a right to fuller compensation points at a distinction that legal systems rarely make, the distinction between property as an asset and property as the means for satisfying a basic need such as housing. Interestingly, the ruling does not explicitly mention housing rights, thus apparently ignoring international human rights law. But its content contributes to the promotion of housing rights like no other high court ruling on the continent.

An important empirical question remains to be answered in the Colombian case: are land and property owners affected by too-high compensations for expropriations, as many planners contend? Regardless of the answer, Bogotá's local government has been using eminent domain procedures in a successful way during the last decade, in contrast with the cases of São Paulo and Mexico City. It is difficult to attribute this state of affairs to a single factor, whether a socially committed congress, enlightened high courts, or competent local governments. Perhaps the interaction among them has produced the most salient regime on eminent domain in the region.

III. Mexico: silence before the monument

Eminent domain was a crucial instrument in the formation of the postrevolutionary Mexican state. During the first half of the twenti-

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[12] An explanation of these concepts would exceed the limits of this chapter.

eth century, it was the instrument of agrarian reform and of the nationalization of strategic economic sectors such as the oil industry, processes on which rested much of the legitimacy of the political regime. However, during the last two decades, using eminent domain to procure land for urban projects has become increasingly difficult. As in Brazil, this is related to an unusual judicial activism, but other elements, mainly in the realm of legal culture, produce different results.

Most Mexican jurists proudly declare that the Mexican constitution of 1917, which marked the end of the military phase of the revolution and placed the interests of property owners below the general interests of society, was the first social constitution in history[13]. There were two strong features in the postrevolutionary Mexican model: it was centered on the transformation of property relations in a rural context, and it was carried out in an authoritarian way. Difficulties have arisen in adapting the social function doctrine to the urban agenda, particularly in the context of a post-authoritarian political order.

As a heritage of the postrevolutionary era, article 27 of the constitution grants wide discretionary powers for the expropriation of land to the president of the republic as well as to state governors. First, instead of the explicit requirement of a previous compensation that one finds in other countries, the Mexican constitution authorizes expropriations "by means of" (*mediante*) compensation, which allows for deferred payments. Second, although the affected party has a legal remedy to challenge the taking –the *amparo* suit– if that remedy is not used, no judicial authority has to intervene in the process: property is transferred to the state by a simple decree by the executive. The constitution even restricts judicial intervention to certain cases of changes in value, a prohibition that the judiciary has ignored systematically. Third, the supreme court has, until recently, maintained the principle that the affected party does not have the right to be heard before the taking is fully effective the right to prior hearing that is part of the due process doctrine in Mexican constitutionalism.

Takings at federal level are ruled by the Expropriation Act of 1936. A remarkable legislative silence of more than 70 years is one of the

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[13] It predated the Weimar constitution, which established the principle of a social obligation inherent in property, by two years.

prominent features in the law of eminent domain in Mexico (Díaz-y-Díaz, 1988). Only two legislative processes are worth mentioning[14]. The first is the Human Settlements Act (*Ley General de Asentamientos Humanos*) of 1976, an attempt to bring the ideas of constitutional article 27 to urban development. Agrarian reform had ended, and Mexico had become a predominantly urban society, so this act offered a program for urban reform: social justice in cities plus a system of rational government decisions (a planning system). It provided the institutional framework for using eminent domain as part of urban administration, although it did not have new rules on expropriations; it would have been difficult to increase the eminent domain powers of the executive.

The second legislative initiative on eminent domain was an amendment to the Expropriation Act as part of the negotiation of NAFTA in 1993 to make clear that compensations should amount to market values[15]. This was in line with international trends; it can even be called a condition that Mexico was forced to accept as part of a negotiation with a world superpower. But it is not as relevant as internal developments that have changed the conditions of eminent domain in the last years. Those developments can be classified into three groups: democratic transition, social resistance, and judicial activism.

Democratic transition has one aspect that, almost by definition, puts limits on the abuse of eminent domain: political pluralism. To the extent that government positions and seats in the parliament are in the hands of different political parties, preventing abuses of power is easier. However, two specific traits in the Mexican transition are relevant here. First, decentralization initiatives, widely regarded as forms of democratization, did not modify the old scheme regarding

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[14] This looks at federal legislation only. Camilo Saavedra's research in progress for the Lincoln Institute of Land Policy is finding considerable changes at the state level.

[15] The most important change in the regime of takings was, however, of a procedural character: even if all expropriations must be paid at commercial values, foreign investors obtained a different remedy for their conflicts with the government. This has been important, as witnessed by the famous *Metalclad* case, but in quantitative terms it has meant much less than conflicts over eminent domain with nationals.

takings. Unlike the Brazilian and the Colombian cases, in Mexico the transfer of eminent domain powers to municipalities is out of the question; such powers are still concentrated in state governors and the president of the republic[16].

The second element that has made takings particularly difficult is social resistance when it comes to taking agrarian communities' land for public purposes[17]. For decades, the federal government expropriated rural lands for infrastructure and urban development, paying low or even no compensation to peasants. After a long process of legal learning and social organization, those communities are now strong enough to resist expropriations. In fact, taking their land often becomes impossible even when government proceeds according to the law. Strange as it may sound in a predominantly urban society, few approve of the expropriation of their land for urban development. One of the biggest fiascoes in the administration of President Vicente Fox (the first opposition candidate to win the presidency in seven decades) was the withdrawal of a project to build a new airport for Mexico City as a result of the opposition of peasants to the expropriation of their lands.

The third and most important factor is judicial activism, which has become a concern for many observers of the Mexican political system because it implies the presence of an actor (the supreme court) that had been a discreet player in the constitutional order (Ríos-Figueroa & Taylor, 2006). The role of the supreme court had been extremely ambivalent vis-à-vis the executive's use of eminent domain power. The court tended to "follow" (the euphemism *acompañar* is hard to translate) the executive in what seemed crucial cases, but the image of a completely restrained judiciary is misleading, even for the high moments of the postrevolutionary period something that, by the way, has been clear in sociological research since the 1960's (Elizondo, 2001; González-Casanova, 1966). It was not unusual for the supreme court to rule against the government in small cases (for example, declaring

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16 In 1999 the major political parties made nine different proposals for amending the constitution, none of which included eminent domain.

17 More than 60% of land in the urban periphery is owned by agrarian communities (*ejidos and comunidades*).

expropriations null and void) and for the latter to accept the defeat, although it also happened that the government refused to comply and managed to keep the issue out of public scrutiny. The court used to be discreet in those cases as well.

In that context, nobody seemed to notice the many instances in which the court's resolutions implied an unusual lack of judicial deference and sometimes an outright violation of the constitution. Most notably, the court used to question the purpose of an expropriation, something that is not only uncommon in other Latin American countries (like Brazil and Colombia) but is also explicitly forbidden by the Mexican constitution (article 27). Thus, when the democratic transition allowed the court to explicitly exert its power as an autonomous branch of government, the executive found itself more restrained by the judiciary than most other governments under constitutional regimes.

In some respects, the new situation resembled that of Brazil in the 1990's: judges began granting exorbitant compensations. It is difficult to distinguish when these compensations were a sign of corrupt practices from when the court was unable to get into the black box of the valuators' logic. For the first time, the court has faced serious criticism from the media. There have also been some interesting rulings establishing reasonable conditions for expropriation procedures. For example, in 2006 the court granted affected parties the right to prior hearing.

Thus, changes in the political system, new forms of social resistance, and an emerging judicial activism have made the procurement of land through expropriation increasingly difficult for both federal and state governments. Some of those conditions resemble the *precatórios* crisis in Brazil, but we do not see anything like a generalized crisis of eminent domain in Mexico. Judges have awarded outrageous compensation in some cases, but this has not led to financial stress, but instead to open political confrontation between branches of government.

The case of Paraje San Juan is a good example. In 1989 an expropriation decree was issued to regularize 12 neighborhoods with around 12,000 households that were the product of four decades of irregular ("pirate") urbanization. A man who presented himself as the owner of the land claimed the compensation for the expropriation. At no point did the judge or the authorities try to clarify whether the man

had been responsible for the illegal development or was a victim of the invasion of his land[18]. The compensation awarded by the judges was equivalent to the current value of all the houses and the urban infrastructure in the area, some US$130 million. In 2003 the judge ordered its immediate payment, which would have been equivalent to one-third of the whole budget for social assistance in Mexico City, a macroeconomic figure.

The compensation in the Paraje San Juan case became the most widely and hotly debated political conflict of the moment. On one hand, the city government openly refused to pay, arguing that it was an obvious case of judicial corruption. On the other hand, many commentators insisted, in the name of the rule of law, that the compensation should be paid. The affair became so embarrassing to the judiciary that the supreme court "attracted" the case and, in open violation of the principle of res judicata, reduced the compensation to a tenth of the original figure.

Legislative silence has prevailed on the subject. As in the case of Brazil, the lack of precise legal rules on several aspects of the expropriation process contributes to the tension between the judiciary and the administration. However, the silence seems to be part of a more general syndrome in the Mexican legal culture: the difficulty of developing new concepts and mechanisms to balance private and public interests in expropriations in the urban context, an issue for which the old paradigm of the postrevolutionary regime cannot offer answers. The problem is not the lack of legislation, but rather the prevalence of a legal culture that emphasizes social justice in a rural society and maintains private property rights in cities in an ambiguous place. It is as if the glorious postrevolutionary past bequeathed a legal monument no one dares modify.

In Mexico the use of expropriation for urban purposes has become increasingly difficult due to a combination of factors. Besides an unusual judicial activism, governments face the general political conditions of a democratic transition as well as social resistance for certain

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[18] Qualified witnesses (civil servants then at high levels) who chose to remain anonymous asserted that the lands were national, not private, property.

projects, all of which make the use of eminent domain more complicated. The main challenge in overcoming the current situation is to develop a new institutional design that reduces administrative discretion, but also that restrains a judiciary that has become an erratic legislator. The international standards of institutional reform are far from providing all the components for the new scheme. A solution will depend on the specific path that the Mexican legal system might follow and its political and cultural dimensions, which are as distinctive as those of any other nation-state.

Final remarks

The rules for, as well as the use of, eminent domain for urban projects in Brazil, Colombia, and Mexico have changed in the last two decades according to the conditions of what can be generally labeled as a post-authoritarian situation, or democratic transition. Those changes imply, by definition, changes in the content of property rights. They have meant finding new ways of dealing with the tension between private and public interests that arise in every case of eminent domain. This chapter has emphasized developments, as well as their consequences, characteristic of each of those countries. Even some aspects that appear to be common to all three, such as judicial activism, have produced different outcomes.

To fully understand the changes, it is necessary to look at them from three points of view: the place of eminent domain in the constitution and especially in the constitutional life of each country, the actual use of eminent domain (in order to consider financial and other conditions of its use), and the legal culture within which public and private actors give meaning to (and eventually legitimize) their respective practices.

Regarding constitutional changes, two aspects are worth mentioning. The first has to do with local democracy and decentralization. Local governments in both Brazil and Colombia have the power to start eminent domain procedures, and this is part of their strength in urban affairs, whereas in Mexico that power is in the hands of the federal and state executives.

The second and most important constitutional question is the role of the judiciary. Whereas in Brazil and Mexico the intervention of judges has aggravated (rather than solved) conflicts over eminent domain cases, in Bogotá the courts have been able to arrive at decisions that not only enjoy wide acceptance; but that also support the use of eminent domain for urban projects without compromising the basic rights of property owners. This means that the role of the judiciary in post-authoritarian situations can vary enormously.

Leaving aside for the moment the inclusion of administrative takings in the 1991 Colombian constitution, there and in Brazil the rule has been that the administration requests the expropriation and a court makes the final decision. In contrast, an expropriation in Mexico produces immediate effects once it is declared by the executive, which gives the impression of a formidable concentration of power in the president and state governors. But in practice this affects only weak owners who do not have access to legal services. In fact, through *amparo* suits, owners can obtain injunctions to indefinitely stop procedures; often judges modify the compensation and also examine whether the motive of an expropriation is correct. They do so in open violation of the constitution. Colombian and Brazilian judges may exert considerable power in establishing compensation, but they show remarkable deference in relation to the motives of the expropriation compared to judges in Mexico. If two decades ago the problem was how to restrain the executive, today the constitutional debate is around the limits of the supreme court's power.

The system for appointing justices of higher courts is the same in all three countries: the legislative power appoints them from a list provided by the executive. However, in the case of Brazil, precatórios were issued by state-level judges, who are appointed without intervention of the legislative branch. Constitutional lawyers and political scientists have a large research agenda to cover in this area before the relationship between institutional design and courts' performance will be clear[19].

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[19] For a discussion, see Ríos-Figueroa & Taylor, 2006.

When we look at the way eminent domain works in practice (something we can do for individual cities only, not for whole countries), we find interesting facts. The city of Bogotá seems remarkable compared to São Paulo and Mexico City in that it has been able to use eminent domain successfully. Although many planners complain that compensations are too high –a contention that remains to be confirmed– none of the city's important urban projects have been frustrated due to problems in eminent domain procedures. The main factors in that success are the wide popular support that projects such as the Transmilenio enjoy, as well as the healthy local finances of the city due to property tax increases.

In contrast, the use of eminent domain by local governments in São Paulo and Mexico City have faced serious difficulties, mainly due to judicial activism that has, so to speak, taken the institution of eminent domain by surprise. In São Paulo the financial impact of the *precatórios* created a real crisis in the use of eminent domain, although there are signs that the crisis is over. In the case of Mexico, exorbitant compensations have prompted serious political conflicts, but the most important effect of judicial activism is that many projects are not even considered because of the uncertainty created by erratic judicial decisions. In both cases, the explanation of the courts' behavior (ideological or political bias, corruption, and/or professional incompetence) remains an important issue for future research.

The practice of eminent domain in those three cities is so different that it is difficult to suspect that something structural in Latin American urban societies would necessarily produce its demise. No matter how real and strong the factors that make its use difficult in some cases, they do not seem to be of a global nature.

Even if jurists in all three countries proclaim the social function of property as the doctrine that illuminates the rules on eminent domain, there is not a homogeneous use of the doctrine. In Mexico during the long agrarian reform, expropriation was the instrument for the creation of a form of land ownership that enjoys wide legitimacy in the rural world, but that cannot be easily adapted to the urban context, if only because the system, in its classical form, relied on an arbitrary use of eminent domain power. As a result, there is not a widely accepted doctrine within which expropriation for urban projects can be seen as legitimate by significant sectors of society.

In Brazil, as in any other country, some (or most) judges do not share the ideas that legislators have introduced in the Estatuto da Cidade or even in the constitutional text; they did not find convincing arguments for their resolutions in the *precatórios* crisis, which undermined their authority. In contrast, the Colombian courts have taken upon themselves the task of elaborating arguments to deal with the complex problems involved in eminent domain cases. In particular, the distinction between different species of compensations has helped both legislators and administrators find solutions that are coherent with urban legislation and the constitution. The diffusion of new (and old) ideas on property and eminent domain throughout the region should be welcomed. Our argument here is that it is more important to understand diversity than to perpetuate the incorrect idea of a single Latin American legal culture. Any initiative aimed at getting the institutions right (whatever "right" means) will have to deal with that diversity.

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Commentary

*Vicki Been**

Antonio Azuela has given us a rich and insightful examination of eminent domain practices in three of the leading cities of Latin and South America. Comparative scholarship, at least in legal fields, sometimes can be frustrating for the reader because it often lacks a helpful frame and either compares apples to oranges or simply fails to compare at all. Azuela, however, is self-consciously careful to note differences between the cities and regimes, and he is astute in drawing implications from the comparisons.

Azuela's perceptive analysis suggests several lessons for eminent domain scholars and policy makers here in the United States and around the globe. His work, along with Jerold Kayden's empirical study in chapter 8, also reveals how much empirical work must be done in order for us to understand how to improve the practice and regulation of eminent domain. The two chapters make clear how little we know, other than through anecdotal evidence, about the actual use of eminent domain, or about the potential effects that measures to limit governments' eminent domain powers (such as those now popular in the United States) may have on urban land use and economic development.

There are several useful lessons that those focused on eminent domain and, more broadly, on property rights can draw from Azuela's portrait of São Paulo, Bogotá, and Mexico City. First, he reminds us of the critical, but often overlooked relationship between the legal rules for the use of eminent domain and the institutional context in which those rules apply. The institutional context has at least two critical dimensions: the relationship between the judiciary and the legislative or executive branch, and the distribution of authority over eminent domain among the national, state, and local governments. In the United States the debate over *Kelo v. City of New London*, 545 U.S. 469

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(2005), often forgets the key explanation the Supreme Court offered for what some (indeed, many) thought was an erroneous decision: the fact that the legislative and executive branches are elected, democratically accountable, and charged with the responsibility of ensuring livable and thriving cities, while judges are charged not with legislating, but rather with interpreting and enforcing the Constitution and laws of the jurisdiction (*Kelo*, 481-483, 489-490). Azuela's exploration of the role the courts have played in limiting the use of eminent domain, especially in São Paulo, is a fascinating reminder that judges are not necessarily good city planners or experts in real estate valuation; nor are they free from ideology, corruption, and institutional pressures.

Second, Azuela's work suggests that we need to pay more attention to how institutional structures can be deployed to control judges, administrative officials, and politicians from overcompensating those whose property is taken by the exercise of eminent domain. The charge that politicians have used eminent domain to reward supporters or to disadvantage enemies has been explored extensively over the years (see, for example, Caro 1974, pp. 850-894), but the threat that either the executive or the judicial branch might award compensation far in excess of fair market value, at the taxpayer's expense, has received little attention. Such overcompensation might result from judges' (and administrators') difficulty in understanding what Azuela correctly notes is a "black box" of valuation. But it also may be that eminent domain scholars need to assess whether compensation payments are similar to economic development incentives difficult to set at the right level, hard for taxpayers to monitor, and even harder for diffuse and unorganized taxpayers to constrain.

Ideally, Azuela will give us an update in about ten years to enable us to better understand whether the *precatórios* crisis in São Paulo was a short-lived transition problem or whether judges continue to be overly generous to landowners in response to public opinion, institutional pressures to show independence from the executive or legislative branch, or undue or corrupt influence of the landowners. If continued study shows that overcompensation is more than just a short-term transition problem, scholars and policy makers must assess alternative strategies for constraining overly generous payments. Azuela's description of how the courts in Colombia have forged a pro-

ductive and fluid dialogue with the other branches on matters of eminent domain suggests that scholars should focus as well on how the manner in which judges (or administrators offering settlements to landowners) are selected, trained, protected from outside influence, and constrained from overstepping their roles correlates with the accuracy of the compensation they (or administrators) offer.

Third, Azuela highlights the need for scholars to focus more attention on valuation conundrums. In the United States some academics have begun to untangle the theoretical questions underlying valuation methods. A leading recent example is Serkin's (2005) work on how different philosophies about when compensation should be paid for regulatory takings are reflected in valuation mechanisms. But much more needs to be done to address the hard questions about how compensation should be determined and what the judicial role should be in overseeing that process. Azuela's insights about how ill-equipped judges are to assess expert valuations and the effect of such ignorance on a municipality's budget show how critical further research in the area is. Azuela hints that Brazil should have dealt with some of the valuation issues in its constitution or laws, but notes in his description of the Colombian constitution that a constitution cannot be too detailed. The extent to which constitutions or other legal texts should try to define the required compensation with greater specificity than general standards like "just compensation" or even "fair market valuation" is one of the many perplexing problems scholars might address. Similarly, Azuela's insight that property owners seem not to care whether compensation is paid before or after the taking suggests that additional research is necessary about what determines whether landowners believe the compensation they receive is appropriate.

Fourth, Azuela's work reveals the need for further analysis of the ways in which eminent domain practices vary between regimes that limit the use of eminent domain to the national or state level and those that allow local governments to exercise eminent domain. Local governments may be particularly prone to capture by what Fischel (2001) calls the "homevoter block," which may have an interest in public works or economic development projects, even if such projects may involve the aggressive exercise of eminent domain. State or national governments, on the other hand, may be too prone to impose

one-size-fits-all policies or too susceptible to capture by, for example, groups ideologically opposed to all but the most traditional uses of eminent domain. A comparison of the frequency and type of condemnations when authority to exercise eminent domain is withheld from local governments, as well as an analysis of how governments or markets get around limits on the exercise of eminent domain, would be extremely useful.

Fifth, one of the most provocative lessons we can draw from Azuela's article lies in his description of provisions in the Colombian constitution and of interpretations of the eminent domain power by the Colombian courts that have the potential to be far more protective of the lower and middle classes than does the Fifth Amendment to the U.S. Constitution. He tells us that the Colombian constitution allows the use of eminent domain for social interest to satisfy the needs of specific groups in society. Similarly, he notes that the Colombian courts have distinguished between the use of eminent domain that takes fungible assets and the use of eminent domain that takes homes or other property used as a means of satisfying a basic need such as housing. Those hints of more radical views of eminent domain are tantalizing, but they left me thirsty for more information about how, if at all, those provisions are being used. How does eminent domain under such a regime look different from the eminent domain practice in the United States or other, more property rights–oriented countries? Could the more liberal eminent domain provisions paradoxically result in less use of eminent domain than in jurisdictions that supposedly are more protective of private property?

Similarly, Azuela's comparative work would be even more useful if he could tell us more about the purposes for which the exercises of eminent domain that he studies were invoked. Of course, one of the challenges of the debate about *Kelo* is the difficulty of drawing a line between economic development and more traditional uses of eminent domain, but there likely are differences between the exercise of eminent domain for the purposes of building a transport system or a park and the economic development context that *Kelo* addressed. Perhaps the key is, as Azuela suggests, wide community support, but it may be that community support for an economic development project will not legitimate an exercise of eminent domain in the same way that

community support of a public works project does. The critical issue may be the support for the use of eminent domain for a particular purpose, not whether the community supports the project at issue.

I hope we'll hear more from Azuela about Brazil's efforts to give local governments the power to ensure that lands are adequately used. Before the current foreclosure crisis in the United States, cities and nonprofits in many areas were struggling to compete in the market for parcels on which to build affordable housing. Now, nonprofits and local governments are struggling to get foreclosed properties back into productive use. Both problems have led to variety of calls around the United States for more governmental power to encourage dysfunctional owners, financial institutions holding foreclosed properties without maintaining them, and other landowners who seem to be sitting on land that could be used more efficiently to use the land or lose it, or at the very least to pay dearly for the privilege of underusing it. Azuela's account of the use of eminent domain as a sanction is fascinating, and I hope we'll learn more from him about that practice.

Finally, Azuela's work reminds us once again about how much more empirical scholarship on eminent domain could reveal about optimal eminent domain practice. To help spur additional work of the quality of Azuela's comparative analysis, I suggest below several categories of questions additional research should address to illuminate the use of eminent domain today and its costs and benefits.

A. Understanding the use of eminent domain today

We know surprisingly little about the who, what, when, where, and why of eminent domain. Until Kayden's work (see chapter 8), all we knew about the use of eminent domain in the United States was from the Institute for Justice's review of newspaper accounts and blunt categorization of all or virtually all exercises of eminent domain as abusive (Berliner, 2003). There were a sprinkling of case studies, such as Nicole Garnett's (2006) work, but no systematic count or classification of condemnations. Similarly, around the globe, there is little empirical evidence about the actual use of eminent domain. The questions scholars should address include the following.

Who is using and paying for eminent domain, and where –the national government, states, or local governments? Agencies with land use and planning oversight, or agencies whose portfolios are either transportation or other infrastructure management or economic development? The agency paying for the condemnation, or an agency able to pass the costs on to the general budget? Big cities or smaller local governments? Suburbs or central cities? Governments subject to free trade agreements' protection of foreign investors, or those that have not entered into such agreements? We know that such differences among governments affect how they respond to compensation requirements, political pressure, and other constraints; but in order to make wise policy about how the law should regulate eminent domain practice, we need to know much more about who is making the condemnation decision, and what constraints influence those decision makers.

What compensation is being paid, and how does that compensation relate to market value, to costs such as relocation expenses, and to subjective values owners attach to their properties? Does the relationship between compensation and fair market value vary according to the purposes for which eminent domain is being exercised, or according to the nature of the eminent domain scheme (such as whether the scheme has a quick-take provision). There has been surprisingly little work on the issue of how close compensation comes to fair market value. The last major study in the United States is decades old (Munch, 1976).

When, or actually how often, is eminent domain being used? Are governments using eminent domain more frequently than in the past? Has the outcry over *Kelo* resulted in fewer exercises of eminent domain? Where frequency of use has changed, what is responsible for the change? If there has been an increase or decrease in the use of eminent domain, for example, is that change related to an expansion (or contraction) in the purposes for which eminent domain can be used, an increase in the pressure compensation awards exert on condemnors' budgets, a change in investor protection agreements, or other variations across jurisdictions or over time?

Why is eminent domain being used? What efforts did the condemnor make to buy the property on the open market? We need a richer understanding of the bargaining (or lack thereof, according to Azuela's analysis) that takes place in the shadow of eminent domain.

B. The costs and benefits of eminent domain

Our understanding of who benefits from the exercise of eminent domain, who suffers, and how that differs according to the characteristics of the legal regime is limited. Similarly, we know much too little about what adjustments the market makes when the use of eminent domain is constrained. Do constraints distort institutional arrangements by leading to more public-private partnerships, or by making governments unduly cautious about involving potential private developers in planning discussions, for example?

Azuela's wonderful comparative analysis of eminent domain practice in São Paulo, Bogotá, and Mexico City sets a high bar for the quality of future research. It provides a compelling illustration of the contribution a richer understanding of the use of eminent domain around the world can make to current debates about how to regulate exercises of condemnation authority. I hope Azuela's example will spur much more work on these critical questions.

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