The Role of Administrative and Judicial Scrutiny in Reviewing the Justification of Expropriation

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Scope of Administrative / Judicial Scrutiny
Administrative and Judicial Scrutiny

Planning Procedure → Expropriation: Administrative Scrutiny → Judicial Scrutiny (Expropriation)

Judicial Scrutiny (plan)

Planning + Expropriation Procedure → Judicial Scrutiny
Review of the Expropriation’s Justification

- The purpose of the expropriation

- Project = means to realise that purpose

- Expropriation = means to enable the implementation of the project
The Purpose of the Expropriation

Section 25(2) of the South African Constitution:

Property may be expropriated only in terms of **law of general application**

a. for a **public purpose** or in the **public interest**; and

b. subject to **compensation**, [...]

The Substance of Public Purpose?
Lazy legislatures...

The Minister may expropriate property for public purposes.
- Art. 2(1) of the South African Expropriation Act

Property can be expropriated to implement a municipal land-use plan.
- Art. 77(1) No. 1 of the Dutch Expropriation Act
... lead to a narrow review

- **ZA:** *Bartsch*, [2010] ZAFSHC 11
- **NL:** Royal Decree, *Staatscourant* 2010, 10742 (IKEA)
Recommendation

Guideline 16.1 of the Voluntary Guidelines on the Responsible Governance of Tenure:

*States should clearly define the concept of public purpose in law, in order to allow for judicial review.*
The Project

- Deference to the authority’s determination concerning:
  - Design
  - Size
  - Location
  - Balance between benefits and drawbacks

- The Alternative Project Argument?
The Project: Recommendation

- Mandatory statutory boundaries protecting vulnerable interests
The Expropriation

- Deference to the authority’s determinations concerning:
  - expediency of the expropriation;
  - balance between benefits and drawbacks.
The Expropriation

- Strict scrutiny: expropriation = least invasive means?
  - more land than necessary?
  - attempt to purchase the land?
  - less invasive legal means?
  - self-realisation?
Concluding remarks

- Not every unpopular expropriation is also unlawful.
- Get involved in the planning process!
- Don’t count on the courts to help you!
- Lobby in Parliament!
Thank you for your attention

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