

**A COMPARATIVE ANALYSIS: LEGAL AND CULTURAL ASPECTS OF  
LAND CONDEMNATION IN THE PRACTICE OF EMINENT DOMAIN IN  
JAPAN AND AMERICA**

By Marissa L.L. Lum\*

- I. INTRODUCTION
- II. BACKGROUND: TWO DOMINATING LEGAL SYSTEMS
- III. THE JAPANESE PROPERTY LAW SYSTEM
  - A. *Japanese Property Law and the Right to Ownership*
  - B. *The Concept of Expropriation in Japan*
    - 1. *The Disaster of Narita Airport*
  - C. *Japanese Ideas and Procedures for Just Compensation*
- IV. THE AMERICAN APPROACH TO CONDEMNATION AND EMINENT DOMAIN
  - A. *Current Eminent Domain Law in America*
  - B. *Precursors to Condemnation in America*
    - 1. *The Landmark Decision of Kelo*
    - 2. *Even Quicker Takes*
  - C. *American Ideas and Procedures for Just Compensation*
- V. A COMPARISON OF CULTURES AND LEGAL SYSTEMS
  - A. *Cultural Differences*
  - B. *Emerging Ironies*
- VI. CONCLUSION

**I. INTRODUCTION**

The Tokyo District Court recently ruled on a petition filed by six landowners in the Ushinuma district of Akiruno and temporarily banned the Tokyo governor from expropriating privately owned land on behalf of the Japanese government for the construction of an expressway.<sup>1</sup> The six landowners refused to sell their land and further demanded that the government's authority to expropriate their

---

\* Marissa L.L. Lum is a second year student at the University of Hawai'i William S. Richardson School of Law. She would like to extend her appreciation to Glenn H. Sonoda who assisted her in editing this article.

<sup>1</sup> *Tokyo Governor Banned from Expropriating Land for Expressway*, MAINICHI DAILY NEWS, Oct. 3, 2003.

land be revoked.<sup>2</sup> While the proposed expressway would aid Japanese commuters through highway expansion, Presiding Judge Masayuki Fujiyama's ruling favored the landowners, stating that "The expropriation would deprive the landowners of their freedom of residence and cause them losses that could hardly be compensated."<sup>3</sup>

Should the Japanese judiciary grant the government permission to expropriate this land? Would a grant of such power be effective or practical for this type of situation, where developers and landowners are at odds? Because of cultural and societal standards and practices, the power of eminent domain is rarely invoked in Japan. This is a great contrast to the United States, where the power of eminent domain is invoked frequently for a wide range of purposes.

The basic principles of eminent domain law in Japan and in the United States are very similar, but the implementation and cultural acceptance of condemnation greatly differs. What are the differences between these two systems? Would the adoption within Japan of the United States' approach to eminent domain be more effective in achieving the goals of the Japanese government? This paper will first discuss the two dominating legal systems which govern the two countries and the fundamental differences between them. Second, it will examine several aspects of Japanese property law and the country's methods of carrying out the eminent domain process. Third, it will explore the American approach to condemnation and compensation. Based on these findings, I will compare and contrast the cultural ideas and legal methods of each system. Finally I will evaluate whether each system works efficiently and consistently with the distinct values and goals of each country.

## II. BACKGROUND: TWO DOMINATING LEGAL SYSTEMS

Most nations in the world follow one of two dominating legal systems – the civil law approach and the common law approach.<sup>4</sup>

---

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916 (1974).

Japan follows the former while the United States follows the latter. Japan has sought to modernize their legal system over the last two centuries.<sup>5</sup> From 1608 to 1868 Japan enjoyed a period of isolation without external military conflict.<sup>6</sup> After Japan was forced to open its borders in 1868, it underwent a national process of modernization, became a large global power, and needed a model after which to construct their new legal system.<sup>7</sup> At the time, France and Germany had the two most advanced legal systems, both of which consisted of Civil Law systems.<sup>8</sup> Japan chose to emulate those countries' Civil Codes, and as a result, the modern Japanese legal system is a Civil Law system.<sup>9</sup> The Civil Code officially took effect in 1898.<sup>10</sup> Since then the Code has generally remained unchanged, besides various amendments.<sup>11</sup>

The main difference between civil law systems and common law systems is that civil law is codified. It is much more rigid than the common law system and there is less room for flexibility.<sup>12</sup> Because of this, Japanese lawyers use methods of deductive reasoning and argue their cases as if there is only one right answer.<sup>13</sup> There is a sharp distinction between public and private law, and a different set of courts and procedures for each.<sup>14</sup> The adjudicatory process in a civil law system is composed of a series of meetings and communications between attorneys.<sup>15</sup> The judge's role is to discover the true basis of

---

<sup>5</sup> HIROSHI ODA, BASIC JAPANESE LAWS 21 (1997).

<sup>6</sup> KENNETH L. PORT & GERALD PAUL MCALLIN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 29 (2nd ed. 2003).

<sup>7</sup> *Id.* at 32.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> ODA, *supra* note 5, at 21.

<sup>11</sup> *See id.*

<sup>12</sup> PORT & MCALLIN, *supra* note 6, at 37.

<sup>13</sup> *Id.* at 38.

<sup>14</sup> *Id.* at 37.

<sup>15</sup> *Id.* at 39-41.

the dispute and to bring forward all the facts of the case.<sup>16</sup> The procedure has a “rather leisurely and bureaucratic air,” and written evidence is preferred over oral testimony.<sup>17</sup>

The American common law system descends from America’s history as a British colony.<sup>18</sup> It includes extensive non-statutory law which places importance on precedent, and is much more open-ended than the codifying civil law system.<sup>19</sup> No formulation of a rule, by a judge or anyone else, is ever completely set in stone.<sup>20</sup> The trademark characteristic of the American legal system is the trial – an oral battle between opponents, involving oral testimony from live witnesses, and the judge as a referee.<sup>21</sup> Trial and litigation are very adversarial – a great contrast from lighter setting of the Japanese system.<sup>22</sup>

### III. THE JAPANESE PROPERTY LAW SYSTEM

#### A. Japanese Property Law and the Right to Ownership

The Civil Law approach to property law is based on Roman law and on ownership.<sup>23</sup> Article 29 of the Japanese Constitution expresses the fundamental rights of Japanese citizens in regards to property, stating that “1) the right to own property is inviolable; 2) property rights shall be defined by law, in conformity with the public welfare; and 3) private property may be taken for public use upon just compensation therefor.”<sup>24</sup> Any further definition and scope of

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See generally Merryman, *supra* note 4; Sprankling, *infra* note 116.

<sup>19</sup> PORT & MCALLIN, *supra* note 6, at 37.

<sup>20</sup> *Id.* at 38.

<sup>21</sup> *Id.* at 39-41.

<sup>22</sup> *Id.*

<sup>23</sup> Merryman, *supra* note 4, at 924.

<sup>24</sup> JAPAN CONST. art. 29.

property rights in Japan are codified in its Civil Code.<sup>25</sup> Japanese property law (*zaisan ho*) has basically remained “unchanged since the adoption of the original Civil Code in 1896,” besides statutes that have been passed to deal with modern trends and to keep up with increased urbanization.<sup>26</sup>

The civil law system values individual ownership rights, resists fragmentation, and avoids dividing ownership.<sup>27</sup> Property is thought to be exclusive, single, and theoretically indivisible in function and time – in every transaction ownership must be transferred completely or not at all.<sup>28</sup> This does not mean that there can only be one single owner. Property can be owned simultaneously by two or more people at a time, in a form of co-ownership that is similar to the American idea of tenancy in common.<sup>29</sup> However, there is no distinction between beneficial and security title, legal and equitable title, and no temporal division into present and future estates. The Civil Law approach to property law can be viewed as a “box” – whoever has the box, owns it.<sup>30</sup> A person can sometimes open the box and transfer the rights inside the box to others, but that person still owns the box, even if it’s empty.<sup>31</sup> While ownership is exclusive, ownership rights and possession rights in Japanese property law are distinguished.<sup>32</sup> Ownership is simply having title (*kengen*) to a thing.<sup>33</sup> Possession is defined as exercising dominion and control over a thing for one’s purpose –the right to the “actual enjoyment” of

---

<sup>25</sup> PORT & MCALLIN, *supra* note 6, at 594.

<sup>26</sup> *Id.* at 593.

<sup>27</sup> Merryman, *supra* note 4, at 924.

<sup>28</sup> *Id.*

<sup>29</sup> Merryman, *supra* note 4, at 925.

<sup>30</sup> *Id.* at 927 (elaborating on the analogy of a box and its potential contents to illustrate the Romanic ownership concept of property).

<sup>31</sup> *Id.*

<sup>32</sup> PORT & MCALLIN, *supra* note 6, at 596 (outlining the basic aspects of each area of Japanese property law).

<sup>33</sup> *Id.*

a thing.<sup>34</sup> The right to possess is what is “important”, and a party can sue to claim the right to possess the property, regardless of title.<sup>35</sup>

In Japan, expropriation (taking possession of land for public use by the right of eminent domain) finds its main authority in Article 29, Paragraph 3 of the Japanese Constitution, and involves the government, an agency or a developer acquiring rights in private land and the private owner receiving a right to compensation.<sup>36</sup> The Japanese are very reserved in exercising their power of eminent domain, mainly because of the overriding values of consensus and social norms in Japanese culture. Some may argue that the Japanese drive for consensus is so strong that it outweighs the greater good of development, often resulting in disorganized projects rather than in streamlined productivity and efficiency.

### B. *The Concept of Expropriation in Japan*

An expropriation “begins upon entry and survey of the land,” and “ends upon completion of the taking.”<sup>37</sup> In 1951, the Land Expropriation Law (LEL) was enacted under Paragraph 3 of Article 29 of the Japanese Constitution “as a general statute concerning compulsory land acquisition for public purpose.”<sup>38</sup> The requirements, procedures and effect of expropriation and land use are all regulated by the LEL.<sup>39</sup> The main LEL procedure is known as “project confirmation” and involves a determination by the Japanese Minister of Construction “that the project promotes the public interest.”<sup>40</sup> The

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (discussing Japanese property possessory rights).

<sup>36</sup> *Id.* at 593.

<sup>37</sup> *Id.* at 614.

<sup>38</sup> DAVID L. CALLIES & TSUYOSHI KOTAKA, TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 147 (2002)

<sup>39</sup> PORT & MCALLIN, *supra* note 6, at 613 (introducing the Land Expropriation Act, which is also referred to in other texts as the Land Expropriation Law of Japan (see *infra* note 41)).

<sup>40</sup> *Id.* at 614.

LEL's purpose is to "balance the promotion of public benefits and the protection of private rights"; a project must promote the public interest to be acknowledged by the LEL.<sup>41</sup> Furthermore, even if a project would potentially serve a useful public purpose, it cannot exercise the privilege of expropriating land if the project is not enumerated in the LEL.<sup>42</sup> In spite of the LEL, land acquisition for public projects is generally not performed by the public procedures, but by mutual private negotiations among the developer, landowners, and other interested parties.<sup>43</sup> The LEL procedures are only invoked when the negotiations fail to yield an agreement.<sup>44</sup>

If a project initiator anticipates or finds difficulty in negotiating an agreement with the landowner and interested parties, he or she can submit a written application for recognition of the project under the LEL.<sup>45</sup> The Minister of Construction or the governor will then decide if the project will be recognized.<sup>46</sup> A decision of recognition has specific, important legal effects. It grants the developer the power of expropriation, it fixes the price of land at the date of recognition,<sup>47</sup> and it binds the interested parties to the

---

<sup>41</sup> *Id.* at 613-614.

<sup>42</sup> CALLIES & KOTAKA, *supra* note 38, at 147 (discussing what is required of a potential project before it can be approved to be able to expropriate land).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 148. It seems that the Japanese will first attempt mutual negotiation among the parties, and if a project initiator finds difficulty (see *infra* note 45), then LEL procedures offer a means of expropriation.

<sup>45</sup> *Id.* (describing what a project initiator should do if he or she expects difficulty when entering into a contract with the original landowner).

<sup>46</sup> *Id.* (citing Art. 20 of the LEL). See also CALLIES & KOTAKA, *supra* note 38, at 149 (citing Kotaka, *Commentary to the Land Expropriation Law*, 157; Yasutaka Abe, *Administrative Discretion and Administrative Relief* (Tokyo, Samseido, 1987). Among notes on this case, see Yasutaka Abe, 152 HANREI-HYORON, 20 (1976); Naohiko Harada, *1973 Term Important Court Decisions (Jurist)* 42-43, (1974); Hiroshi Shiono, 178 HANREI-HYORON, 24 (1973); Hidezaku Hama, *Court Decisions on Public Nuisance & Environment (Jurist)*, 2nd ed., 161-163 (1980); Yoshikazu Tamura and Giichi Shibaie, 111, 112 RITSUMEIKAN L.R. 566 (1973); Mitsuo Kobayakawa, *A Hundred Decisions on Town Planning and National Land Use Planning (Jurist)*, 118 (1989), etc.).

<sup>47</sup> *Id.* (citing Art. 71 of the LEL).

action.<sup>48</sup> No person who obtains a right of interest after the recognition will “be included in the interested parties.”<sup>49</sup> The mode of acquisition of land is “original, unlike the American idea of compulsory purchase, in which the mode of acquisition involves a derivative succession to whatever ownership rights existed in the compulsory seller.”<sup>50</sup>

The Japanese government rarely invokes the doctrine of eminent domain, and there are very few reported eminent domain cases in Japanese history.<sup>51</sup> The Japanese government has a common practice of proceeding by consensus.<sup>52</sup> In Japan, negotiations between the parties are chosen over strict legal procedures, and before any sort of decision regarding property is made all owners and co-owners of the land must reach a consensus.<sup>53</sup> Attempting to reach a consensus with those affected by the taking (instead of the government simply condemning the property and moving out the occupants) slows development.<sup>54</sup> This overriding idea of consensus seems to be more of a cultural attribute than a legal one,<sup>55</sup> and these cultural aspects are substantially responsible for the ways that Japanese legal procedures are formed and carried out. Americans may view this approach as ineffective and unnecessarily time consuming, but because of cultural differences, the Japanese preference for negotiations between parties along with the method of consensus of all co-owners of the property before eminent domain can

---

<sup>48</sup> *Id.* at 149 (lists the main legal effects of project recognition).

<sup>49</sup> *Id.* (citing Art. 8, Para. 3 of the LEL).

<sup>50</sup> PORT & MCALLIN, *supra* note 6, at 614 (describing the important implications for Japanese expropriation being achieved by pure administrative disposition).

<sup>51</sup> *Id.* at 607.

<sup>52</sup> *Id.* (illustrating the implications this has on Japanese expropriation practice).

<sup>53</sup> *Id.* at 599.

<sup>54</sup> *Id.* at 607-8.

<sup>55</sup> *Id.* at 599.

take place has proven in fact to be the most effective method of taking land in Japan.<sup>56</sup>

### 1. The Disaster of Narita Airport

The recent example of the New Tokyo International Airport in Narita, Japan (Narita Airport),<sup>57</sup> in which there was great opposition from Japanese citizens<sup>58</sup> effectively presents the concept and exemplifies the importance of negotiation and consensus in the Japanese eminent domain process. In 1966, the Japanese Cabinet chose the farm land of the site of the airport because it believed it was the only flat land in the Tokyo region that could “easily” be expropriated and developed.<sup>59</sup> Project initiators did not expect the expropriation to cause such a negative and extreme reaction from Japanese citizens.<sup>60</sup> Instead of receiving formal notification, the landowners of the farm villages first learned of the expropriation through local newspapers.<sup>61</sup> The landowners were shocked, angry, and never in agreement with the development of the airport.<sup>62</sup> Farmers occupying the various sites have engaged in violent protests against Japanese officers who have attempted to remove them, and several of them have lost their lives in the process.<sup>63</sup> In addition to farmer-landowners, students and political parties formed the *Sanrizuka Shibayama Union to Oppose the Airport* (Sanrizuka-Shibayama Rengo Kūkō Hantai Dōmei) to oppose the development,<sup>64</sup>

---

<sup>56</sup> See discussion, *infra*.

<sup>57</sup> Established and operated by a public corporation. Isaku Shibata, *Japanese Laws Related to Airport Development and the Need to Revise Them*, 65 J. AIR L. & COM. 125, 126 (1999).

<sup>58</sup> PORT & MCALLIN, *supra* note 6, at 608.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (The Japanese Cabinet had previously named another area as the site of the new airport).

<sup>63</sup> *Japan Transportation Scan*, KYODO NEWS INTERNATIONAL, INC., July 18, 2005.

<sup>64</sup> PORT & MCALLIN, *supra* note 6, at 608.

and employed legal and physical warfare tactics.<sup>65</sup> Protests and strong resistance have made the task of development extremely difficult and as of 2003, nearly forty years later, the project was still not complete.<sup>66</sup> “Construction of a second runway was stalled because the government and the Airport Authority failed in its negotiations with local residents” who refused to give up their plots of land.<sup>67</sup> Construction of a third runway was also suspended because it was not approved by residents living in areas potentially affected by aircraft noise.<sup>68</sup> While the protests have become more civil over the years, “the area residents still refuse to accept compensation and leave” the premises.<sup>69</sup>

The Japanese Cabinet has thus learned from this experience, and “successive Cabinets have attempted negotiation as a strategy rather than [the] use [of] forceful” eviction.<sup>70</sup> Attempts to strategize and negotiate with landowners have proven to be much more effective in the long run for Japan. However, they have also proven to be extremely costly. The Japanese will go out of their way not to take private property.<sup>71</sup> These efforts are illustrated through the building of the Kansai International Airport near Osaka, Japan in 1994.<sup>72</sup> Builders “filled in parts of Osaka Bay and created an enormous manmade island at a cost of approximately \$1.3 billion.”<sup>73</sup> The entire island is built 18 meters deep on a “seabed” that has been described to have a consistency “similar to firm tofu.”<sup>74</sup> Because of this unstable

---

<sup>65</sup> Matthew J. James, *Keeping the Peace – British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 DICK. J. INT’L L. 405, 441 (1997).

<sup>66</sup> PORT & MCALLIN, *supra* note 6, at 608.

<sup>67</sup> Shibata, *supra* note 57, at 132.

<sup>68</sup> *See* Shibata, *supra* note 57, at 132.

<sup>69</sup> PORT & MCALLIN, *supra* note 6, at 609.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (analogizing and describing the unstable foundation of the development).

consistency the island continues to sink over the years and the upkeep and reengineering of it is extremely costly.<sup>75</sup> “After six years of operation, the airport [incurred] approximately \$1.3 billion in operating losses” (emphasis added).<sup>76</sup> The user charges at Narita Airport and at Kansai International in 1999 were the highest in the world.<sup>77</sup> Still, the Japanese citizens are willing to bear that burden through higher user charge levels, the Japanese government is willing to increase its already large national deficit,<sup>78</sup> and Japanese companies are willing to be extremely exhaustive and creative with their financing,<sup>79</sup> all in order to satisfy the majority and to avoid another Narita Airport situation.

C. *Japanese Ideas of Just Compensation*

While Article 29 of the Japanese Constitution does not expressly prohibit taking land without just compensation<sup>80</sup> in the way that the American Constitution’s Fifth Amendment does,<sup>81</sup> it is still interpreted to mean that private property should be taken only upon payment of just compensation. No land condemnation takes place in Japan unless the right to compensation is given to the private owner of the land in exchange for the acquisition of rights in the land.<sup>82</sup> The

---

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* The amount of losses the airport has incurred since the start of its operation equals the amount expended to build the entire development.

<sup>77</sup> Shibata, *supra* note 57, at 130.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (explaining how the development of new airports in Japan will most likely need to be carried out by forming privately-held corporations and how these companies will need to continue to implement high charge levels in order to recover the large development costs).

<sup>80</sup> See JAPAN CONST. ART. 29, PARA. 3 (“Private property *may* be taken for public use upon just compensation therefor” (emphasis added)).

<sup>81</sup> See U.S. CONST. amend. V. “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

<sup>82</sup> PORT & MCALLIN, *supra* note 6, at 617.

Japanese Constitution is the underlying authority of just compensation.<sup>83</sup> For example, if a certain statute allowed for a taking without providing just compensation, just compensation would otherwise be constitutionally provided for based on Article 29, Paragraph 3, and “the property owner can bring suit...claiming compensation under that provision.”<sup>84</sup> However, if a particular statute does contain “a just compensation provision,” a landowner should claim under that provision, because it would embody just compensation under the constitutional provision “in substance and in procedure.”<sup>85</sup>

A taking must be a “full” taking in order to have the right to compensation.<sup>86</sup> Mere regulations and any “damage” that falls short of an actual taking<sup>87</sup> will rarely be honored with the right of

---

<sup>83</sup> CALLIES & KOTAKA, *supra* note 38, at 153-4 (citing Shigekazu Imamura, *Law of National Liability of Compensation*, 72 (Tokyo: Yuhikaku, 1957); Ziro Tanaka, *New Edition of Administrative Law* (complete rev., 2nd ed.), 213 (Tokyo: Kobundo, 1978); Naohiko Harada, *The Substance of Administrative Law* (complete rev.), 226 (Tokyo: Gakuyushobo, 1994); Shiono, *Administrative Law*, 280; Hitoshi Kaneko, *General Theory of Administrative Law*, 216-217 (Tokyo: Samsendo, 1983); Tsuyoshi Kotaka, *General Theory of Administrative Law*, 2nd ed., 159-160 (Tokyo: Syosei, 2000); Yasutaka Abe, *Law of National Liability of Compensation*, 263ff. (Tokyo: Yuhikaku, 1988); Katsuya Uga, *Law of National Liability of Compensation*, 394 (Tokyo: Yuhikaku, 1997).

<sup>84</sup> *Id.* (mentioning a Japan Supreme Court (Sup. Ct., Nov. 27, 1968, 22 Keishu 12, 1402 (1968)) example: Art. 4, Sub-Para. 2 of the River Adjacent Land Regulation Order (repealed) without a just compensation provision does not mean there will no compensation in any case necessary, and the defendant, through proving his actual loss, could request just compensation based on Art. 29, Para. 3 of the Constitution (citing Renpei Kuwano, Note, Commentary to Supreme Court Criminal Law Decisions of 1968 Term, 263ff (1968); Shozo Kondo, Note, *A Hundred Court Decisions on Administrative Law* (2) (3<sup>rd</sup> ed., 332 (1993), etc.)).

<sup>85</sup> *Id.*

<sup>86</sup> PORT & MCALLIN, *supra* note 6, at 617 (discussing what is necessary to constitute a “full” taking and what falls short of a “full” taking).

<sup>87</sup> Chapter III, § I, art. 212 of the Japanese Civil Code relates to compensation for damage. It states that “the person having the right of passage must pay compensation for any damage done to the land passed over. Such compensation, however, except for damage arising from the construction of a path, may be paid annually.”

compensation.<sup>88</sup> For a full taking, adequate (“full” or “just”) compensation is standard practice.<sup>89</sup> In order to determine what constitutes just compensation, the Japanese Cabinet put together *The Guideline of Standards for Compensation for Loss Caused by Acquisition of Land for Public Use*<sup>90</sup> which provides “requisites for compensation and [methods of] calculation.”<sup>91</sup> Since most Japanese land condemnation actions are carried out by negotiation and mutual agreement, this guideline is mainly aimed at such practice.<sup>92</sup> However, “compensation in connection with actual expropriation procedures shall also be based on this guideline.”<sup>93</sup>

In Japan, just compensation provides for the economic value (fair market value) of the property.<sup>94</sup> To constitute just compensation, several requisites must be satisfied.<sup>95</sup> First, “all actual losses caused by an acquisition of property should be fully compensated” (however, very notably, the actual amount of compensation is often decided through negotiation between the parties to the action).<sup>96</sup> Secondly, “the criteria of calculation of loss should be socially objective” –

---

<sup>88</sup> PORT & MCALLIN, *supra* note 6, at 617.

<sup>89</sup> *Id.* at 614-615.

<sup>90</sup> CALLIES & KOTAKA, *supra* note 38, at 150 (citing Tadao Kobayashi, *Outline of the Guideline of Standard for Compensation for Loss Caused by Acquisition of Land for Public Purpose* (Tokyo: Kimdaitosho, 1900) [hereinafter *Guideline*]; Tsuyoshi Kotaka, *Land Acquisition and Compensation*, 2nd ed. (Tokyo: Yukikaku, 1996); Akira Nishino and Aiichi Tanabe, *Law of Compensation* (Tokyo: Shinyusha, 2000); *See also* Cabinet Decision, June 29, 1962, rev., Dec. 12, 1967.

<sup>91</sup> CALLIES & KOTAKA, *supra* note 38, at 150. *See also* Art. 1 of the LEL.

<sup>92</sup> *Id.* at 150.

<sup>93</sup> *Id.* (citing Cabinet Agreement, June 29, 1962).

<sup>94</sup> *Id.* at 154.

<sup>95</sup> *Id.* (citing Kotaka, *Commentary to the Land Expropriation Law*, 369; Tsuyoshi Kotaka, *Land Use Regulation and Supreme Court Decisions*, 7; Kotaka, *General Theory of Administrative Law*, 163).

<sup>96</sup> *Id.* *See also* Adversary Doctrine, Art. 48, Para. 3; JAPAN CONST. art. 49, para. 2.

consideration should not be given to subjective or emotional losses.<sup>97</sup> Finally, “the standard date for calculating compensation” must be the date of notification of project recognition under the LEL,<sup>98</sup> and any development value or potential value of the property shall not be included in compensation.<sup>99</sup> The LEL incorporates a “comparable sales method” to aid in determining the fair market value of land, where “actual sales of similar land located nearby, before the date of project confirmation,” are evaluated.<sup>100</sup> Certain criteria that is arguably subjective does get some consideration in the valuation process<sup>101</sup> – when historic, academic, or cultural values are associated with a property they may be incorporated into compensation calculation depending on how they “influence market values.”<sup>102</sup>

The LEL provides that the Lands Expropriation Tribunal (Land Tribunal) is the agency who determines compensation upon expropriation.<sup>103</sup> Owners of lands often group together in order to collectively bargain against the Land Tribunal for higher compensation.<sup>104</sup> Collective bargaining has proven to get land owners compensation that frequently exceeds the amount that would have been originally awarded by the Land Tribunal.<sup>105</sup> If land owners are unsatisfied with the amount of their award, they may appeal the Land Tribunals compensation determination to the Minister of

---

<sup>97</sup> CALLIES & KOTAKA, *supra* note 38, at 155. *See also Guideline*, art. 7 and art. 8, para. 4.

<sup>98</sup> *Id.* *See also* Art. 71 of the LEL. However, when land is acquired through negotiation and agreement, rather than through condemnation procedures, the date of the conclusion of the contract set forth between the parties is the date of calculation. *Guideline*, art. 47. *See also* CALLIES & KOTAKA, *supra* note 38, at 155.

<sup>99</sup> PORT & MCALLIN, *supra* note 6, at 615.

<sup>100</sup> *Id.*

<sup>101</sup> CALLIES & KOTAKA, *supra* note 38, at 157.

<sup>102</sup> *Id.* (illustrating examples of what and what would not have influence on property market values).

<sup>103</sup> PORT & MCALLIN, *supra* note 6, at 617.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Construction, who has the final say in the administrative appeal level.<sup>106</sup> After this process has been exhausted, land owners may appeal the issue to the courts.<sup>107</sup> “Such appeals may also be brought directly to the courts, provided that the issue is limited to [adjusting the amount of a] compensation award.”<sup>108</sup> The Supreme Court of Japan “has decided eight expropriation cases within the last five years,”<sup>109</sup> and has written two “significant decisions on compensation.”<sup>110</sup> Generally, the court held compensation is an “issue that should be settled early.”<sup>111</sup> “An owner cannot seek to quash the Land Tribunal’s decision” later in the process “as to the amount of compensation.”<sup>112</sup> Furthermore, if an expropriator should abandon a taking, “the landowners and other interested persons are entitled to be compensated for certain losses they have suffered.”<sup>113</sup>

#### IV. THE AMERICAN APPROACH TO CONDEMNATION AND EMINENT DOMAIN

##### A. *Current Eminent Domain Law in America*

American property law is based on estate, which is a much more flexible concept than strict ownership.<sup>114</sup> It consists of “various sets of legal interests” that can lie with different persons at any given

---

<sup>106</sup> *Id.* at 617-18.

<sup>107</sup> *Id.* at 618.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (discussing recent developments in Japanese property law and noting the important trend of judicial confirmation of traditional Japanese practices).

<sup>111</sup> *Id.* at 618.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 618. *See also* Art. 92 and Art. 106 of the LEL.

<sup>114</sup> Merryman, *supra* note 4, at 918 (beginning his discussion of the differences between ownership and estate in the two different legal systems of Italy, a Civil Law nation, and the United States).

time<sup>115</sup> – a set of rights which at minimum includes “the right to possess and use, the right to exclude others, and the right to transfer.”<sup>116</sup> Together, a variety of institutionalized interests in land are greater than in an ownership property system, and various sets of legal interests (e.g. future interests) can be conveyed to other persons.<sup>117</sup>

The takings clause within the Fifth Amendment of the United States Constitution is comparable to Art. 29, Para. 3 of the Japanese Constitution, and provides that “no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>118</sup> A main purpose of this Amendment’s guarantee is to address the dilemma that is caused when the American concept of individual rights of private property conflicts with the power of eminent domain exercised by the sovereign.<sup>119</sup> “Any unit of government in the United States” – federal, state, local, as well as quasi-governmental agencies, public corporations and utilities – has the authority of eminent domain to take property.<sup>120</sup> The power of eminent domain, or compulsory purchase, “does not [mean] that the government’s right to take [land] is based on a preeminent sovereign title or right.”<sup>121</sup> Rather, it is based on the concept that power is necessary to “allow the government to fulfill the interests of the people whom the government represents.”<sup>122</sup> In essence, the people of the state possess the original

---

<sup>115</sup> *Id.* at 927.

<sup>116</sup> JOHN SPRANKLING, RAYMOND COLETTA & M.C. MIROW, GLOBAL ISSUES IN PROPERTY LAW 2 (2006).

<sup>117</sup> Merryman, *supra* note 4, at 927.

<sup>118</sup> U.S. CONST. amend. V.

<sup>119</sup> CALLIES & KOTAKA, *supra* note 38, at 356 (acknowledging the clash between the two fundamental concepts).

<sup>120</sup> *Id.* at 355-56. *See also* 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.02 (3rd ed. 2006).

<sup>121</sup> CALLIES & KOTAKA, *supra* note 38, at 356 (citing Eramus, *Eminent Domain Jurisprudence*, at 1-2 ALI-ABA Course of Study, 1993).

<sup>122</sup> *Id.* (citing *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848)). *See also* 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.02 (3rd ed. 2006).

and ultimate title. The process of eminent domain in the United States “is typically governed by statute in each of the fifty states.”<sup>123</sup>

On the state level, the power to initiate the exercise of eminent domain ordinarily resides exclusively in the legislature and is inactive until legislative action is taken.<sup>124</sup> However, “once authority has been given to exercise the power of eminent domain, the matter is no longer [completely] legislative.”<sup>125</sup> “Executive authorities may then be allowed to decide whether the power will be invoked and to what extent it may be used.”<sup>126</sup> Federal eminent domain power is less limited, as the United States Constitution contains nothing that requires the exercise of the power of eminent domain to originate with an act of Congress.<sup>127</sup>

Legislative authorities may delegate the right to take property and have broad discretion regarding the selection of such agents.<sup>128</sup> State legislatures also have “broad discretion to amend or cancel the powers they have delegated,” as long as there are no pre-existing preclusive rights or statutes.<sup>129</sup> Delegation of authority must be guided by some principle or rules to limit its use.<sup>130</sup> Ordinarily,

---

<sup>123</sup> *Id.*

<sup>124</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[1] (3rd ed. 2006) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). *See also* 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[3] (3rd ed. 2006) (citing *Cline v. Kansas Gas & Elec. Co.*, 260 F.2d 271 (10<sup>th</sup> Cir. 1958)).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing *Van Witsen v. Gutman*, 79 Md. 405 (1894)).

<sup>127</sup> *Id.* (comparing *Kiernan v. Portland*, 223 U.S. 151 (1912), holding that “state legislation by initiative and referendum does not violate any rights under the federal constitution”).

<sup>128</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[3] (3rd ed. 2006) (citing *Dean v. County Bd. of Educ.*, 210 Ala. 259 (1923) and *Craddock v. Univ. of Louisville*, 303 S.W. 2d 548 (Ky. 1957)).

<sup>129</sup> *Id.* (citing *Western Union Tel. Co. v. Louisville & N.R. Co.*, 258 U.S. 13 (1922)).

<sup>130</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[3][b][iii] (3rd ed. 2006) (citing *U.S. v. 243.22 Acres of Land*, 43 F.Supp. 561 (E.D.N.Y. 1942), *aff’d* 129 F.2d 678 (2d Cir. 1942)).

“taking of private property involves so much detail that it is delegated to administrative officers or subordinate bodies,” and those parties exercise eminent domain “directly or by means of the inception of judicial proceedings.”<sup>131</sup> Eminent domain power may also be authorized to individuals, subject to constitutional limitations, if they are “bound to devote the property to be taken to public use.”<sup>132</sup>

Judicial action is an important means by which government acquires property by eminent domain in the United States.<sup>133</sup> The courts are the primary “vehicle for such compulsory purchase acquisitions,” mainly because they “determine the ‘just compensation’” aspect of the land condemnation.<sup>134</sup> The majority of condemnation actions begin with the filing of a complaint, which must contain a description and the intended public use of the property.<sup>135</sup> A summons is then issued to all parties who claim any interest in the land that is to be condemned.<sup>136</sup> The trial court then has the jurisdiction to determine issues that arise in the case,<sup>137</sup> and also must determine whether the taking “violates any Constitutional rights of any person contesting the validity of the proceedings.”<sup>138</sup> Any time after the service of the summons, and upon motion, the court may put the government (or private developer) in possession of the property sought to be condemned.<sup>139</sup> Once in possession, the condemning party may “do work” on the property pursuant to its

---

<sup>131</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[3] (3rd ed. 2006)

<sup>132</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[3][b][iii] (3rd ed. 2006).

<sup>133</sup> CALLIES & KOTAKA, *supra* note 38, at 357.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (citing HAW. REV. STAT. §§ 101-15 and 101-16 (2002)).

<sup>136</sup> *Id.* (citing HAW. REV. STAT. § 101-15 (2002)).

<sup>137</sup> *Id.* (citing HAW. REV. STAT. § 101-10 (2002)).

<sup>138</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03[1] at 3-46 (3rd ed. 2006).

<sup>139</sup> CALLIES & KOTAKA, *supra* note 38, at 357.

declared public use purpose of condemnation, as long as it has deposited fair compensation with the court.<sup>140</sup> The government is subject to strict notice requirements to the landowners, and additional parties are allowed to intervene.<sup>141</sup> The following is an illustration of what can lead to the filing and completion of such condemnation actions.

#### B. *Precursors to Condemnation in America*

The Fifth Amendment of the United States Constitution states that one of the requirements for the government to take private property is that it must be for a public use.<sup>142</sup> However, the concept of “public use” has come to mean very little, as the courts have greatly expanded the meaning of the term and can construe and stretch almost any project to constitute a public use.<sup>143</sup> Courts seem to only apply a minimal level of scrutiny. The Supreme Court rulings in the landmark cases *Hawaii Housing Authority v. Midkiff*<sup>144</sup> (“This Court will not substitute its judgment for a legislature’s judgment as to what constitutes “public use” unless the use is palpably without reasonable foundation”)<sup>145</sup> and *Kelo v. City of New London*<sup>146</sup>

---

<sup>140</sup> *Id.* (citing HAW. REV. STAT. § 101-10 (2002)).

<sup>141</sup> *Id.* (citing HAW. REV. STAT. §§ 101-20 and 101-21 (2002)).

<sup>142</sup> U.S. CONST. amend. V.

<sup>143</sup> James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859 (2004).

<sup>144</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 230 (1984) (where the Court held that the Land Reform Act of 1967 [enacted by the Hawaii Housing Authority (HHA) after the state legislature concluded that concentrated land ownership was responsible for skewing the state’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare] was constitutional and that the HHA enacted the Act not to benefit a particular class of individuals but to attack certain perceived evils of concentrated property ownership in Hawaii, which was a legitimate public purpose, and that condemnation was not an irrational power to achieve that purpose).

<sup>145</sup> *Id.*

<sup>146</sup> *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005).

(“Without exception, our cases have defined [the “public purpose”] concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field”)<sup>147</sup> show that almost any conceivable declaration of public use or purpose will be allowed to pass, even if that purpose is never actually brought to fruition.<sup>148</sup> An increasing number of eminent domain projects are turning out to be shams – they identify a small incidental public purpose which is actually a facade for an underlying purpose of a private benefit.<sup>149</sup> While many opponents of eminent domain are advocating for a stricter test in order to steer away from decisions like *Kelo*, the claim of “public use” is still being abused and has resulted in a very liberal and aggressive conception of the power of eminent domain.

### 1. The Landmark Decision of *Kelo*

The recently decided case of *Kelo v. City of New London* is a prime example of the liberality of the American concept of eminent domain and the breadth of the idea of “public use.” In *Kelo*, a property developer submitted a plan to the city which called for extensive redevelopment of a residential section of New London, including the addition of restaurants, stores, residences and a hotel. The city approved the plan on the theory that the development would bring economic rejuvenation – the plan was projected to create over 1000 jobs, increase tax and other revenues, and generally revitalize the economically distressed city.<sup>150</sup> The land slated for development included a state park and approximately 115 parcels of private property.<sup>151</sup> The developer was able to purchase most of the property, but nine owners of private parcels, including Susette Kelo, refused to sell.<sup>152</sup>

---

<sup>147</sup> *Id.* at 480.

<sup>148</sup> CALLIES & KOTAKA, *supra* note 38, at 370 (noting that the ultimate realization of a declaration of public purpose is not a necessary element to the privilege of expropriation).

<sup>149</sup> Krier, *supra* note 143, at 859.

<sup>150</sup> *Kelo*, *supra* note 146 at 473.

<sup>151</sup> *Id.* at 474.

<sup>152</sup> *Id.* at 475.

The nine land owners, whose land was not defined as blighted, brought suit against the city when it attempted to exercise the power of eminent domain to acquire the property. The landowners argued that the condemnation violated the Fifth Amendment because the underlying purposes of the proposed development did not constitute a public use. Despite their seemingly persuasive arguments, the Court ruled in favor of the City, holding that the development plan of “economic rejuvenation” served a public purpose and therefore constituted a public use under the Takings Clause of the Fifth Amendment.<sup>153</sup>

The Court’s reasoning displays the very liberal American application of the concept of “public use” – the Court stated that the definition of “public purpose” is broad,<sup>154</sup> and economic development satisfies the “public use” requirement.<sup>155</sup> Furthermore, it stated that a city’s determination that a program of economic rejuvenation was justified was entitled to deference, and did not require reasonable certainty that the expected public benefits would actually accrue; even if no economic rejuvenation ever occurs, this development project still qualifies as a public use, consistent with and affirming the *Midkiff* decision. This concept can be upsetting in that theoretically a person’s home could be taken by the government simply for the vain purpose of a developer wanting to build a hotel.

## 2. Even Quicker “Takes”

In addition to America’s generally aggressive condemnation practice, the United States further allows for a “quick take” provision, in which a condemning authority is permitted to take immediate possession of a property being condemned.<sup>156</sup> The quick take

---

<sup>153</sup> *Id.* at 484.

<sup>154</sup> *Id.* at 469.

<sup>155</sup> *Id.* at 484.

<sup>156</sup> CALLIES & KOTAKA, *supra* note 38, at 358 (citing HAW. REV. STAT. § 202-32 (2002)). Japan has a comparable procedure – the Law of Special Measure for Land Acquisition was added in 1961 to provide a procedure for urgent expropriation for projects that are especially needed. However, like the LEL, this law is rarely invoked because the Japanese prefer to carry out expropriation matters by mutual negotiation. Callies, *supra* note 38, at 147-48.

provision serves as a demonstration of what is valued in the United States – efficiency and business interests – since what the quick take provisions allow a condemnor to do is “avoid delays and the burden of interest payments.”<sup>157</sup> “The condemnor is generally required to pay a deposit” which ranges from a slight amount to the full fair market value of the property.<sup>158</sup> “After the deposit is paid, title vests in the government”<sup>159</sup> (meaning that the government can obtain title very quickly), “though the government does not obtain actual possession until [it] obtains a judgment ordering the surrender of the property.”<sup>160</sup> “The capacity to condemn is an inherent [and essential] attribute of [an American] sovereign government,”<sup>161</sup> and the American system certainly makes use of this grant of power.

C. *American Ideas and Procedures for Just Compensation*

“Compensation is the most important aspect of any American condemnation action.”<sup>162</sup> The payment of compensation is an essential element of the valid exercise of eminent domain<sup>163</sup> and an individual has a fundamental and constitutional right to compensation

---

<sup>157</sup> *Id.* at 360.

<sup>158</sup> *Id.* at 361. Procedures vary by state as to timing of applications for possession and deposit amounts. The federal condemnation statute is more stringent – it requires the federal agency concerned to pay a deposit that is no less than the property’s fair market value.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* See also Searles et al., *The Law of Eminent Domain in the U.S.A.*, C975 ALI ABA 333, 351 (1995); Title III of the Federal Uniform Relocation Assistance and Real Property Acquisition Act of 1970.

<sup>161</sup> 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.01 (3rd ed. 2006).

<sup>162</sup> Arguably, the American view supports the idea that compensation (or “getting paid” in a business type transaction) is the most important part of the process in terms of the American concept of justice in that it restores the person to the status quo. See also CALLIES & KOTAKA, *supra* note 38, at 358.

<sup>163</sup> 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.01 (3rd ed. 2006).

when his land is taken for public use.<sup>164</sup> “Compensation,” as used in the constitutional provision as a limitation upon the power of eminent domain, implies a full and complete equivalent (usually monetary) for the loss sustained by the owner whose land has been taken or damaged.<sup>165</sup> Nothing short of actual payment constitutes just compensation.<sup>166</sup> Restraint of use of property or excessive regulations cannot be imposed, even for a temporary period, without payment of compensation<sup>167</sup> (however, reasonable conditions may be imposed).<sup>168</sup>

The intent of just compensation is to not sacrifice justice for efficiency (though arguably that is what often results).<sup>169</sup> Just compensation is normally measured by the fair market value of the property at the time of the taking.<sup>170</sup> It should put the owner of the condemned property in as good a position pecuniarily as if his property had not been taken.<sup>171</sup> Generally, for the purposes of assessing compensation, “property is valued...at the date the summons is served on the property owner.”<sup>172</sup> “Any subsequent

---

<sup>164</sup> 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.01[1] (3rd ed. 2006).

<sup>165</sup> *See Id.*

<sup>166</sup> *Id.* (citing *Sale v. State Highway Public Works Comm’n*, 242 N.C. 612 (N.C. 1955)).

<sup>167</sup> 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.42[2] (3rd ed. 2006) (citing *Joint Ventures, Inc. v. Dept. of Transp.*, 563 So. 2d 622 (Fla. 1990)).

<sup>168</sup> *Id.* (citing *Nathanson v. Dist. Of Columbia Bd. Of Zoning Adjustment*, 289 A.2d 881 (D.C. App. 1972)).

<sup>169</sup> 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1A.04[2] (3rd ed. 2006) (citing Posner, *The Economic Approach to Law*, 35 TEX. L. REV. 757, 778 (1975)).

<sup>170</sup> 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.01 (3rd ed. 2006) (citing *U.S. v. 50 Acres of Land*, 469 U.S. 24 (1984)).

<sup>171</sup> *Id.* (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942)).

<sup>172</sup> CALLIES & KOTAKA, *supra* note 38, at 358. (citing HAW. REV. STAT. § 101-24 (2002) as an example of a state statute that sets forth such a provision).

change is irrelevant for compensation purposes.”<sup>173</sup> The right to claim compensation is not dependent upon the mode of appropriation,<sup>174</sup> nor upon whether the property is actually devoted to the purpose for which it was acquired.<sup>175</sup>

The constitutional provision obligating the condemnor to pay compensation is “strictly construed in favor of the condemnee.”<sup>176</sup> Thus, “the owner’s right to compensation is absolute and the condemnor has no right to impose conditions or qualifications thereon.”<sup>177</sup> When “private property has been taken or damaged for public use without compensation,” the property owner may take action in a suit by reason of “inverse condemnation” (a *de facto* or common law taking).<sup>178</sup> The adjudication of the right to condemn is made only after a hearing at which the owner/respondent/condemnee is entitled to be represented.<sup>179</sup> Such a hearing is the appropriate occasion for contesting the validity of the taking.<sup>180</sup> Most disputes regarding the exercise of eminent domain in the United States include the issue of just compensation.<sup>181</sup>

---

<sup>173</sup> Id.

<sup>174</sup> 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.01 (3rd ed. 2006) (citing *Wilshire v. Seattle*, 154 Wash. 1 (Wash. 1929)).

<sup>175</sup> *Id.* (citing *Jordan v. Clearfield County*, 107 Pa. Super. 441 (Pa. 1933)).

<sup>176</sup> *Id.* (citing *Sale v. State Highway Public Works Comm’n*, 242 N.C. 612 (N.C. 1955); *Guilford Realty Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69 (N.C. 1963); and *Stinchcomb v. Ok. City*, 81 Okla. 250 (Okla. 1921)).

<sup>177</sup> *Id.* (citing *U.S. v. Chicago, M., St. P. & P.R.R.*, 282 U.S. 311 (1931)).

<sup>178</sup> *See Id.*

<sup>179</sup> 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 26A.05[1] (3rd ed. 2006).

<sup>180</sup> *Id.* (citing *Forbes v. U.S.*, 268 F. 273 (5<sup>th</sup> Cir. 1920)). *See also* *State of Wash. ex. rel. Oregon R. and Navigation Co. v. Fairchild*, 224 U.S. 510 (1912).

<sup>181</sup> CALLIES & KOTAKA, *supra* note 38, at 356.

## V. A COMPARISON OF CULTURES AND LEGAL SYSTEMS

### A. Cultural Differences

While efficiency and economic development are highly valued in America, consensus and social norms are the overriding values in much of Japanese society. These cultural differences make the Japanese much more reserved in their practice of exercising eminent domain than in America, where land is condemned quite often for a large range of purposes. The Narita Airport situation and the landmark decision of *Kelo* demonstrate the dynamics of the two cultures in relation to eminent domain practices. The violent reactions to the attempted condemnation of the farm land near the Narita Airport site along with the Japanese government's subsequent decisions to forgo any expropriation<sup>182</sup> emphasizes the importance that Japanese society places on consensus and respect for original landowners. Legal provisions are sometimes placed second to the concept of abiding to social norms, and even though the Japanese government has the inherent right to expropriate private property, it will go out of its way not to do so in order to respect landowners. Even though the provisions of property law are expressly codified in Japan's civil law system, an otherwise legally permissible action by the government to condemn land will not yield positive results if the interests of the original landowners are not valued.<sup>183</sup>

The decision of *Kelo* paints a very contrasting picture. While landowners were upset by the government's condemnation action, the matter was resolved judicially four years after the filing of the original complaint<sup>184</sup> – a far contrast from the extensive forty year battle between landowners and developers at Japan's Narita Airport. The

---

<sup>182</sup> For instance, the Japanese government's decision to build the Kansai International Airport on an extremely costly man-made island that filled in Osaka Bay rather than to condemn land for the development.

<sup>183</sup> Illustrated through the Narita Airport example.

<sup>184</sup> The original complaint was filed in 2002 (*see Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789 (2002)) and a final decision was rendered in 2006 (*see Kelo v. City of New London*, 126 S. Ct. 326 (2005) and *Kelo v. City of New London*, 2006 Conn. Super. LEXIS 1754 (2006)).

*Kelo* decision emphasizes the liberal application of the concept of “public use” in American courts. There is a history of cases in which the American government has prevailed in taking private lands for purposes that seem to be a far cry from the constitutionally required “public use.”<sup>185</sup> Because efficiency and economic development are very highly valued in American society, and landowners are often left with no choice but to surrender their land to government condemnation and to accept the compensation that is given to them based on the property’s objective fair market value.

B. *Emerging Ironies*

Theoretically, the Civil Law system is more systematic and straightforward than the American common law system. For example, rather than a large field defined as “property law,” Japanese property provisions are codified and distributed.<sup>186</sup> It has even been argued that the American approach is “better” for attorneys because the greater ambiguity of the law creates more work for them (and therefore keeps them employed).<sup>187</sup> However, paradoxically, the American method of eminent domain has proven to be more streamlined, efficient, and uncompromising, while the Japanese system is more complicated and time consuming.

Additional ironies come forth when the two systems are further compared. In America’s legal system, where the law is generally more flexible than in a codified system, the concept of one’s right is very clear<sup>188</sup> – it is an entitlement that one does or does not

---

<sup>185</sup> Krier, *supra* note 143, at 859-860 (citing *Berman v. Parker*, 348 U.S. 26 (1954) where the Court held that clearing blighted land was sufficient to constitute public purpose and therefore sufficient to constitute “public use”; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) where the Court held that condemnation action aimed at an alleged land oligopoly constituted a public use; and *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) where the City’s plan to condemn a residential neighborhood and to convey it to General Motors to build an assembly plant was approved on the basis that the plant would give a boost to the economy and that amounted to public use (though this case has since been overruled by *County of Wayne v. Hathcock*, 471 Mich. 445 (2004)).

<sup>186</sup> See Merryman, *supra* note 4, at 917, 944.

<sup>187</sup> See *id.*

<sup>188</sup> PORT & MCALLIN, *supra* note 6, at 32, 37.

have, and many fundamental rights are afforded to U.S. citizens.<sup>189</sup> While Japan has the rigidity of a codified system, the Japanese concept of a “right” is vague, differs depending on context, and only gains meaning in a given situation.”<sup>190</sup> This variation in view could possibly stem from the cultural differences between the two societies, and the fact that the Japanese function by setting social norms for society, rather than by mandating rules that will apply in advance to any situation.<sup>191</sup>

In America, through the Constitution, “private property rights and personal liberty are treated together.”<sup>192</sup> The Japanese Constitution’s Article 29 “addresses property rights separately.”<sup>193</sup> However, the concept of personal liberty seems to be more closely associated with property rights in Japan than in America. There is a great amount of personal pride and attachment that is found between the Japanese and their property, and it is difficult to convince people to “give up” their land even when offered compensation. For example, at the early stages of the Narita Airport development, a number of villagers chained themselves to their homes and refused to leave.<sup>194</sup> Compensation is a much more accepted concept in America, where it is the most valued aspect of any condemnation action.<sup>195</sup> In contrast, Japanese eminent domain disputes primarily concern the actual taking of land. Americans, for the most part, will take monetary compensation. This is not the case in Japan, where people will strongly contest the expropriation action altogether, illustrated by

---

<sup>189</sup> Examples of fundamental rights afforded to United States citizens by their Constitution include the right to own property, to vote, to travel, and to free speech.

<sup>190</sup> PORT & MCALLIN, *supra* note 6, at 32.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 613.

<sup>193</sup> JAPAN CONST. art. 29. *See also* PORT & MCALLIN, *supra* note 6, at 613.

<sup>194</sup> *See* Tokyo Journal “Field of Dreams – Filled with Concrete” (02/00) (visited Nov. 1, 2006) <<http://www.tokyo.to/backissues/feb00/tj0200p6,7,8,9/index.html>>.

<sup>195</sup> CALLIES & KOTAKA, *supra* note 38, at 358 (describing certain means state statutes have taken to assess and compute such compensation).

the Narita Airport situation. An otherwise rigid code of expropriation provisions is set aside in Japan to honor the wishes of the individuals involved in the process.

## VI. CONCLUSION

While American federal, state and local governments have a simpler time exercising the power of eminent domain, American procedures and practices would not yield the same results if they were implemented in Japan. In regards to property, the cultures are not products of the practice of eminent domain – rather, it is the practice of eminent domain that is a product of the cultures and societies of the two countries. The differing values and goals of each country play a large role in the effectiveness of certain government practices. The liberal condemnation practices of America would not hold much value in the Japanese culture and if implemented would have an adverse outcome on the country. While it often ends up in drawn out, mishmash development projects, the Japanese prefer to decide matters by mutual negotiation and to proceed only by consensus. If these values are offended in the process, the results are often unfavorable and sometimes even chaotic to the Japanese society.

Not only is the United States' eminent domain practice unsuited for the Japanese culture, but the aggressiveness of the approach is even overwhelming and upsetting for some American landowners, many of whom are opposed to eminent domain altogether.<sup>196</sup> Opponents refer to the *Kelo* decision as “un-American,” and allege that the United States Supreme Court has completely done away with the requirement of “public use” by basically ruling that “eminent domain for private development is now legal.”<sup>197</sup> This belief has support as some American developers cannot imagine a world without eminent domain since it has become such an important tool for their businesses.<sup>198</sup> While certain values such as

---

<sup>196</sup> One opponent of eminent domain in America is Dana Berliner, a senior lawyer at the Institute for Justice, a leading advocate for curtailing its use. Diane Cardwell, *Bloomberg says Power to Seize Private Land Vital to Cities*, NEW YORK TIMES, May 3, 2006, at B.

<sup>197</sup> Paul Moskowitz, *Individuals' Rights and Eminent Domain*, NEW YORK TIMES, Aug. 7, 2005, at 14WC.

<sup>198</sup> Terry Pristin, *Square Feet; Developers Can't Imagine a World without Eminent Domain*, NEW YORK TIMES, Jan. 18, 2006 at C.

reasonableness and freedom would be advantageous in any societal context, it has proven difficult to completely fit these values into either the American or the Japanese eminent domain system because of conflicting principles and practices. The current eminent domain systems of each country seem to be the most effective for each of the two cultures at this point in time. Perhaps one day each government will be able to redress the major problems and develop a system that is able to satisfy the landowners, developers, and government alike.