Expropriation Procedures in Germany and the Netherlands: Ready for the Voluntary Guidelines on the Responsible Governance of Tenure?

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Abstract: Throughout the world, particularly in the Global South, state authorities expropriate property rights without following a fair, transparent, and participatory procedure. The Voluntary Guidelines on the Responsible Governance of Tenure provide good governance standards for expropriation procedures that are the results of in-depth world-wide consultations with all stakeholders. Not only countries in the Global South, however, but also countries in Global North are meant to observe the Guidelines. Whether or not expropriation procedures in Germany and the Netherlands are ready for the Guidelines is the topic of this contribution. The Guidelines contain several recommendations for fair, transparent, and participatory expropriation procedures. The state should empower affected persons to participate. Information about the procedure and the subject-matter should be widely disseminated. Participation should take the form of deliberations at a point in time when affected persons can still influence the decision to expropriate property. Obligations to balance all involved interests and to furnish reasons should also form part of a good expropriation procedure. German and Dutch law mostly comply with these Guidelines. However, these systems do not seem to empower participants sufficiently, and do not show a sufficient commitment to deliberations among participants and between participants and the authority. Also, German law does not inform holders of contractual use rights as well as it informs holders of registered property rights.


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1. Introduction

The expropriation of land commonly entails that the state takes away a property right from its holder and transfers the property right to a state entity or a private entity. In practice, the implementation of an urban development or infrastructure project, for instance, may necessitate the expropriation of property rights of one or more persons who refuse to sell their property. Not only is expropriation a severe infringement of the fundamental right of property, it also has a substantial adverse economic and social impact upon the expropriatee(s) and the community in which they live. It therefore comes as no surprise that constitutions around the world subject the expropriation of land to certain conditions. The most common regime subjects the expropriation of land to the requirements that an Act of Parliament authorises the expropriation authority to expropriate, the expropriation serves a public purpose, and the state pays fair compensation to the owner and other holders of property rights on the land.

Ideally, the expropriation authority will only decide upon whether or not the expropriation serves a public purpose and whether or not to expropriate the land after following a fair, transparent, and participatory administrative procedure. Such a procedure provides the authority with valuable information on the benefits and disadvantages of the expropriation as well as on the opinions of affected persons, allow for public control, strengthen the democratic skills of the citizens and raise the legitimacy of the expropriation. Arbitrary expropriations, by contrast, stand in the way of secure land tenure and cause distrust, thereby undermining the legitimacy of state action, inhibiting sustainable economic development and entrenching or raising the risk of poverty. In order to help avoid these consequences, the Committee on World Food Security (CFS) issued in 2012 the non-binding Voluntary Guidelines on the Responsible Governance of Tenure of

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2 For instance, Section 25(2) of the Constitution of the Republic of South Africa, 1996, reads as follows:
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 amount of which and the time and manner of payment of which
have either been agreed to by those affected or decided or approved by a court.
Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as: Guidelines). The Guidelines, in particular Guideline 16.2, contain provisions on how an expropriation procedure should be designed in order to ensure that it is fair, transparent and participatory.

Viewed from the comfortable perspective of countries in the Global North, such as the EU member states and the United States, where the legal systems widely operate smoothly, the redesigning of expropriation procedures may seem a task for the Global South only. It cannot be denied that in the Global South, the expropriation of land is often effected despite the fact that the competent authority has not followed a fair, transparent, and participatory administrative procedure. Yet, the Guidelines are globally applicable, and this must be taken literally, as I hear from officials of the Food and Agriculture Organization of the United Nations (FAO), which is assisting in the promotion and implementation of the Guidelines. Therefore, it is time to ask whether or not the expropriation procedures in the Global North are ready for the Guidelines.

This contribution examines what model of transparent and participatory expropriation procedures the Guidelines propose and whether expropriation procedures under German and Dutch law follow this model. For this purpose, section 2 first introduces the Guidelines, their importance to, and their potential impact upon, land tenure laws and policies. Section 3 defines the term “expropriation procedure” as it is used in the Guidelines to delineate the scope of the analysis. Section 4 contains an analysis of the expropriation procedure envisaged by the Guidelines and evaluates whether German and Dutch law meet the requirements of the Guidelines. The following aspects are considered: measures to empower people to participate; the provision of information to the people; the access to the expropriation procedure; the moment of participation; the position of the expropriation authority in the state system; the form of participation; the duty to furnish reasons and the obligation to balance interests.

5 See fn 4.
6 The Global South refers to all countries in Africa, Central and Latin America as well as most countries in Asia.
8 Guideline 2.4.
2. The Voluntary Guidelines on the Responsible Governance of Tenure

The FAO is an agency of the United Nations. Its primary goals are to reduce poverty and malnutrition and to assist in creating productive and sustainable forms of agriculture throughout the world. The good governance of the social, legal, and administrative arrangements surrounding the use of land (in short: land tenure) is considered to be one of the keys to achieving these goals.9 The “good governance” of land tenure prescribes how the access to resources should be regulated in practice in order to promote security of tenure.10 The FAO therefore facilitated a participatory process in order to develop standards for good tenure governance. This process cumulated in the Guidelines, which the CFS endorsed on May 11th, 2012.

The Guidelines were the result of a long bottom-up drafting process. In 2009 and 2010, 15 multi-stakeholder consultations were held with representatives of academia, civic organisations, the public sector, and the private sector.11 In spring 2011, e-consultations followed.12 In 2011 and 2012, a working group drafted the Guidelines on the basis of intergovernmental negotiations. The CFS endorsed the Guidelines in May 2012. This thorough input from major stakeholders fuels the hope that the Guidelines not only reflect the latest insights about the shortcomings of current tenure regimes, but will also meet with acceptance.13

The Guidelines call upon states, both in the Global South and the Global North, and other stakeholders14 to use the Guidelines when planning strategies,

9 Guidelines, p. IV.
12 Guidelines, p. VI.
14 Guideline 2.3.
policies, laws, programmes, and activities.\textsuperscript{15} However, the Guidelines are a non-binding instrument; none of the rules that it contains affect the national or international legal obligations of the states.\textsuperscript{16} The Guidelines can thus be classified as soft law. The effectiveness of soft law is often questioned, even more so if a non-state organisation adopted the rules. Yet, despite their non-binding nature and their non-state origin, they may have a considerable impact on how land tenure is regulated throughout the world.\textsuperscript{17} First, the FAO, an influential UN agency, is widely disseminating the Guidelines. The FAO hosted regional awareness workshops in 2013 and awareness workshops at national level in 2014,\textsuperscript{18} and has been providing training and advocacy materials.\textsuperscript{19} This has two effects. It raises awareness about the need to revisit the issue of tenure governance and its diverse subtopics.\textsuperscript{20} Furthermore, it provokes lively discussions among the people, which will change the tenure policies.\textsuperscript{21} In addition, the G8, the G20, the Rio 20+, the UN General Assembly, the Francophone Assembly of Parliamentarians and the Berlin Agriculture Ministers’ Summit are officially promoting the implementation of the Guidelines.\textsuperscript{22} Furthermore, the Guidelines were also endorsed by the World Bank and by large private corporations, such as CocaCola,\textsuperscript{23} which fosters the hope that these actors will also assist in raising awareness.

Secondly, their sources, the CFS and the FAO, and the input and assistance from major stakeholders during the consultations and the implementation phase, may give the Guidelines such authority as to encourage or even to force states to take into account the Guidelines, the more so if the FAO and the stakeholders actively engage in deliberations and lobbying for the Guidelines.\textsuperscript{24} In order to support this process, the FAO is seeking to form partnerships with stakeholders

\textsuperscript{15} Guidelines, p. V; see also Guideline 2.3; on the implementation of the Guidelines: A. Arial \textit{et al}, ‘Governance of Tenure, Making it happen’, [2012] \textit{Land Tenure Journal} 63, 67 et seq.

\textsuperscript{16} Guidelines 2.1, 2.2 and 2.4.


\textsuperscript{19} Guidelines, p. V.

\textsuperscript{20} Arial \textit{et al} (n15), pp. 67 and 71.


\textsuperscript{22} Munro-Faure (n18), Slide 2.

\textsuperscript{23} Munro-Faure (n18), Slide 3.

\textsuperscript{24} Zerilli (n21), p. 5, who described the mechanism behind this phenomenon as follows: “[...] [compliance] is effected by moral suasion and self-regulation, notably by the fear of being margin-
and enhance their capacity to identify flaws in the current tenure regime and improve tenure governance sustainably. Obvious candidates for partnerships include surveyors, notaries, and NGOs, such as Oxfam. Also, USAid, for instance, already committed 300 million US$ to promoting the implementation of the Guidelines. However, the involvement of FAO and other foreign or international institutions may also be viewed as an unwelcome external influence.

Thirdly, the fact that other countries, NGOs or private corporations implement the Guidelines or even see positive results from this implementation may further increase the pressure upon other countries to implement the Guidelines as well. For instance, USAid is realigning its land governance practices so as to comply with the Guidelines. Fourthly, as states, NGOs and private corporations start to implement the Guidelines, the Guidelines may increasingly reflect a common opinion of the majority of States, which may additionally persuade other States to implement them.

A major obstacle to the implementation of the Guidelines is their broad and abstract nature. States need a concretisation of the broad guidelines because the states will find it easier to comply with rather precise norms. However, this concretisation will require a lot of funding and personnel because the Guidelines should be adjusted to the cultural, economic, and social context in which they are applied. This is because a procedure will be more effective, efficient and likelier to meet with acceptance if it is adjusted to the needs of its users in a particular setting. As Guideline 5.5 puts it, procedures should be designed through participatory processes, open to all affected parties. The Guidelines themselves list supplementary guidelines on technical details as means to facilitate the concretisation. On the ground, the FAO is currently providing technical and legal assistance to various countries in the Global South and drafting technical and legal guides. Soon, FAO expects to publish a legal framework for the implementation.

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3. The Voluntary Guidelines on Expropriation

Guideline 16 deals with expropriation and compensation for expropriation. The Guidelines relevant to this contribution read as follows:

16.1 Subject to their national law and legislation and in accordance with national context, States should expropriate only where rights to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review. States should ensure that all actions are consistent with their national law as well as their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. They should respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation in accordance with national law.

16.2 States should ensure that the planning and process for expropriation are transparent and participatory. Anyone likely to be affected should be identified, and properly informed and consulted at all stages. Consultations, consistent with the principles of these Guidelines, should provide information regarding possible alternative approaches to achieve the public purpose, and should have regard to strategies to minimize disruption of livelihoods. States should be sensitive where proposed expropriations involve areas of particular cultural, religious or environmental significance, or where the land, fisheries and forests in question are particularly important to the livelihoods of the poor or vulnerable.

16.3 States should ensure a fair valuation and prompt compensation in accordance with national law. Among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination.

Before I turn to the delineation of the research object of this contribution, the expropriation procedure, I first describe the legal framework of expropriations under the Guidelines, German law, and Dutch law. In the context of the Guidelines, the expropriation of rights to land seems to refer to formal expropriation, which means that the state takes away a right on land from a natural or legal person and transfers it to the state or another natural or legal person.31 The equivalent constitutional provisions in German and Dutch law would be Art. 14(3) of the German Basic Law (Grundgesetz; GG) and Art. 14(1) of the Dutch Constitu-

31 Guideline 16.1. Furthermore, Guideline 4.3 stipulates that “all tenure rights are limited [...] by the measures taken by States necessary for public purposes.” Evidently, Guideline 4.3 also refers to regulation that restricts the exercise of a right.
tion (Grondwet; Gw). They subject the formal expropriation of land to the requirements that an Act of Parliament authorises the expropriation, the expropriation serves the public good or the public interest respectively and the state pays fair compensation. Guidelines 16.1 to 16.3 provide for the requirements that the expropriation serves a public purpose, the competent authority follows a transparent and participatory procedure, and the state pays fair compensation. Guideline 16.1 states that “[…] States should expropriate only where rights to land […] are required for a public purpose”. Moreover, the term “required” may imply the requirement that the expropriation is suitable and necessary to realise that purpose. Guideline 16.2 provides for the transparent and participatory procedure applicable to the “planning and process for expropriation”. Guideline 16.3 recommends that the state ensure a fair valuation and prompt compensation.

Expropriation can be effected by an Act of Parliament (statutory expropriation), by an administrative decision (administrative expropriation), or a court order (judicial expropriation), provided that an Act of Parliament confers the power to expropriate upon the administrative organ or the judge respectively. The Guidelines only seem to refer to administrative expropriation because Guideline 16.2 stipulates the expropriation procedure to allow for public participation, which is not characteristic of either parliamentary or court procedures. Therefore, in what follows, this contribution only deals with the administrative expropriation procedure. In addition, as both Guideline 16.2 and the Dutch administrative expropriation procedure only concern the decision to expropriate the property rights, but not the decision on the compensation, this contribution does not deal with the determination of the compensation.

3.1. Expropriation Procedures under the Guidelines

Legislatures around the world have introduced an expropriation procedure that precedes the administrative decision to expropriate. These procedures are first and foremost intended to provide the competent authority with sufficient information to take a well-founded decision on whether the expropriation would meet the constitutional and statutory requirements and whether or not to expropriate

32 Cf. Van der Walt (n3), pp. 456 et seq.
33 Dutch law combines elements of administrative and judicial expropriation. The expropriation of property rights cannot be effected by merely an administrative decision, but also requires a judgment following that administrative decision. See Art. 80, read in conjunction with Art. 18, of the Dutch Expropriation Act (Onteigeningswet, Ow).
the land.\textsuperscript{34} The procedure, however, also has the goals to give the public the opportunity to defend their interests in the process and to create acceptance.\textsuperscript{35}

An examination of the Dutch and German expropriation procedures in the light of the procedure prescribed by the Guidelines requires a definition of the term expropriation procedure. As the Guidelines provide the standards by which the national regimes are evaluated, it is appropriate to adopt the definition used in the Guidelines. In its first sentence, Guideline 16.2 provides that States should ensure that the planning and process for expropriation are transparent and participatory. The Guidelines, however, do not provide a formal definition. Rather, the Guidelines contain various requirements for the expropriation of land, which point to what an expropriation authority needs to address in an expropriation procedure.

On the one hand, the requirements concern expropriation as a means to implement a chosen project. Guideline 16.1 provides that States should only expropriate property where the expropriation is required for public purposes. The expropriation authority would thus have to determine whether the expropriation would serve a purpose that qualifies as public and whether it is suitable and necessary to expropriate land for this purpose. Guideline 16.1 further stipulates that the States should respect all legitimate tenure right holders by acquiring the minimum resources necessary. Similarly, Guideline 16.2 provides that the authority should have due regard to strategies that minimise disruptions of livelihoods. These recommendations confirm that the expropriation authority would have to scrutinise whether the expropriation of the (whole parcel of) land would be the least invasive means to realise the envisaged purpose.

On the other hand, the Guidelines also concern the characteristics of the project itself. According to Guideline 16.2, the expropriation authority should identify everyone who is likely to be affected and give them the opportunity to participate. The procedure should further provide information on alternative ways to realise the purpose. In evaluating this information, the authority should have due regard to strategies that minimise disruptions of livelihoods. This Guideline adds that the states should be sensitive where proposed expropriations


involve areas of particular cultural, religious or environmental significance or where the land is particularly important to the livelihoods of the poor and the vulnerable. The expropriation authority would thus have to consider and weigh the different interests involved and, in particular, search for alternative projects that do less harm to affected interests.

3.2. Expropriation Procedures in German Law

In German law, the administrative procedures that lead to an expropriation are generally divided into two phases. The first phase is the planning phase. In this phase, the planning authority determines the goal that a piece of land has to serve and designs the project that will be implemented on that land. In taking these decisions, the planning authority balances the involved interests and considers less harmful alternatives to the envisaged project. If there is no formal planning procedure, the expropriation authority will also perform this function. The planning phase thus largely addresses what Guideline 16.2 requires.

The second phase is the expropriation phase. In this phase, the competent authority decides whether or not to expropriate the property rights to allow for the implementation of the chosen project. Before taking this decision, the authority first scrutinises whether the plan is lawful. Then, it examines whether the expropriation of the land would meet the requirements of the applicable expropriation statute and Art. 14(3) GG. The project has to serve a public good objective of particular weight, which refers to the purpose of the project, and has to be suitable, reasonably necessary, and proportionate to contribute to the achievement of the project’s purpose. The expropriation has to be a suitable, strictly necessary, and proportionate means to make the implementation of the project possible. During the expropriation phase, the competent authority does not consider alternative projects. In the expropriation phase, the competent author-

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37 G. Henze, Die nicht planakzessorische Enteignung: Prüfung der Voraussetzungen durch die Enteignungsbehörde (Peter Lang 2009), pp. 95 et seq.
38 Runkel, in Ernst/Zinkahn (n36), § 87, margin number 55.
41 Runkel (n38), § 87, margin number 55.
ity thus addresses issues raised in Guidelines 16.1 and 16.2. An expropriation procedure in terms of the Guidelines therefore comprises the planning and expropriation phase in German law.

The examination in this contribution is confined to the expropriation of land for the purpose of implementing a binding zoning plan under the Federal Building Code (Baugesetzbuch; BauGB). This form of expropriation not only frequently occurs in practice, but also nicely illustrates how the law shapes and connects the planning and expropriation phase. In the planning phase, the municipal council of each municipality adopts a binding zoning plan on the basis of a balancing of all relevant interests.42 This zoning plan prescribes the permissible use of the land. It prohibits other uses, but does not compel the owner or other users of the land to use the land in accordance with the plan.43 If it is necessary to expropriate the land in order to implement the binding zoning plan, the municipality may proceed to the expropriation phase. According to § 85(1) lit. 1 BauGB, the municipality may apply for the expropriation of the land. The expropriation authority will then scrutinise whether the project and the expropriation meet the statutory and constitutional requirements.44 Each phase thus has its own dedicated planning or expropriation procedure.

3.3. Expropriation Procedures in Dutch Law

The most important basis for expropriation in Dutch law is Title IV of the Expropriation Act. More specifically, it is Art. 77(1) lit. 1 Ow, which permits the expropriation of land for the implementation or enforcement of a binding zoning plan. Art. 77(1) lit. 1 Ow divides the administrative procedures that lead to an expropriation into two phases. The first phase is the planning phase. In this phase, the municipal planning authorities adopt the binding zoning plan and specify the project for which land can be expropriated, often in accompanying documents.45 The designations in the binding zoning plan are based upon a

42 § 1(7) of the Federal Building Code (Baugesetzbuch; BauGB).
balancing of all interests relevant to spatial planning that would be concerned by the binding zoning plan. The municipality also considers less harmful alternative projects. In the planning phase, the competent authority thus addresses what is required by Guideline 16.2.

The second phase is the expropriation phase. In that phase, the municipality applies to the Crown for the expropriation of the land required to implement the binding zoning plan. In an administrative expropriation procedure, the Crown decides whether or not to expropriate the land by royal decree (Koninklijk besluit; KB). The Crown scrutinises whether the expropriation serves to implement or enforce a binding zoning plan, whether the expropriation serves a public interest (publiek belang), whether it is urgent to expropriate the land and whether the expropriation is a necessary and proportionate means to make the implementation of the project possible. The binding zoning plan precludes that objections of a spatial nature (planologische aard) are made before the Crown, which further separates the planning and the expropriation phase. An objection of spatial nature refers to several categories of cases. For instance, citizens can no longer make the objection that there is a less harmful alternative to the project or that the project is based upon an unequitable balancing of interests. In the expropriation phase, the competent authority thus addresses issues raised in Guidelines 16.1


48 Art. 78(1) Ow.

49 J.A.M.A. Sluysmans & J.J. Van der Gouw, Onteigeningsrecht (Kluwer 2015), pp. 42 et seq.


and 16.2. Therefore, an examination in the light of the Guidelines has to concern both the planning and the expropriation phase.

4. Evaluation

In this section, I first turn to the definitions of transparency and participation in the Guidelines and the benefits and limitations of transparency and participation in order to provide a framework for the analysis of the Guidelines and clarify its significance. Subsequently, I analyse the Guideline 16.2 and other relevant provisions as to the following aspects: required measures to empower people to participate; the provision of information to the public; the access to the procedure; the moment of participation; the position of the authority in the state system; the form of public participation; and the obligation to furnish reasons and balance the involved interests. In each sub-section, I compare the requirements under the Guidelines to the current legal regimes in German and Dutch law and evaluate whether they comply with the Guidelines.

4.1. Participation and transparency

Guideline 16.2 provides that the expropriation procedure should be participatory and transparent. Before turning to the specific recommendations of the Guidelines and evaluating whether German and Dutch law comply with them, I first explore the meaning of the terms “participatory” and “transparent” and the benefits and limitations of these concepts.

Public participation refers to the contributions to, and comments on, a proposed expropriation by the public in an administrative procedure conducted by the expropriation authority. These principles first entail that the State should, prior to its decision, engage with, and

52 Coglianese et al. (n34), p. 3. Consequently, participation does not refer to all contributions of the people or their representatives to an expropriation decision. In particular, it does not refer to deliberations among members of a directly elected body that has been authorised to expropriate. Sections 226(1) and (8) of the UK Town and Country Planning Act 1990, for instance, authorise directly elected councils of districts, boroughs and counties to issue compulsory purchase orders that have to be confirmed by the Secretary of State. Deliberations among the elected representatives are also contributions of the people and may enhance the democratic legitimacy of the decision, but are not considered in this contribution.
seek the support of those whose legitimate tenure rights could be affected. Engaging with these people also includes responding to their contributions. This shows the interactive character of participation in terms of the Guidelines. Successful interactive participation, however, cannot be taken for granted. That is why the Guideline recommends that the state ensure that the participation is active, free, effective, meaningful and informed. The effectiveness and freedom of participation are threatened by power imbalances within the group of persons interested in the outcome of the procedure. Some of these persons are better informed, have a higher social status or simply have better communication skills. For this reason, the Guideline provides that the State should take these imbalances into account when shaping the procedure.

Transparency is a pre-condition of informed participation in expropriation procedures. Guideline 3B.8 recognises transparency as a leading principle of responsible governance of tenure. It entails that the States should clearly define and widely publicise decisions, policies, laws, and procedures. Concerning the expropriation procedure, this definition thus in particular requires transparency as to the details of the procedure. Moreover, the State should ensure that the participation of the public is informed, as Guideline 3B.6 provides in very general terms. Therefore, the people need access to information about the facts underlying the procedure. The background of these recommendations is that it was a major demand of the participants in the consultations in 2009 and 2010 that information be easily accessible. The principle of transparency thus ensures that the people can make an informed contribution and enables them to detect incomplete information, unfair treatment and errors in the reasoning of the administrative organ, and to base their views upon all the available information.

If transparency is ensured and other pre-conditions of effective participations are met, such as the actual ability to participate, participation can contribute substantially to the good governance of tenure in general, and security of tenure in particular. First, it provides the competent authority with more information on the subject-matter, including the impact that the decision would have on disadvantaged members of society. It thus enhances the quality of the decision because the competent authority can better balance the affected interests. Sec-

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54 Coglianese et al (n34), p. 3.
55 Outcome document of consultation meetings (n11), p. 4.
ondly, participation that goes beyond the mere provision of information can serve as an accountability and control mechanism that protects the people. The people that are affected by a decision can verify whether the information is complete, the competent authority has taken due account of their interests, and whether the reasoning of the competent authority is flawed. Thirdly, it enhances the (democratic) legitimacy of the decision to expropriate. The people that are affected by a decision will be more likely to accept the expropriation if they have received all information on the subject-matter and have had the opportunity to express their view in an expropriation procedure with sufficient safeguards. Participation thus prevents unrest and interference with the use of the land after the decision, thereby promoting security of tenure. A fourth benefit of participation is capacity building. Citizens have to learn how to participate effectively in democratic and administrative processes. If the State has to ensure that participation is active, free, effective, meaningful and informed, the State will encourage the people to improve their knowledge on land issues and their communication skills. This may in the future prevent decisions that further disadvantage already disadvantaged people.

There are, however, certain hindrances to the realisation of these benefits. The states must ensure that all affected persons are equally and effectively represented and that the legal framework is properly implemented. Participation is also often found to introduce poor-quality thinking, e.g. flawed reasoning and considerations that are not based upon all relevant facts, into the decision-making process and to lead to results that are overly protective of the participants’ interests. The competent authority should therefore seek support from experts in both the participation process and the decision-making process in order to avoid these effects. Furthermore, the participation of the general public must not require so many resources and time that the process is considerably delayed or

59 Dietz & Stern (n35), pp. 43 & 50.
60 Turnhout et al (n13), p. 26; Dietz & Stern (n35), pp. 51 & 63.
62 Dietz & Stern (n35), pp. 54 & 64.
that the quality of the decision declines.\textsuperscript{63} Non-empirical legal research cannot answer the question to which extent these requirements are met in practice, and the examination of these aspects therefore goes beyond the scope of this contribution. These aspects, however, must be taken into account when expropriation procedures are designed and their importance are addressed below when different forms of participation are discussed.

4.2. Empowerment

Guideline 3B.6 provides that the State should ensure that the participation is active, free, effective, meaningful, and informed. The extent and content of this recommendation are not entirely clear because it may, on the one hand, merely refer to guaranteeing procedural fairness or, on the other hand, even to active measures to empower people to participate effectively. Effective participation requires knowledge on the subject-matter and the procedure, communication skills, creativity as well as courage.\textsuperscript{64} Most scholars acknowledge that there are vast differences between people as to their social power and status, their economic abilities, their communication skills, intelligence, creativity and courage and that these differences inhibit the participation of some people, even in countries like the United States or EU member states.\textsuperscript{65} Some people simply cannot participate effectively. Other people with less well-developed abilities are, in practice, silenced by the conditions under which they have to participate or by those with better developed abilities.\textsuperscript{66}

These empirical findings indicate that such differences between participants may prevent the benefits of public participation from accruing. Procedural fairness is thus not sufficient to guarantee effective participation; rather, the state needs to adopt empowering measures. The Guidelines reflect this finding. Guideline 3B.6 recommends that the State take into account power imbalances between the people when designing participation mechanisms. Guideline 3B.3 establishes equity and justice as leading principles of the Guidelines. These principles entail that the State should acknowledge that there are differences between people and that the State should take positive action, including em-

\textsuperscript{63} F.M. Barnard, Democratic Legitimacy: Plural Values and Political Power (McGill-Queen’s University Press 2001), p. 143; Dietz & Stern (n35), p. 34.

\textsuperscript{64} Turnhout et al (n13), p. 26.


\textsuperscript{66} O’Neill (n13), p. 484; Goodwin (n58), pp. 487 et seq; and Kohn (n61), pp. 412 et seq.
powering measures, in order to promote equitable tenure rights and access to land. Guideline 6.6 confirms that states should consider additional measures to support vulnerable or marginalised groups who would otherwise not be able to access administrative services. Guideline 4.10 points in a similar direction by recommending that the states facilitate participation. The history of the Guidelines confirms the finding that the state should take empowering measures. The participants of the consultations already demanded that people be empowered, in particular, to provide meaningful feedback and comments on the proposed action.\textsuperscript{67} As means to achieve this goal, the participants mentioned education and awareness raising.\textsuperscript{68}

As some scholars suggest,\textsuperscript{69} the main obstacle to effective participation in German and Dutch administrative procedures seem to be the complexity of the proposed project and the interests involved as well as the limited ability of some participants to see through this complexity and to formulate an adequate response. In addition, differences in intellectual abilities and financial leeway may further disadvantage those who are already disadvantaged. In addition to raising educational standards, which seems to be a long-term empowering measure, the most suitable empowering measure seems to be a representative who is sufficiently familiar with the facts of the case and administrative law to defend the interests of their client. In particular, attorneys-at-law may be suitable candidates.

Both German and Dutch law permit all persons to seek assistance from other people or to authorise another person to represent them in their dealings with an administrative authority.\textsuperscript{70} The formal possibility to obtain the help of other people, however, does not mean that Dutch and German law properly empower people to participate. Effective assistance is mostly expensive. For this reason, the mere formal possibility to seek help from somebody else may actually widen the gap between the well-off and the disadvantaged. The state should therefore at least reimburse the costs of the assistance.

In the planning phase, neither Dutch nor German law reimburses the costs incurred by participants before the municipal authorities have adopted the zoning plan.\textsuperscript{71} However, affected persons can lodge a complaint against the zoning plan with the competent Higher Administrative Court (\textit{Oberverwaltungsgericht}) in
Germany\textsuperscript{72} or with the Judicial Division of the Council of State (\emph{Afdeling bestuursrechtspraak van de Raad van State}).\textsuperscript{73} Under German law, the municipality or another state entity will, in principle, only reimburse the costs incurred by participants if the complaint is successful.\textsuperscript{74} German law, however, makes provision for legal aid for those whose personal or financial circumstances do not allow them to go to court if the complaint is sufficiently likely to be successful.\textsuperscript{75} A similar regime applies under Dutch law. If the complaint is successful, the Judicial Division is competent to order the municipality to reimburse the costs incurred by the complainant.\textsuperscript{76} Persons who earn less than \texteuro{}26,000 per year and do not have assets worth more than \texteuro{}25,000 can apply for legal aid.\textsuperscript{77} Whether or not legal aid sufficiently empowers participants is questionable because the bureaucratic application for legal aid and the need to go to court may have a deterring effect on participants. This is particularly worrisome because in the planning phase participants may still have an influence on the project that is selected.

In the expropriation phase, the costs of legal advice and representation are reimbursed. Under German law, §121(1) and (2) BauGB stipulate that the owner, the holders of limited property rights, and holders of contractual use rights can have their expenses reimbursed if the costs were necessary to defend their legal interests.\textsuperscript{78} Under Dutch law, Art. 50 of the Expropriation Act stipulates that the courts, in principle, orders the municipality to reimburse the legal costs incurred by affected persons.\textsuperscript{79} If the Crown does not take the expropriation decision or the municipality does not proceed to expropriate the land, the municipality will still have to reimburse those costs.\textsuperscript{80}

A smaller group of people in need of even more empowerment are blind, deaf, mute, illiterate, and people who cannot read or speak the country’s official language. German law takes empowering measures to enable these people to interact with the authorities. Deaf and mute people must have access to a person who can use the official German sign language.\textsuperscript{81} Upon request the authority must

\textsuperscript{72} §§47(1) lit. 1 of the Code of Administrative Court Procedure (\emph{Verwaltungsgerichtsordnung}; VwGO), 10 BauGB, 74(1) and 70 VwVfG.

\textsuperscript{73} Art. 8:1 Awb, Art. 2, Bijlage (Annex) 2, Awb, read in conjunction with Art. 8:6 Awb.

\textsuperscript{74} §154(1) and (2) VwGO.

\textsuperscript{75} §§166(1) VwGO, 114(1) of the Civil Procedural Code (\emph{Zivilprozessordnung}; ZPO).

\textsuperscript{76} Art. 8:75(1) Awb.

\textsuperscript{77} Art. 12(1), 34(1) of the Legal Aid Act (\emph{Wet op de rechtsbijstand}).

\textsuperscript{78} Battis (n43), §121, margin number 7.

\textsuperscript{79} Den Drijver \textit{et al} (n50), p. 64.

\textsuperscript{80} Den Drijver \textit{et al} (n50), p. 50.

\textsuperscript{81} H. Schmitz, in Stelkens \textit{et al} (n36), §23, margin numbers 70 \textit{et seq}. 

make relevant documents accessible for blind people. People who cannot read or speak German can use their mother tongue to make written or oral representations. In principle, the person using their mother tongue needs to provide a translation within a certain period of time or bring an interpreter. However, where such a person cannot afford to pay for the translation or the interpreter, the authority will have to cover the costs of the translation or an interpreter. This assistance seems exemplary. What is, however, less exemplary is that these people need to take the initiative and seek the authority’s assistance. For instance, the blind, the illiterate and people who cannot speak or read the official language are, in principle, expected to seek the help of acquaintances, friends or family to understand from written information that there is an administrative decision in the making and that they need to take action. This might be a significant hurdle to empowering this group. However, identifying and separately notifying all members of this group may be too burdensome for state authorities. That said, the authority should at least pro-actively approach these people when the authority is aware of their disadvantages.

Under Dutch law, Art. 3:2 of the General Administrative Law Act (Algemene wet bestuursrecht) stipulates that every authority has the obligation to prepare an administrative decision prudently and to gather all information relevant to the decision. This may, for example, oblige the authority to provide an interpreter for a person who does not speak the official language. This is likely to apply to all other groups who cannot communicate effectively in Dutch, in particular the deaf and the mute who will need a person who knows the Dutch sign language. There is, however, no obligation to identify and pro-actively to help disadvantaged groups. As in Germany, this may be a major obstacle to empowering these people.

This analysis is, of course, only a rough assessment of empowering measures in these two jurisdictions. Empirical research needs to be done into how much empowerment which groups of people need and what authorities on the ground actually do to empower them.

82 Schmitz (n81), § 23, margin number 71a, see also regulations at state level, such as the regulation on barrier-free documents of North-Rhine Westphalia (Verordnung über barrierefreie Dokumente – VBD NRW).
83 § 23(2) VwVfG; Schmitz (n81), § 23, margin numbers 40 et seq and 49 et seq.
84 Schmitz (n81), § 23, margin numbers 8 and 40 et seq.
85 See, for instance, Tiedemann, in J. Bader & M. Ronellenfitsch (eds), Beck’scher Online-Kommentar VwVfG (C.H. Beck), § 41, margin number 15; Schmitz (n81), § 23, margin number 71a.
4.3. The provision of information to participants

The provision of information on the subject-matter and on the characteristics of the procedure, is vital to effective participation. Only if the information is easily available, will the public be able to detect incomplete information, unfair treatment, and errors in the reasoning of the administrative organ and to base their views upon all the available information.\(^87\) There are three aspects to the provision of information in the Guidelines that need further examination. The first one is the group of people that have access to information. Guideline 3B.8 recommends that the states widely publicise information on the procedure. The entire public should thus have access to the details of the expropriation procedure. The access to information on the subject-matter, however, seems to be restricted to those who may be affected by the decision. Guideline 3B.6 only recommends that the states engage with those who, having legitimate tenure rights, may be affected by the decision. Thereafter, Guideline 3B.6 recommends that states should ensure informed participation. It would be logical to deduce that the State should provide information to those whose legitimate tenure rights may be affected by the decision, but not to other people. In an expropriation context in a developed country, persons whose legitimate tenure rights may be affected are in particular the owner of the land, holders of limited real (use) rights, such as leaseholders and holders of servitudes, and holders of contractual use rights, such as tenants. Guideline 16.2 is the more specific provision on expropriation procedure. This Guideline states that the states should ensure that persons who are likely to be affected by the expropriation decision are properly informed. This Guideline confirms what has been said about the other Guidelines. These recommendations thus clearly make a distinction between persons who are likely to be affected by a decision and those who are not. Hence, the access to information on the subject-matter is restricted.

Remarkably enough, this approach seems to depart from the demands raised during the consultations. The participants demanded that information be easily accessible and available to all.\(^88\) Would this approach have been better? That is doubtful. It is true that the more restrictive approach to information on the proposed expropriation enables fewer people to participate and might lead to a loss of valuable information and other input from people who are not likely to be affected by the decision. This might render the decision of lower quality. On the other hand, however, having to provide information or the access to information

\(^87\) Coglianese et al (n34), p. 3; Gutmann & Thompson (n56), pp. 47 & 95.
\(^88\) Outcome document of consultation meetings (n11), p. 4.
to all members of society might require time and resources that could be essential to the functioning of the authority or could otherwise be dedicated to the participatory elements of procedure.\textsuperscript{89}

The second aspect is the content of the provided information. Guideline 16.2 states that the States should ensure that the persons who are likely to be affected by the decision are properly informed. Guideline 3B.6 recommends that the States ensure active, free, effective, meaningful and informed participation. The deduction would be that the states have to provide all the information necessary to enable the people to make meaningful representations and to defend their interests. This will in particular include information on the project, the land required for the project and when the people can exercise which procedural rights.

The third and last aspect to be considered is the degree of proactiveness that the Guidelines expect from the states or, in other words, the question whether the competent authority needs to provide information on its own initiative. Guideline 3B.8 recommends that the states widely publicise the procedure to be followed. Furthermore, according to Guidelines 3B.6 and 16.2, the states should ensure that the participants make a contribution that is based upon a proper information basis. The Guidelines thus expect the State to be pro-active. Given the Guidelines’ commitment to empowering people to participate, this choice is logical and can particularly help disadvantaged participants to participate effectively. Whether or not it is feasible for state authorities to be that pro-active in practice, remains to be seen. In any event, proactiveness requires time and resources that could also be dedicated to other features of the procedures.\textsuperscript{90}

\subsection*{4.3.1. German Law}

At the planning stage in German law, a thorough participation mechanism precedes the adoption of the binding zoning plan. Twice, the municipality has to provide all inhabitants of the municipality with information. The municipality first has to publicise its intention to draft and adopt a binding zoning plan.\textsuperscript{91} As early as possible, the entire public is informed about the goals of the planning, the alternative concepts and the likely effects.\textsuperscript{92} Having considered the comments of the public on the goals and concepts, the municipality provides for inspection by the public a draft of the binding zoning plan with a justification thereof and

\textsuperscript{89} Coglianese \textit{et al} (n34), p. 4; Barnard (n63), p. 143.
\textsuperscript{90} Barnard (n63), p. 143; Dietz & Stern (n35), p. 34.
\textsuperscript{91} § 2 (1), 2\textsuperscript{nd} sentence BauGB.
\textsuperscript{92} § 3 (1), 1\textsuperscript{st} sentence BauGB.
details on the goals, the purposes, and the effects of the binding zoning plan.\textsuperscript{93} In addition to other information on the procedure, the municipality has to announce that the drafts are publicly accessible for one month and that citizens can submit comments within that period.\textsuperscript{94} The manner in which the authority timely announces the intention to adopt a binding zoning plan and the opportunity to inspect the draft depends upon the law of the respective state (\textit{Land}) or municipality.\textsuperscript{95}

At the planning stage, German law thus over-achieves the goals set by the Guidelines. Unlike the Guidelines, German law foresees the provision of information on the procedure, the envisaged project, its effects, and alternatives to all inhabitants of the municipality. This information should be sufficient to enable people to participate or, at least, to raise their awareness and make them seek more information. Also, the municipality needs to take the initiative to provide information and must not wait for citizens to inquire about the plan.

At the expropriation stage, German law follows a different regime. § 108 BauGB provides that the expropriation authority has to summon the owner and other holders of registered real rights to a hearing about the expropriation. According to § 108(3) BauGB, the notice includes the essential content of the application for expropriation, in particular the purpose of the expropriation and the targeted land,\textsuperscript{96} and the request to submit objections before the hearing. The essential content certainly does not refer to all information necessary to make a meaningful contribution. Other participants are merely notified of the initiation of the expropriation procedure by a public notice.\textsuperscript{97}

§ 29(1), 1\textsuperscript{st} sentence of the Administrative Procedure Act (\textit{Verwaltungsverfahrensgesetz}, VwVfG) further obliges the expropriation authority to allow participants “[…] to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests.” Furthermore, § 25(1), 2\textsuperscript{nd} sentence VwVfG provides that the competent authority shall “give information regarding the rights and duties of participants in the administrative proceedings” to participants. It is disputed whether or not the information only includes procedural rights of the participants in the specific administrative procedure or also substantive rights of the participant.\textsuperscript{98}

\textsuperscript{93} §§ 3 (2) and 2a lit. 1 BauGB.
\textsuperscript{94} § 3 (2), 1\textsuperscript{st} and 2\textsuperscript{nd} sentence BauGB.
\textsuperscript{95} Battis (n43), § 2, margin number 4.
\textsuperscript{96} Battis (n43), § 108, margin number 5.
\textsuperscript{97} § 108(5) BauGB.
\textsuperscript{98} Kallerhoff (n69), § 25, margin number 44; including information about substantive rights: D. Herrmann, in Bader & Ronellenfitsch (n85), § 25, margin number 14.
expropriation authority in any case has to inform participants about various procedural and substantive aspects of the expropriation procedure. Importantly, however, §§ 25, 29 VwVfG only oblige the authority to give information upon request.\(^9\)

Who are these participants? §§ 25 and 29 VwVfG refer to participants in terms of § 13 VwVfG.\(^1\) Participants are persons listed in § 13(1) VwVfG or persons whose legal interests may be affected by the procedure and who are recognised as participants by the competent authority. However, § 106 BauGB is a lex specialis of § 13 VwVfG and defines the term ‘participant’ as applied to expropriation procedures.\(^1\) § 106 BauGB inter alia lists the expropriatee, the holders of real rights on the land and certain holders of personal rights, in particular tenants and other holders of rights to use the land. However, the Federal and State Information Freedom Acts (Informationsfreiheitsgesetz) grant everyone access to information upon request, subject to narrow exceptions.

At the expropriation stage, German law only partially complies with the Guidelines. The German regime meets the requirements of the Guidelines in that the authority must actively provide information on the procedure and at least some abstract information on the planned project to the owner and holders of limited real rights. The notice and the information contained therein may be sufficient to make the owner and holders of limited real rights aware of what is at stake and to make them request further information from the authority. Therefore, this may reflect an equitable balance between the need to inform affected persons and the need to use resources wisely. Holders of contractual use rights, however, do not receive a notice, but are only informed through a public notice. There is the danger that tenants fail to realise fully that the expropriation threatens their use rights. As tenants are mostly in a weaker position already, this seems contrary to the Guidelines’ commitment to empowering people to participate effectively. German law thus fails to comply with the Guidelines in that the authority does not sufficiently inform holders of contractual use rights.

4.3.2. Dutch Law

At both the planning stage and the expropriation stage in Dutch law, the applicable procedure is the uniform public preparatory procedure (uniforme openbare

\(^9\) Kallerhoff (n69), § 25, margin number 40.
\(^1\) Kallerhoff (n69), § 29, margin number 37; Kallerhoff (n69), § 25, margin number 24.
voorbereidingsprocedure) governed by Division 3.4 of the Awb. At the planning stage, the municipal council has to make the draft of a binding zoning plan, including an explanatory document, available for inspection at the municipality with all documents necessary to evaluate the plan. Before it is made available for inspection, the content of the draft must be publicised online, in the state gazette and a suitable newspaper or another suitable medium. This notification also includes the place and the time at which the draft can be inspected and how everyone can submit their objections. If the designations of the draft binding zoning plan are envisaged to be implemented within a short period of time, the municipality also has to send a separate notification to the owners and holders of limited real rights on the affected land.

At the planning stage, Dutch law thus overfulfils the standards of the Guidelines. In line with the Guidelines, the Dutch planning authority proactively provides sufficient information on the envisaged plan and the procedure. This information is available to the entire public so that Dutch law, unlike the Guidelines, does not restrict the group of people who have access to the information.

The expropriation authority has to make the draft decision available for inspection at the municipality in which the concerned parcels of land are located. Before it is made available for inspection, the mayor of that municipality at least publicises a summary of the content of the draft decision in the state gazette and a suitable newspaper or another suitable medium. The authority upon its own initiative has to give everyone the chance to be aware of the plans and to obtain more information. In addition, the Dutch Government Information (Public Access) Act (Wet Openbaarheid van Bestuur; Wob) provides for access to information upon request to everyone. The access can only be denied under very narrow conditions. Moreover, the mayor has to send the draft to persons to whom the decision will be directed. In expropriation cases, these persons will be in particular the owners, holders of registered limited real (use)

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102 Art. 3.8(1) Wro and art. 78(2) Ow.
103 Art. 3.1.6 Bro.
105 Art. 3:12(1) Awb, read in conjunction with Art. 3.8(1) lit. a Wro; artt. 1.2.1(1), 1.2.1a, and 1.3.1 Bro.
106 Art. 3:12(3) Awb, read in conjunction with Art. 3.8(1) lit. d Wro.
107 Art. 3.8(1) lit. c Wro.
108 Artt. 3:11(1) Awb, 78(2) Ow.
109 Artt. 3:12(1) and (2) Awb, 78(2) Ow.
110 Art. 3(1) Wob.
111 Artt. 10 and 11, read in conjunction with Art. 3(5) Wob.
rights, and tenants.112 Unlike German law, Dutch law also pro-actively notifies tenants and provides the affected persons with the whole draft of the decision. At the expropriation stage, Dutch law thus meets the requirements of the Guidelines.

4.4. The Access to the Procedure

The next question to be addressed is which persons can participate in the expropriation procedure. Ideally, the more people there are that participate in a procedure, the more information and views on the proposed expropriation the competent authority will gather and consider when taking their decision. This may lead to an improvement of the quality of the decision.113 This advantage, however, is unlikely to materialise in practice. The first reason is that it is difficult to ensure that the affected groups, disadvantaged groups in particular, can participate equally and effectively or are equally and effectively represented.114 It will be even more difficult to give the views of disadvantaged groups the necessary weight if unaffected groups with vested interests also contribute to the procedure.115 The second reason is that participation of more people requires more resources and more time, which may eventually result in the quality of the decision declining.116

The Guidelines reflect these findings. Guideline 16.2 states clearly that the state should identify persons who are likely to be affected, inform them properly and consult them at all stages. Guideline 3B.6, which establishes consultation and participation as leading principles of the Guidelines, uses a different term, namely persons who, having legitimate tenure rights, could be affected. Guideline 16.2 is the provision applicable to expropriation procedures, which is why Guideline 3B.6 does not have direct influence on who should have access to the procedure. But it may indicate that persons are only or at least more likely to be affected in terms of Guideline 16.2 if they have legitimate tenure rights that would be affected by the expropriation. The conclusion is that the Guidelines recom-

113 Dietz & Stern (n35), pp. 43 & 50.
115 Cf. Dietz & Stern (n35), pp. 61 et seq.
116 Barnard (n63), p. 143; Dietz & Stern (n35), p. 34.
mend restricting the access to the procedure to a certain category of people. This group will in particular include holders of real rights on the land and tenants. Given the limited resources of many states, particularly in the Global South, this appears a reasonable choice.

### 4.4.1. German Law

The planning procedure for the adoption of a binding zoning plan in German law gives the entire public the opportunity to make representations about the envisaged project. Before a draft plan is publicised, the public can comment on the goals of the planning procedure,\textsuperscript{117} and once the municipality has published a draft, the public can comment on the draft.\textsuperscript{118} German law therefore overfulfils the requirements of the Guidelines. One may also argue that German law is over-inclusive because it does not restrict the group of persons who can participate in the procedure. However, as planning concerns the development of the entire municipality and the German state does generally not experience any shortage of resources, this choice should not be contrary to the Guidelines.

At the expropriation stage, § 106(1) BauGB restricts the access to the participation mechanism to the persons listed in that paragraph. The participation mechanism is thus not open to the general public. The participants particularly include the owner, the holders of other registered real rights on the land and certain holders of personal rights, such as tenants and other holders of contractual use rights. Remarkably, the owner and holders of other registered real rights receive a personal notice of the participation mechanism according to § 108(1) and (3) BauGB. The holders of contractual use rights, by contrast, have to look out for a public notice.\textsuperscript{119}

German law complies with the Guidelines in that it opens the participation mechanism for holders of registered and unregistered use rights. However, the expropriation authority does not need to identify and separately notify the holders of contractual use rights and only has to publicise a public notice. This may hamper the equal access to the procedure, which may not comply with the Guidelines in the light of the commitment of the Guidelines to empowerment.

\textsuperscript{117} § 3(1), 1st sentence, BauGB; Battis (n43), § 3, margin number 9.

\textsuperscript{118} § 3 (2) BauGB.

\textsuperscript{119} § 108(5) BauGB.
4.4.2. Dutch Law

At the planning stage, once the draft of the binding zoning plan has been made available for inspection, everyone has a right to express their opinion orally or in writing within six weeks. As does German law, Dutch law thus over-accomplishes the goals of the Guidelines.

At the expropriation stage, only persons with a legitimate interest (Belanghebbende), not everyone can submit their objections and other opinions within six weeks after the draft decision has been made available for inspection. The competent authority, however, can grant access to other persons. In any case, the owner of the expropriated property will be regarded as such an affected person. Holders of registered limited property rights on the land are also regarded as affected persons. The Crown also deems holders of personal use rights, such as tenants, to be affected persons. Art. 3:13 Awb ensures that these persons are notified separately to make sure that these persons are aware of the expropriation proceedings. Therefore, Dutch law meets the requirements of the Guidelines.

4.5. Meaningful Participation: The Beginning of Participation

Guideline 3B.6 demands that participation be meaningful. The moment at which public participation begins may be too late for participation to be meaningful because the authority may already have made up its mind on the basis of the information provided by parties that have vested interests in the envisaged project, such as the project developer. However, if the participation processes are started too early, the authority may not be able to provide the public with all essential information. Although it is hard to pin-point the moment when participation would be too early or too late, the public should participate once the planning authority has roughly evaluated the implications of its own project idea or a developer’s plan to carry out a certain project.

121 Art. 3:15(1) Awb, read in conjunction with Art. 78(2) OW.
122 Artt. 3:15(1), 3:16(1), (2) Awb.
123 Art. 3:15(2) Awb.
125 Damen et al (n34), p. 140; Sluysmans & Van der Gouw (n49), pp. 37 et seq.
126 Sluysmans & Van der Gouw (n49), p. 37.
127 Verbeek (n112), Art. 3:13 Awb, 2.
128 Dietz & Stern (n35), p. 103.
The participation process thus needs to start in the planning phase because it is then that the planning authority shapes the project. Under German law, having been informed about the details of envisaged planning procedure, the public can discuss the purposes and goals of the planning procedure and the potential project.\textsuperscript{129} Only after this discussion does the council make a draft, on which the public can then comment again.\textsuperscript{130} This approach seems to allow for meaningful participation because it facilitates an early assessment of the plan by the public and, at a later stage, allows for more detailed input on the basis of the detailed information provided by the draft. Under Dutch law, by contrast, the public can only make representations after the municipal council has published a draft plan.\textsuperscript{131} The draft may contain enough detailed information for the public to participate, but the late start of the participatory process may render the participation less effective because the authority may already have made up its mind. This analysis is, of course, incomplete because in practice, the responsiveness of planning authorities varies and informal consultations or deliberations not required by law may generate more public input.

\subsection*{4.6. Meaningful Participation: The Authority’s Position in the State System}

Whether or not participation is likely to be meaningful also depends upon the position of the competent authority in the state system. A complexity of indicators with contradictory implications influence how predisposed an authority is to facilitate and respond to input from the public. Too name but a few: a directly elected organ is more accountable to the public because they can be directly voted out of office.\textsuperscript{132} Unlike appointed organs,\textsuperscript{133} directly elected organs therefore prove to be more responsive to the needs of the public, particularly at local level.\textsuperscript{134} However, more specialised organs, which are mostly appointed bodies,

\begin{thebibliography}{99}
\footnotesize
\item\textsuperscript{129} § 3(1) BauGB.
\item\textsuperscript{130} § 3(2) BauGB.
\item\textsuperscript{131} Artt. 3:15(1), 3:16(1), (2), and 3.8(1) lit. d Wro. Cf. Van Buuren \textit{et al} (n46), p. 93.
\item\textsuperscript{132} D.M. Estlund, \textit{Democratic Authority} (Princeton University Press 2008), p. 65; and Bekkers & Edwards (n114), pp. 43 \textit{et seq}.
\end{thebibliography}
are better suited to handle complex cases. Not only its accountability to the public, but also whether the authority is a local, provincial or federal organ plays a role. Developers may find it easier to influence and collude with local authorities than federal or provincial authorities because institutional safeguards against corruption are weaker at local level. Such influence may shield the local authority from the input of the people. Another indicator is whether the authority competent at the expropriation stage was also involved in the planning procedure. During the planning procedure, the authority may have developed a vested interest in the project so that it is unlikely to halt the acquisition of land for the project.

In the planning phase, both German and Dutch law designate the directly elected municipal council as the competent authority. It facilitates meaningful participation because the members of such a council are directly accountable to the people and, therefore, more responsive to their wishes. It therefore seems a reasonable choice as long as the municipal council receives professional assistance in determining the consequences of a certain plan. In the expropriation phase, Dutch law designates the Crown, which is represented by a Ministry of the Kingdom, as the competent body to assess applications for expropriations. Under German law, § 104(1) BauGB designates a higher administrative authority as the competent body. A higher administrative authority is accountable to a Ministry of a German state. These choices seem reasonable because the authorities do not have a vested interest in the expropriation and the expropriation authorities mainly need to evaluate whether an expropriation complies with the law, which requires a lot of legal expertise.

135 Gutmann & Thompson (n56), p. 128.
137 Battis (n43), § 104, No. 1. See, for instance, § 14 of the State Administration Act of Baden-Württemberg (Landesverwaltungsgesetz, LVG BW).
4.7. The Form of Participation

The people who may participate in the expropriation procedure can contribute to the procedure in different ways. Throughout the world different forms of participation are discussed and implemented. They allow for different degrees of popular input and have a different impact on the quality of the outcome. Before analysing the form of participation that the Guidelines recommend, I introduce four broad categories of forms of participation and examine to what extent they can generate the benefits of participation. These categories do not form an exhaustive list; many procedures share elements of two of the categories. Having analysed the model that the Guidelines recommend, I evaluate the German and the Dutch model. Note that I do not consider the deliberations in the municipal councils during the planning phase.

4.7.1. Types of Participation

The first form of participation is the provision of information. This entails that the participants provide the competent authority with information on the subject-matter. This form of participation answers the need of the competent authority for information. The information enables the authority to consider alternative decisions and to predict their impact. Ideally, this provision of information will enhance the quality of the decision. This result, however, depends upon the effective representation of all affected groups because the competent authority may otherwise not have all necessary information. Furthermore, the provision of information cannot serve as an accountability or control mechanism because the competent authority and the participants do not discuss how this information influences the opinion of the authority on the proposed expropriation. The (democratic) legitimacy that this participation mechanism generates is limited because the participants do not express their views. The capacity building will

139 See sub-section 4.1.
140 Damen et al (n34), pp. 46 et seq; Coglianese et al (n34), p. 3; Nordic Council of Ministers (n34), p. 47. Dietz & Stern highlight the importance of local experts who are familiar with what is happening on the ground: Dietz & Stern (n35), p. 50.
141 O’Neill (n13), pp. 484 and 486; Nordic Council of Ministers (n34), p. 41; Doubtful about whether or not this is the case: Bekkers & Edwards (n114), p. 51; Dietz & Stern (n35), pp. 60 et seq.
also be limited because the participants only (need to be empowered to) provide information, but do not engage in discussions.

The second model of public participation is consultation. In this model the citizens not only provide information, but the competent authority also gives the citizens the opportunity to express their opinion on the proposed expropriation. No deliberations follow and the decision is exclusively taken by the competent authority. Ideally, the competent authority will not only have the necessary information, but will also be able to view the case from the perspectives of different participants, which will enhance the quality of the decision. Yet again, it is essential to the success of this participation mechanism that all affected groups are effectively represented. Not only would the provision of information otherwise be selective, the competent authority would also tend to view the case from the perspective of a certain group of people. Moreover, consultation mechanisms cannot fully function as an accountability or control mechanism because consultations do not guarantee that the competent authority takes the views into account when taking the decision. An additional obligation to justify the decision to expropriate and to state how the authority took account of the participants’ views might be a solution, but does not guarantee that the authority actually reflects on their opinion. Concerning the generation of (Democratic) legitimacy, this mechanism will generate more than the first model because the participants may also express their views on the subject-matter. Consultations will also contribute more to capacity building in that the participants must (be empowered to) express their opinions on the subject-matter.

The third form of participation is deliberation. This model is based upon three elements: the provision of information by the participants; the opportunity of the participants to express their view on the subject-matter (consultation); and deliberation. Deliberation refers to reasoned dialogues that may lead to a change of opinions of the participants and the authority. There may be two-way communication between the authority and the participants and multi-way deliberations among the participants and between the participants and the authority. Deliberation plays a particular role in deliberative theories of democracy. Scholars argue that we all have certain beliefs and preferences on which we hardly ever reflect.

142 Nordic Council of Ministers (n34), p. 48.
143 Bekkers & Edwards (n114), p. 51; and O’Neill (n13), pp. 484, 486 and 493.
144 Arnstein (n138), pp. 216 et seq.
145 See on the functions of the obligation to give reasons: Stelkens, in Stelkens et al (n36), § 39, margin number 1; see on the obligation to balance interests: Damen et al (n34), pp. 388 et seq.
146 Nordic Council of Ministers (n34), pp. 40 et seq.
147 F. Peter, Democratic Legitimacy (Routledge 2009), pp. 43 et seq.
These beliefs and preferences, of course, also play a role when citizens express their opinions in administrative procedures. The importance of deliberation is that citizens have to consider all facts, including the drawbacks of their position, and the arguments of others. On the basis of equality and the ability of citizens to reason, scholars assume that citizens will then revisit their beliefs and preferences and change them if they think this appropriate.\textsuperscript{148} The eventual input of citizens will thus better reflect their living conditions and the preferences that result from those. Ideally, deliberations can effectively perform all functions of participation. They provide the competent authority with information, the reconsidered views of citizens and force the authority to reflect on their opinion. The latter also indicates that deliberation can better serve as an accountability and control mechanism than consultations. The deliberation will enhance the (democratic) legitimacy of the decision because every actor could express and reflect on their opinion, thereby also contributing to capacity building. This improvement will be even greater if the authority hosts multi-way deliberations instead of only two-way deliberations.\textsuperscript{149}

There are, however, a few obstacles to this improvement. Not only may certain concerned groups not be effectively represented in the deliberation,\textsuperscript{150} but deliberations, if badly managed, are also prone to being dominated by charismatic figures.\textsuperscript{151} The latter may lead to preferences that would not have been shaped in deliberations without this influence. Furthermore, deliberations are particularly time-consuming and require a lot of resources. As there are fewer resources available for the rest of the decision-making process, this may result in the quality of the decision decreasing.\textsuperscript{152} Furthermore, the improvement is limited by the fact that the competent authority proposes a draft decision, thereby defining problems and the main aspects of the decisions, which mostly remain unquestioned in the participation process.\textsuperscript{153}

The fourth form of participation is the decision by the people on whether or not land should be expropriated.\textsuperscript{154} To what extent this form of participation

\textsuperscript{148} Peter (n147), pp. 43 et seq.
\textsuperscript{150} Bekkers & Edwards (n114), p. 51; O’Neill (n13), pp. 484, 486 and 493, who also points to the proper authorisation of representatives; Turnhout \textit{et al} (n13), p. 26, point to the fact that the people do not have equally well developed cognitive and communication skills.
\textsuperscript{151} Goodwin (n58), pp. 487 et seq; Kohn (n61), pp. 412 et seq; and Dietz & Stern (n35), pp. 60 et seq.
\textsuperscript{152} Barnard (n63), p. 143; Dietz & Stern (n35), p. 34.
\textsuperscript{153} Turnhout \textit{et al} (n13), p. 26; Dietz & Stern (n35), p. 35.
\textsuperscript{154} Cf. Nordic Council of Ministers (n34), p. 51.
effectively performs the functions of participation first depends upon whether the proposed decision is the result of deliberations among the people and not determined by a competent state authority.\textsuperscript{155} If the decision has been proposed by a state authority, the people can control the authority and can also democratically legitimise the decision, provided that all affected groups are informed and vote.\textsuperscript{156} At the same time, the vote will not directly contribute to the quality of the decision, only indirectly if the rejection of the proposal leads to a revision thereof. Its contribution to capacity building will depend upon whether or not information is provided before the vote and public deliberations take place.\textsuperscript{157} If the proposal has been developed through deliberations among the people, the input from the people can also enhance the quality of the decision and this process can contribute to capacity building. This improvement, however, will depend upon the effective participation of all affected groups,\textsuperscript{158} the accessibility and provision of all relevant information on the subject-matter,\textsuperscript{159} and the quality of the deliberations.\textsuperscript{160}

4.7.2. The Form of Participation under the Guidelines

The Guidelines recommend a form of participation that goes beyond the provision of information. Guideline 16.2 clearly states that the states should consult at all stages the persons who are likely to be affected by the decision. A purpose of these consultations is to gather information about possible alternatives and strategies to minimise disruptions. The fact that the Guidelines use the term “consult” does not imply that they refer to the concept that has been described in the previous sub-section. Consultations in terms of the Guidelines rather have distinct deliberative elements. Guideline 16.2 provides that these consultations should be conducted in accordance with the principles of the Guidelines. Guideline 3B.6 that establishes consultation and participation as leading principles

\textsuperscript{156} Bekkers & Edwards (n114), p. 51; O’Neill (n13), p. 484; Nordic Council of Ministers (n34), p. 41.
\textsuperscript{157} Bekkers & Edwards (n114), p. 51; furthermore, the quality of the deliberation would matter. People do not have equally well developed cognitive and communication skills, which is the reason why deliberations are prone to being dominated by influential figures. See: O’Neill (n13), p. 484; Turnhout et al (n13), p. 26; Dietz & Stern (n35), pp. 60 et seq.
\textsuperscript{158} Bekkers & Edwards (n114), p. 51; O’Neill (n13), p. 484; Nordic Council of Ministers (n34), p. 41.
\textsuperscript{159} Bekkers & Edwards (n114), p. 51.
\textsuperscript{160} Dietz & Stern (n35), pp. 54 & 64.
recommends that the States engage with, and seek the support of, the people who, having legitimate tenure rights, could be affected. Furthermore, the States should respond to contributions of participants. These recommendations indicate that the contact between the States and the people should go beyond the opportunity for the people to express their view. The Guidelines suggest that the states and the people should discuss the matter thoroughly and, where possible, come to a mutual understanding. Interestingly, the Guidelines only seem to refer to interactions between the state and the participants, but not to deliberations among the participants. These two-way deliberations would not have all the benefits of multi-way deliberations.

4.7.3. German Law

At the planning stage, the public first has the opportunity to comment and discuss the goals of the planning procedure. The discussion is meant to be a dialogue among citizens and between the citizens and the municipality and thus entails multi-way deliberations.161 Once the municipality has made available a draft of the binding zoning plan, a notice and comment procedure follows. During one month, the public can comment on the drafts. The municipality will then have to consider the comments and suggestions, and will subsequently notify the persons who have commented of the result of this examination.162 Every time the draft is altered, the notice and comment procedure has to be repeated.163 This procedure is a repetitive consultation procedure because the public can submit to the planning authority their preferences and the reasons for them. It is, however, not aimed at a dialogue among the people and between the people and the authority.

The planning stage in German law thus complies with the Guidelines because at least a part of the planning procedure will have deliberative elements. The rules applicable to the expropriation stage lead us to a more cautious conclusion. The Federal Building Code provides for two participatory elements. § 107(1), 3rd sentence, BauGB obliges the competent authority to give the participants the opportunity to make representations. This mechanism has two objectives. First, the competent authority can gather all relevant information about the subject-matter and prepare the subsequent hearing. Secondly, the participants can express their view on the matter and bring forward arguments for their position.164

161 Battis (n43), § 3, margin number 9.
162 § 3 (2), 3rd sentence BauGB.
163 § 4 a (3) BauGB.
164 H. Dyong in Ernst/Zinkahn (n36), § 107, margin number 6.
After the participants have had the opportunity to make representations, the authority employs another participation mechanism. The competent authority must base its decision to expropriate, including the decision on the public purpose, upon a hearing that it convenes in accordance with § 108 BauGB.\(^{165}\) The Federal Building Code, however, does not make provision for the exact procedure. Scholars agree that the subject-matter has to be thoroughly discussed and that the participants can make representations and present their arguments.\(^{166}\) A thorough discussion may suggest a deliberative character. It is, however, for the chairman to decide whether or not to allow for two-way or multi-way deliberations as envisaged in deliberative democratic theories.\(^{167}\) The German model thus has one consultation mechanism and one mechanism that also allows for deliberative elements. Depending upon how these rules are put into practice, German law at the expropriation stage may comply with the Guidelines.

### 4.7.4. Dutch Law

At the planning stage, the public has a right to express their opinion orally or in writing within six weeks after the publication of the draft plan.\(^{168}\) Dutch law does not contain any explicit obligation for the municipality to respond to objections before the plan is adopted or to notify other persons whose opinions deviate from the submitted objections and give them an opportunity to react. However, as Art. 3:2 Awb obliges the municipal council to gather information about all relevant facts and interests, the municipal council will have to request the other persons to respond to the new objection if it does not dispose of sufficient information to evaluate the objection.

This mechanism is primarily a consultation mechanism and therefore does not contain the deliberative elements that the Guidelines require. At the expropriation stage, affected persons can submit their objections and other opinions within six weeks after the draft decision has been made available for inspection.\(^{169}\) A distinct element of the expropriation procedure is the hearing that follows the opportunity to express one’s opinion. The Crown has to hear all affected persons who have submitted an opinion. Furthermore, they may hear all

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165 § 112(1) BauGB.  
166 Dösing (n83), § 108, margin number 14.  
167 Dyong (n164), § 108, margin number 20.  
169 Artt. 3:15(1), 3:16(1), (2) Awb.
other affected persons. Depending upon how the hearing is designed, this hearing may have deliberative elements so that Dutch law at the expropriation stage would comply with the Guidelines.

4.8. Obligation to balance interests and to give reasons

An obligation of the competent authority to balance the interests of the participants and an obligation to give reasons for their decisions can guarantee the quality of the procedure and ensure that participation can actually achieve its goals. The obligation to balance interests may ensure that the authority identifies the interests at stake, ascertains the impact of the decision on these interests, reflects upon their own opinion and finds an equitable balance between the interests. The obligation to give reasons also performs this function and may ensure that the obligation to balance interests is effective. The obligation to give reasons also performs other functions. The reasons for a decision can provide the basis for judicial review. Moreover, if the decision is properly justified in comprehensible language, the people will be more likely to accept the decision.

The Guidelines implicitly recommend an obligation to balance the interests involved. Guideline 16.2, which recommends that the state identify all affected interests, possible alternative approaches and mitigation measures, would not make sense without it. The Guidelines seem to remain silent regarding the obligation to give reasons. Guideline 21.4, which recommends that decisions on tenure conflicts be in writing and based upon an objective reasoning, is not applicable to expropriation procedures and there is no other provision that explicitly requires reasons. However, the obligation to furnish reason is implied by other Guidelines. Guideline 3B.9 postulates accountability as a leading principle of the Guidelines. Guideline 6.9 states that the States should guarantee the access of the people to judicial review. It is obvious that the people can only hold the competent authority accountable and that a judicial review is only possible if the competent authority provides reasons for their decision.

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170 Art. 78(4) Ow.
171 Cf. C. Hoexter, Administrative Law in South Africa (2nd edn, Juta 2012), pp. 463 et seq; Damen et al (n34), pp. 388 et seq.
172 Hoexter (n171), p. 464.
173 Hoexter (n171), pp. 463 et seq.
174 Hoexter (n171), p. 463.
175 Hoexter (n171), pp. 463 et seq.
4.8.1. German Law

Under German constitutional law, the competent authority needs to balance the public benefits of the project and the expropriation against their adverse impact upon private and public interests.\(^\text{176}\) The authority thus needs to identify the interests, ascertain the impact of the project and the expropriation upon them and balance them.\(^\text{177}\)

The effectiveness of the obligation to balance the interests is further enhanced by the obligation of the competent authority to furnish reasons for its decision.\(^\text{178}\) This obligation includes discussing the representations made by participants to the extent that the decision does not reflect them.\(^\text{179}\) German law therefore seems to comply with the Guidelines.

4.8.2. Dutch Law

Under Dutch law, the obligation to balance all directly affected interests is laid down in Art. 3:4(1) Awb. These interests in particular include the interests of the owner, the holders of limited real (use) rights, and tenants, but also the interests of neighbours and public interests, such as environmental protection. This obligation requires identifying the interests that are at stake and ascertaining the impact upon these interests. The competent authority will therefore be compelled to consider the opinions and interests of the participants.\(^\text{180}\) In particular, it cannot confine itself to adopting the point of view of one participant.\(^\text{181}\) Ideally, this obligation will make the competent authority reflect on their own point of view.

Art. 3:46 Awb requires that the authority base its decision upon a well-founded justification. The justification of the decision must show that the competent authority has actually balanced the interests of the participants.\(^\text{182}\) This entails that the competent authority not only has to refer to the relevant statutory provisions in the justification, but also has to respond to representations made by

\(^{178}\) § 39(1) VwVfG.
\(^{179}\) Stelkens (n145), § 39, margin number 49.
\(^{180}\) Damen et al (n34), pp. 388 et seq.
\(^{181}\) Damen et al (n34), pp. 388 et seq.
\(^{182}\) De Poorter, in Van Buuren et al (n46), Art. 3:46 Awb.
participants.\textsuperscript{183} In view of this analysis, Dutch law seems to comply with the Guidelines.

5. Concluding Remarks

German and Dutch law largely comply with the Voluntary Guidelines on the Responsible Governance of Tenure. Problems may occur in three fields. The first field is the empowerment of disadvantaged people. German and Dutch law do not seem to provide sufficient assistance to socially disadvantaged people because the costs for professional legal assistance are not reimbursed in the planning phase. In order to assess which impact this shortcoming may have, more empirical research is needed to determine which impact one’s social status as well as one’s intellectual and communication skills have on one’s ability to defend one’s interests in an administrative procedure. Also, German and Dutch law do not seem to protect sufficiently the access of the illiterate, the blind and people who cannot speak the official language to the administrative procedure.

The second issue concerns the form of participation. Whereas the Guidelines demand deliberative elements, the participation mechanisms under German and Dutch law, except for the deliberations during planning procedure under the German Federal Building Code, do not show such a clear commitment to deliberations. It is worth researching how these participation mechanisms function in practice in order to conclude whether they comply with the Guidelines.

The third problem concerns the information provided to holders of contractual use rights under German law. Unlike the owner and the holders of registered limited real rights on the land, the holders of contractual use rights are not notified separately of the intention to expropriate. This may unduly put these persons at a disadvantage, which may be contrary to the Guidelines’ commitment to empowering people to participate.

The analysis contained in this contribution is an example of the monitoring of compliance with the Guidelines. As a non-binding and non-state legal instrument, the Guidelines partially have to rely upon NGOs and academics to raise awareness of the Guidelines, concretise the Guidelines and to monitor whether national jurisdictions follow their recommendations. This offers a lot of research challenges and opportunities. There are three research objects, the Guidelines,

\textsuperscript{183} Art. 3:47(2) Awb demands references to applicable statutory provisions. Art. 3:46 Awb stipulates that the decision has to be based upon a solid justification. See: Damen \textit{et al} (n34), pp. 451 \textit{et seq}.
the regulatory frameworks of States and what is actually happening on the ground. Concerning the Guidelines, legal and social researchers should concretise the Guidelines jointly with the communities, particularly in Global South. These dialogues between researchers and communities can be inspired by best practice examples from other countries that the researchers have gathered. The legal framework that FAO will soon publish may facilitate these dialogues. The researcher could then, for instance, make check lists for a specific state or a specific community. This would facilitate the monitoring because it would be clear what a transparent and participatory procedure would mean in a specific setting. Concerning the regulatory framework, legal researchers could examine it. Concerning the reality on the ground, social researchers could regularly examine whether or not the regulatory framework is properly implemented on the ground and whether it has unintended effects. The researchers could then jointly write a country report. The check lists would then regularly be used to find out whether the regulatory framework as it is implemented in practice complies with the Guidelines. This will enable the FAO to monitor compliance and the progress in implementing the Guidelines over time.

Apart from the (potential) shortcomings mentioned above, German and/or Dutch law may very well serve as role models for the further concretisation of the Guidelines. The implantation of rules from one jurisdiction in another, however, faces various challenges that need to be addressed during the dialogues between the communities and researchers. These challenges include different understandings of what are sufficient participation and empowerment, a different institutional framework in which to implement the rules, making available sufficient resources to implement the concretised rules, and, last, but not least, avoiding the impression of undue external influence through the introduction of foreign rules.

Cf. Guidelines 5.5, 6.1, and 16.4.