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The Zimbabwe Law Review is no longer a thing of the past!

You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review" !

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7 / 8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9 / 10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.

In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

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The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.

EXPROPRIATION UNDER ROMAN-DUTCH LAW

by

Ben Hlatshwayo*

Introduction

Roman-Dutch law, like Roman law before it, recognised the state's right to expropriate the private property of citizens under specific circumstances.¹ Although the acknowledged state powers of expropriation were not as extensive as the powers of control of private property to be found in developed capitalist countries today², it is credit to the Roman-Dutch law system, in particular, that it anticipated these future developments by hundreds of years in evolving the concept of restriction of private

Lecturer, Department of Public Law, University of Zimbabwe.

See authorities cited in footnote 13 *infra* in connection with Roman-Dutch Law and, for Roman Law: Jones JW, "Expropriation In Roman Law" (1929) 45 LQR 512. Please note that the old major Roman-Dutch authorities shall be cited as shown below (references to authorities which are cited less frequently in this paper are made in the relevant footnotes):

Bynkershoek: Cornelius van Bynkershoek, *Quaestionum juris publici libri duo*. (Leiden 1739) translated into English by T Frank *sub nom: Questions of Public Law* (Oxford 1930)

Gr: Hugo Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (The Hoge 1631). The authoritative edition is the 29th (Leiden, 1952) ed F Doring, H F W D Fisher and EM Meijers, translated into English (2 ed 1631) by R W Lee *sub nom The Jurisprudence of Holland* (Oxford 1926), although A F S Maasdorp's translation of the *Inleiding* (Cape Town 1888) has been used in a few sections of this paper, specifically in footnotes 21&30.

de jure: *De jure belli ac pacis libri tres* (by Hugo Grotius) (Paris 1625), translated into English (Amsterdam edition 1625) by FW Kelsy *sub nom: The Law of War and Peace* (London 1925).

Huber: Ulrich Huber, *Heedendagse Rechtsgeleerdheyt* (Leeuwarden 1686), translated into English (5th ed Amsterdam 1768) by P Gane *sub nom: The Jurisprudence of my Time* (Durban 1939).

Pufendorf: Samuel Pufendorf *De Jure Naturae et Gentium libri octo* (Lund 1672), translated into English (1688 ed) by C W and W A Oldfather *sub nom: On the Law of Nature and Nations* (Oxford 1934)

Schorer ad Gr: William Schorer, *Aanteekeningen over de Inleidinge tot de Hollandsche Rechtsgeleerdheid van Hugo de Groot* (Middelburg 1769). Selected notes translated into English by A F S Maasdorp as an appendix to his translation of the *Inleiding* (Cape Town 1888)

Van der Linden: Johannes van der Linden *Rechtsgeleerd Practicaal en Koopmans Handbook* (Amsterdam 1806), translated into English by H Juta *sub nom: Institutes of Holland* (Cape Town 1884)

² Stein P and Shand J, *Legal Values in Western Society*, Edinburgh University Press, 1974 pp 222-6.

ownership in the interest of public necessity or utility. Unlike Roman law, where “no systematic exposition of legal rules concerning expropriation is to be found”³, Roman-Dutch law developed a legal framework concerning the grounds and procedures for expropriation.

While expropriation is now invariably governed by statute, it is still important to understand the Roman-Dutch common law position and its roots in Roman Law as discussed below as a base and point of departure against which the provisions of modern expropriation statutes can be understood, explained and judged, and as inspiration for new legislation. Some modern writers have been rather too quick in dismissing the views of old Roman-Dutch writers on expropriation as irrelevant in the interpretation of modern expropriation statutes⁴, basing their views largely on the following passage in Schreiner, JA’s judgement in the case of *Joyce and McGregor Ltd v Cape Provincial Administration*:

Whether the passages in the Roman-Dutch writers which say that expropriation can only take place against reasonable compensation are mere summaries of enactments having the force of law; or whether they are based on some theory of expropriation apart from statute, such as that of *dominium eminens*, they appear to me to be equally irrelevant to the construction of modern statutes.⁵

It is respectfully submitted here, however, that it is one thing to reject the Roman-Dutch doctrine of inherent state powers of expropriation, especially in the light of specifically authorising statutes which was the situation in the *Joyce and McGregor* case, and quite another thing altogether to dismiss the views of Roman-Dutch writers on expropriation as irrelevant to the interpretation of modern statutes. Behind expropriation statutes lies a whole theory of expropriation and Roman-Dutch writers made great contributions to it: to the nature of expropriation, principles of compensation and the right of the owners to be heard. Where an expropriation statute is silent or vague on these matters it is submitted that Roman-Dutch authorities can be called in aid with much profit to the whole endeavour. This submission is all the more compelling in the Zimbabwean situation where by and large the judicial method of expropriation prevails at the time of the writing of this article.⁶

³ In *Lawsa* 10 para. 3, the authors give a brief historical development of expropriation and point out that the state in ancient Rome in all probability had powers of expropriation although “no systematic exposition of the legal rules concerning expropriation is to be found in Roman Law and that under the feudal system expropriation was unnecessary”.

⁴ *Lawsa* 10 para 3/ Carrey Miller (n 23) p 113.

⁵ 1946 AD 658 at p 671.

⁶ Although in the 11th and the 12th amendments to the Constitution of Zimbabwe the jurisdiction of the courts in determining the fairness of the compensation is apparently ousted, the efficacy of such ouster is doubtful. In the Land Acquisition Act 1992 the judicial approach is followed in the acquisition of non-designated and derelict land and a dual approach — judicial and purely administrative — is followed for designated and communal land. See B Hlatshwayo, “Compulsory Acquisition of Land in Zimbabwe” and B Hlatshwayo “Land Expropriation Laws in Zimbabwe and their Compatibility with International Law” 1993 *Zim L Rev* (forthcoming).

Roman Law

Although the Roman law classical texts display no general right of expropriation⁷, the supreme legislature could expropriate for any purpose since in historical times there were no restrictions on its powers.⁸ It is not known exactly how the mechanism worked nor is it clear whether specific enabling legislation was invariably required.⁹ Buckland & McNair distinguish between expropriation for public utility purposes on one hand, and, on the other hand, expropriation on the basis of overriding necessity, and express doubt as to whether any public utility expropriation at all took place in classical Rome :

.... so far as utilities are concerned, there is little sign of any such thing in classical law. Indeed even such evidence as there is may be deceptive, for it seems that the cases recorded are of lands which were technically the property of the State, though in the hands of the possessors holding, in practice permanently, but technically at the will of the State.¹⁰

However, emperors later did expropriate for public utility purposes but they did so sparingly.¹¹ As far as public necessity (overriding necessity) expropriation is concerned, Buckland & McNair observe that various officials had "large powers of destruction of property for religious, military or police purposes."¹² For example, the aediles destroyed to check fires and the augurs ordered the destruction of building which obstructed their view of the flight of birds.

If the procedure for expropriation in Roman law is difficult to reconstruct, the requirement for compensation is even more deeply buried in the memory of history. The limited evidence there is seems to suggest that compensation was generally obligatory for public utility expropriations and was based on a reasonable valuation of the property.¹³ In certain circumstances, however, public utility expropriation was not compensatable. For example, the Senatusconsult of 11 BC which provided for space to be kept on either side of an aqueduct did not provide for compensation for the loss of use.¹⁴ It would seem that no compensation was payable in public emergency (overriding necessity) expropriation. For example, commenting on the story told by Cicero of a man who tried to escape the consequences of an order for the demolition of his house issued by augurs by selling the house and concealing the order, Burks¹⁵ first concludes:

⁷ See Buckland W W and McNair AD, *Roman Law & Common Law: A Comparison in Outline*, 2nd ed by F H Lawson (Cambridge University Press, 1952) pp 95-6, and also Lewis C, "The Modern Concept of Ownership of Land" 1985 *Acta Juridica* 241p 252.

⁸ Buckland & McNair (n 4) pp 95-6.

⁹ Burks P, "The Roman Law Concept of *Dominium* and the Idea of Absolute Ownership" 1985 *Acta Juridica* 1 p 12.

¹⁰ Buckland & McNair (n 4), pp 95-96.

¹¹ *Ibid* p 96 and the authorities therein cited especially in footnote 3.

¹² *Ibid* .

¹³ Burks P, (n 6) p 13.

¹⁴ *Ibid* (But note that this case is doubted by Buckland & McNair (n 4) who argue thus: "What looks like a case (of expropriation for public utility), the Senatusconsult of 11 B.C. dealing with aqueducts, is explained as creating certain general restrictions on ownership for the future, in the neighbourhood of aqueducts." p 96.

¹⁵ *Ibid* .

This shows that the augurs had powers to order demolition and, also, that they did not pay compensation ... since the story would lose most of its point if the vendor were not trying to evade a major loss. but later attempts a retraction:

But again this may not be evidence of an attitude which tolerated expropriation without payment. It is possible that the owner rashly built up into the augurs' line of vision and therefore had only himself to blame.

The first conclusion is clearly the more compelling one.

Roman-Dutch Law

General

Under Roman-Dutch law expropriation was understood as the deprivation of ownership by act of authority on the basis of public necessity or utility.¹⁶ Thus, according to Grotius, complete ownership may be lost "by act of authority, when the Commonwealth needs some property and expropriates the subject"¹⁷. Huber states that "the property of a private person is subject to the common good; so that the sovereign has power, for reasons of general necessity or the benefit of the citizen, to take away from persons the free control of their property".¹⁸ How is this toleration of a fairly extensive intrusion into the right of ownership to be explained?

Perhaps the answer lies in that Roman-Dutch law viewed ownership as an essentially restricted right. Huber, for example, after defining ownership as the entire power over a corporeal object (power of free control and alienation) with the right of vindication, immediately points out that this power may be curtailed by law, i.e. by both public law and private law restrictions.¹⁹ But it is not merely the existence of these restrictions which made the concept of ownership in Roman-Dutch law non-absolute. In a seminal article Visser²⁰ points out a number of factors which tend to illustrate the relative nature of ownership in Roman-Dutch law. Firstly, he points out that Roman-Dutch writers, influenced by medieval conceptions of ownership (the so-called *dominium directum* for the feudal lords and *dominium utile* for the vassals), acknowledged duplex *dominium* or "split ownership", i.e., they viewed both *dominium* and limited real rights as different types of ownership, and that the idea that there

¹⁶ Gr 2.32.7; Huber 2.2.8,9; Van der Linden 1.7.4; Ant; pp 112-114 and Van Hessel, *Rechtsg. Brieven*, br. 46 p 47 — the last two authorities as quoted in La Leck, *Index to the Opinions of Roman-Dutch Lawyers and the Decisions of the Courts of the Netherlands which have been digested in the Algemeen Berdeneerd Register of Nassau La Leck (1741-1795)*, by Dr. A A Roberts, edited by S.I.E. van Tonder, South African Law Commission Research Series 4, vol 3, p 572.

¹⁷ Gr 2.32.7.

¹⁸ Huber 2.2.8

¹⁹ Huber 2.2.5,7.

²⁰ Visser DP, "The "Absoluteness" of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39 pp. 39-46. Visser's view that the real origin of individualistic or absolute concept of ownership is not to be found in Roman-Dutch Law but in the writings of the *Pandects* of the Nineteenth century, is commented upon with approval by AJ van der Walt, "The Effect of Environmental Conservation Measures on the Concept of Landownership" 1987 SALJ 469 at pp 475-6.

are no degrees of ownership....” an idea which obviously aids an individualistic, absolute view of ownership”. was only weakly developed. The second reason he gives is a philosophical one, i.e., that, influenced by the older natural law philosophy, the “basic stance” of Roman-Dutch law “was that ownership is, and should be restricted”, the most important indication of which was the idea of *dominium eminens* (overriding ownership) of the state over the property of its citizens. (We shall examine this aspect at length in the next section). Finally, he discusses a number of private law restrictions on ownership in Roman-Dutch law which make even clearer its “fundamentally restricted nature”, among them: “neighbour law” restrictions and the prohibition or limitation of the power of alienation on practical and social grounds (lack of, or limited, capacity and prohibited subject matter). But perhaps of particular interest here is his discussion of restrictions which had socio-economic and even political significance, e.g., the concept of *naastingrecht* (right of recall) and the *recht van spasteking* (right to abandon the land).

The *naastingrecht* was a right, in respect of immovable property only, accorded to certain members of the owner’s family, certain neighbours, creditors, the town or the city authorities, which entitled the holder thereof to take over a sale already concluded by the owner, at a price agreed upon between buyer and seller. The reasons for the existence of the *naastingrecht* which Visser points out included the facilitation of property remaining within the family, prevention of property belonging to members of one family from being reduced to small, uneconomic units, prevention of the rich from acquiring a position of political dominance by buying up property where voting rights were coupled with ownership of land and to facilitate town planning.

As far as the *recht van spasteking* is concerned, one can do no better than to quote Visser’s explanation directly:

The owner had the *recht van spasteking*, which was the right to abandon the land (by literally placing a spade in the ground) in order to avoid the dyke dues. If this was done the owner forfeited all the land he owned in the area surrounded by the same dyke and this land was relocated by the *dijkgraaf* and *heemraden* to neighbouring land owners who were prepared to maintain the dyke.²¹

Thus, the owner’s power to abandon land subject to a real burden of the maintenance of dykes was restricted as its exercise carried a heavy penalty of forfeiting all the land surrounded by the same dyke.

The above discussion has served to illustrate that the concept of ownership in Roman-Dutch law was essentially restricted. The discussion covered both public and private law restrictions in broad general terms but since the concern of this paper is largely with public law restrictions we now focus specifically on that subject.

²¹ Visser, D.P. (n 17) p 45. see also Gr 2.32.3. where it is stated: “Lands subject to dyke dues, however, cannot be renounced without at the same time renouncing all other lands situated within the same drainage circle, and lands which have been excavated not at all”.

Dominium Eminens

The most important public law restriction on ownership in Roman-Dutch law was the idea that the state has *dominium eminens* or "overriding ownership" over the property of citizens.²²

Basis of Eminent Domain

The basis of the right of eminent domain is expressed by Grotius in his *Inleidinge* as follows:

Next, civil communities having come into existence, it was found necessary that the whole community should have a higher right over the property of citizens than the citizens themselves, not only because the members and everything belonging to the members must be applied to the body corporate, without which members cannot be preserved, but also because experience of human failings taught that without further laws the peace of the citizens and the undisturbed possession of property could not long continue."²³

Thus, for Grotius, based on his quotation above, two reasons justified the state's higher right: firstly, the need to defend the community from external threats and secondly, the maintenance of peace and undisturbed possession of property internally. These reasons clearly show that Grotius correctly understood the source of this right as sovereign authority. Writing many years later, Bynkershoek²⁴ wanted to emphasise the sovereign basis of this right when, following the German humanist philosopher, Christian Thomasius, he suggested a change in the terminology from "*dominium eminens*" to "*imperium eminens*" since "*imperium*" more accurately encapsulates the concept of expropriation as deriving from sovereign authority: the same supreme power that possesses the right of war and peace, of concluding treaties, of raising and spending taxes, etc. However, having made the terminology *caveat*, Bynkershoek continued to use Grotius's term, *dominium eminens*, which term has found its way into modern use, and still bearing its Grotian meaning, as "eminent domain".²⁵

Finally, the basis of the right of the state to expropriate under eminent domain should not be confused with the basis of the right of the individual to take the property of another in the case of necessity. Grotius likened the latter right to the reclamation of the primordial community of ownership occasioned by "direct need" when "the primitive right of the user revives, as if community of ownership had remained, since in respect of all human laws ... the law of property included ... supreme necessity seems to have been excepted."²⁶

²² For example, Gr 2.3.2., 2.32.7. *de jure* 2.14.7., 3.20.7., 3.19.7

²³ Gr 2.3.2.

²⁴ Bynkershoek, *Quaestionum juris publici* 2.15.

²⁵ The use of the term is most prevalent in the United States of America. See, e.g. Freyer T, "Reassessing the Impact of Eminent Domain in Early American Economic Development" in Kermit LH (ed) *Land Law and Real Property in American History* (Garland Publishing Inc., New York and London, 1987) who states: "Eminent Domain, the right of Government to take private property for public use, is an integral part of sovereignty in the United States."

²⁶ *de jure* 2.2.6.2. The juxtaposition of the justification of the right of an individual to take the property of another in the case of necessity with the right of the state to expropriate in Carrey Miller DL *The Acquisition and Protection of Property* (Juta & Co. Ltd., Cape Town, 1986) p. 107 can lead to an erroneous implication being drawn that somehow both rights share the same rationale.

In fact, a judicious use of sovereign powers, including powers of eminent domain, may, by ensuring basic livelihood for all, eliminate the anarchy of necessity-induced individual self-help and, thus, result in the maintenance of a secure property regime. Of course, Grotius and other natural law theorists did not conceive of eminent domain in this grand state interventionist model. This is understandable since their theory of property involved reciprocal obligations inherent in the concept of ownership itself, whereunder the propertied **securely lived well** by allowing the propertyless to **simply live** from the same property. It is to their credit, though, that their thesis still recognised a significant role for the state even within such a property regime. By contrast, the *laissez-faire* positivist theorists restricted the role of the state while at the same time making ownership absolute — an antithesis of the natural law approach. The synthesis, however, only comes with the socialist state which seeks to socialise the ownership of the most important form of property: means of production. But a shift from the *laissez-faire* approach is already observable in modern capitalist welfare states where wide powers of state control of private property are recognised.²⁷

Who could exercise eminent domain powers?

According to Grotius the right of eminent domain belonged to the state and was exercised by one who held supreme authority²⁸ or one who represented the state²⁹. In the specific circumstances of the Netherlands, the *Dijkereeves* and the *Heemraden* had this right “entitling them to take material for the construction and repair of the dykes, provided they take it from the nearest available locality and with the least possible damage, proper compensation being given”.³⁰ Local authorities (“towns and bailiwicks”) did not have this right and could only expropriate under authorisation by the state and upon satisfying a number of requirements.³¹

Content of *dominium eminens*

As far as what was entailed by the exercise of the right of eminent domain is concerned, Grotius says that the state or its representatives could “use the property of the subject, and even destroy it or alienate it³².” And Huber agrees when he points out that the notion included the power to “take away from persons the free control of their property; also to compel them to sell their goods, or, in the case of necessity, to go without them for no payment, but no longer than the necessity continues.”³³

Requirements for the exercise of eminent domain powers

All the above aspects of eminent domain, i.e. its basis and content, were generally agreed upon by the major Roman-Dutch law authorities. The subject of dispute, however, centred on the definition of the control of this right³⁴. But there was no

²⁷ Stein & Shand (n 2) pp 222-6.

²⁸ *de jure* 3.19.7.

²⁹ *de jure* 3.20.7.1.

³⁰ Gr 2.32.7.

³¹ Huber 2.2.9.

³² *de jure* 3.20.7.1.

³³ Huber 2.2.8.

³⁴ *Bynkershoek* 2.15.

dispute as to the need for the control, most writers being alert to the potential of abuse of this right. For example, Grotius cautions:

"... we must note that recourse is had to the right of eminent domain, not indiscriminately, but only in so far as this is to the common advantage in a civil government, which even when regal, is not despotic."³⁵

Bynkershoek echoes Grotius in urging moderation in the exercise of eminent domain powers:

....the right of eminent domain must be exercised with prudence not rashly abused, and it is an abuse of the right to use compulsion under it without adequate grounds or to take more than public necessity or utility absolutely requires. But if he (i.e. the ruler) appropriates upon adequate grounds, he will do so with the least possible harm to his subjects and upon payment of the price from the common treasury. He who convinces himself that he can act differently is a bandit rather than a prince.³⁶

But what requirements had to be satisfied before eminent domain powers could be exercised? Grotius spells out the requirements thus : "... the first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right."³⁷ Leaving aside for the moment the question of compensation, we note that Grotius was satisfied with public utility as the basis for the exercise of eminent domain powers. Pufendorf required necessity but did not insist on the last degree of necessity³⁸. Bynkershoek³⁹ considered Grotius' and Pufendorf's views and came to the conclusion that he would allow expropriation on either ground as the distinction lacks precision and has little or no worth. Schorer⁴⁰ also examined the necessity/ utility argument and came down in favour of utility because in the case of necessity " ... the sovereign has no greater power than a private person, for in such a case even a private person would be entitled to seize the goods of other private persons" although in his other writings he still insisted that the state "may exercise the power only in case of necessity and not where it is merely for the public benefit".⁴¹ On the side of utility can be added the weighty opinions of van der Linden and Huber who, respectively, also considered that expropriation could be based on "public benefit"⁴² and "general necessity or the benefit of the citizens".⁴³

Therefore, the necessity/utility argument as far as the right of the state to expropriate is concerned seems to have been settled in favour of utility, with necessary being an *a priori* case.

Bynkershoek discusses whether expropriation should be allowed in the case of embellishment, adornment, or recreation and concludes that it should not be allowed. Accordingly, he disapproves a clause in the institution of the University of Leiden that expressly allowed such expropriation:

³⁵ *de jure* 3.19.7.

³⁶ *Bynkershoek* 2.15.

³⁷ *de jure* 2.14.7.

³⁸ *Pufendorf* 8.5.7.

³⁹ *Bynkershoek* 2.15

⁴⁰ *Schorer ad Gr* 2.3.2.

⁴¹ As quoted by La Leck (n 13) p 572.

⁴² *Van der Linden* 1.7.4.

⁴³ *Huber* 2.2.8.

"...William I of Orange ... in the Charter issued in the name of Phillip II of Spain for the founding of the Leyden Academy (January 6, 1574) (*Het Groot Plac.*, III.3.7.1.) ... authorised the magistrates of Leyden at any time to destroy and occupy private houses and other public and private property upon payment of the price to the private owners, not only for the buildings of the Academy, but also for ornamental purposes and for the pleasure-grounds of the students, to quote the exact words: "In every way useful for the adornment of the same and for the recreation of the students, provided they are bound to repay the individual owners or possessors of the private houses at a rating decided upon by the alderman." The kind of knowledge of public law here displayed, I would not employ..."⁴⁴

It is difficult to say whether Bynkershoek was justified or not at the time in viewing the embellishments at Leyden as luxurious and undeserving the use of eminent domain powers. The line between luxurious embellishments and beneficial improvements is a very thin and wavering one. Certainly, today the recreation grounds for students would be justifiable on the basis of utility. The proliferation of environmental legislation in the modern world, its sheer scope and coverage, governing anything from open spaces to slum clearances in inner cities, goes beyond anything Roman-Dutch writers had experience of, but even during their own time there were nascent harbingers of the greater things to come. For example, laws (*keuren*) of certain places already prevented the abandonment of houses due to their derelict state and "article 46 of the Keuren van Leiden — prohibited the demolition or destruction of buildings (to prevent the facade of the city being ruined) on pain of expropriation of the land on which the buildings stood in favour of the city."⁴⁵

Compensation

It has been said that Roman-Dutch writers viewed payment of compensation by the state for expropriation rather as a moral duty than as an enforceable right of the subject⁴⁶. Although the above conclusion is usually backed with quotations from the actual texts of the old authorities, it is respectfully submitted here that more light can be shed into the real meaning of these texts if the concrete fact situations, the practicalities of reimbursement and the "utility/necessity scale", which the writers clearly had in mind, are taken into account. It must also be noted that the validity of expropriation was not contingent upon the payment of compensation but the right to compensation emerged as a derivative right⁴⁷. Consequently, some of the old writers recognised the need for the state to have sufficient time after the expropriation to put itself in funds to meet the payments, but the liability remained until fully discharged.⁴⁸

⁴⁴ *Bynkershoek* 2.15.

⁴⁵ Visser, D P (N 17) p 44 quoting D G Van der Keessel, *Praelectiones turis hodierni ad Hugonis Grotii introductionem ad iurisprudentiam Hollandicam* (eds. P van Warmelo, W I Coertze, H L Gonin & D Pont) Amstelodami/Promunturi B S in urbe (1963) *ad Gr* 2.3.8.

⁴⁶ *Lawsa* 10 para 3, Carrey Miller, D L (n 23) p 113.

⁴⁷ As Observed in *Bynkershoek* 2.15: "Accordingly the *Lex Aquilia*, does not apply when private property is destroyed for the public welfare, but an action *in factum* for the value of the goods destroyed is not precluded."

⁴⁸ *de jure* 3.20.7.2, *Pufendorf* 8.8.3.

We proceed now to examine the actual texts in the light of the above preliminary observations. We have already seen that Grotius required as a second requisite for expropriation that "compensation from public funds be made, if possible, to the one who has lost his right".⁴⁹ The words "if possible" have been interpreted to mean that payment of compensation was a matter for "equity" and "justice" and not an enforceable legal liability⁵⁰. However, it is possible and even likely, that the words were meant to cater for a practical situation where the state was temporarily out of funds as Grotius explains later in the same work:

"The state, furthermore, will not be relieved of this burden if perchance it is not equal to the payment at the time; but whenever the means shall be at hand the obligation will reassert itself as if merely in suspense."⁵¹

It is also instructive to note that in all other passages referring to *dominium eminens* in *de Jure* Grotius puts the requirement for compensation very strongly, maintaining that "compensation ought to be given"⁵² and that "the state is bound to make good at public expense the damage to those who lose their property".⁵³

When Pufendorf treats the payment of compensation as a matter of "... the most manifest equity..." rather than strict obligation, it must be realised that he had in mind expropriation on the basis of necessity which is the only ground he had restricted eminent domain to in the preceding paragraph⁵⁴. It would appear even further that he had in mind extreme necessity or a public emergency situation, when citizens may be called upon to make contributions or may "lose their fortunes for the public weal".⁵⁵ It is under such circumstances that Pufendorf holds that compensation would not be mandatory but equitable. Where, however, the citizen has negligently put himself in harm's way by, for example, having buildings outside city walls which building are then torn down in a war, no compensation is payable.⁵⁶

Again, where all citizens suffer equal damage due to the destruction of a war, Pufendorf opines that no compensation is payable because "it is all that can be expected if the state allows no one to become worse off by its own fault, while it has never obligated itself to bear the losses of its subjects".⁵⁷ The reasoning on this last point is somewhat muddled and the requirement that the citizens should have suffered equal damage is curious, although his preoccupation with a situation of extreme necessity is quite obvious, which is the point being made here. Perhaps a clearer opinion on war damages is that of Bynkershoek who asserts that general calamities, which imply no permanent deprivation, like when one's property is "ground chosen for the battle field or for the positioning of camp", such loss "all subjects must bear with equanimity, and there is never any restitution for it."⁵⁸ Cases

⁴⁹ *de jure* 2.14.7.

⁵⁰ *Bynkershoek* 2.15.

⁵¹ *de jure* 3.20.7.2.

⁵² *de jure* 3.19.7.

⁵³ *de jure* 3.20.7.2.

⁵⁴ *Pufendorf* 8.5.7.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Bynkershoek* 2.15.

of extreme necessity excepted, Pufendorf is in full agreement with Grotius that "the state is obligated to reimburse private individuals ... out of the public treasury, either at once, or as soon as it begins to be solvent⁵⁹" for all utility and ordinary necessity expropriations.

Compensation for necessity-induced expropriation was problematic for two basic reasons: the degree of the necessity, i.e. whether extreme or ordinary, and the duration of the deprivation, i.e. whether temporary and confined to the period of necessity or permanent and going beyond the special period. We have already seen above how the degree of necessity led to special rules being developed for a variety of extreme necessity situations. In fact, it remained controversial in Roman Dutch law whether the state was bound to pay compensation for private property it destroys in an emergency⁶⁰. The problem of duration of deprivation was resolved by allowing compensation only where deprivation of property was permanent. Thus, Huber⁶¹ defines the sovereign's powers of expropriation as "to take away from persons the free control of their property; also to compel them to sell their goods, or, **in the case of necessity, to go without them for no payment, but no longer than the necessity continues.**" (emphasis added) Decker⁶² is to the same effect in his definition of *dominium eminens*, which is worth quoting at length:

... *dominium eminens* is the power possessed by the Sovereign to deprive, in the case of public necessity, or for the benefit of the citizens, particular individuals of the free disposal of their property, and to compel them to sell their property, **or in the case of need to give it up without payment. But this cannot last longer than the necessity, for then compensation may justly be claimed.** (Emphasis added.)

It was in the light of the above problems of special cases and fine distinctions that Bynkershoek⁶³ saw the need for uniformity in reimbursement as a desirable goal: "But why should we not lay down a general principle that all loss sustained by private citizens for common necessity or utility should be shared by all and should be paid for from the public treasury?"

This goal, however, has remained elusive even to this day for a number of reasons: limited state resources to satisfy all the possible claimants and the fact that social and political considerations make some of the distinctions indispensable. An example of the "everlasting" distinctions is that concerning state security in wartime, the value of which, through the ages, has almost invariably been held to prevail over the right to compensation⁶⁴. Another is the distinction between expropriation on the hand and, on the other, the exercise of the so-called state "police power" over

⁵⁹ Pufendorf 8.8.3.

⁶⁰ La Leck *op cit.*, (fn. 13) p: 572 quotes Schorer as follows: "It is a controversial question whether the State in an emergency may destroy private property without compensation". Schorer, *Aant.*, p 668 *in med*"

⁶¹ 2.2.8.

⁶² Decker's note (d) to *Van Leeuwen RHR 2.2.1 (Het Roomsche Recht)* (Leiden and Rotterdam 1664); 12 ed with notes by C W Decker (Amsterdam 1780-3) translated into English by J G Kotze, *sub nom Commentaries on the Roman-Dutch Law* (London 1881-6).

⁶³ Bynkershoek 2.15.

⁶⁴ Stein, P and J Shand (n 2) p.225.

property, i.e. the numerous measures whereby the state regulates economic activity, health, safety and general welfare of its subjects. The exercise of these measures of control often causes loss or damage to the citizens but as long as it falls short of a complete "taking", no compensation is payable⁶⁵. But surely a severe restriction of the owner's management and enjoyment of his or her property, like the prohibition of the use of land for any of the purposes which give it substantial economic value, may amount to a "taking" in every respect but name. Or as Shakespeare's Shylock in *The Merchant of Venice* graphically put it:

"You take my house when you do take the prop
That doth sustain my house, you take my life
When you take the means whereby I live." ⁶⁶

Yet modern governments would be seriously hamstrung and crushingly costly if citizens were to be compensated for all losses suffered in the exercise of state measures of control. Certainly, compensation for all losses sustained by private citizens for the common good is still as noble a goal today as when van Bynkershoek yearned for it more than two and a half centuries ago. Unfortunately, it is equally still unattainable. Efforts at its realisation through the delicate balancing of the competing values of public good and private rights are bound to continue to achieve less than satisfactory results until the basic conflict between private ownership and public requirements is resolved.

Finally, we consider the issue of the quantum of compensation. The views of the old authorities ranged from those who plumped for "reasonable compensation"⁶⁷ or "suitable compensation"⁶⁸ at the lower scale, to those who insisted on compensation "at a valuation"⁶⁹ at the higher end of the scale. It appears that the "utility/necessity" argument also affected the level of compensation, with a higher quantum of compensation payable where property was expropriated for public benefit, as distinct from public emergency, purposes. Most of the public utility expropriations seem to have been associated with local authorities, and, in the state concessions for such expropriations, compensation at a valuation was almost invariably insisted upon.⁷⁰

Expropriation procedure

Under Roman-Dutch law local authorities could only exercise the right of expropriation under authorisation by the state but, even then, they had to satisfy a number of requirements which amount to the modern judicial method of expropriation where expropriation is effected by the decision of a court: the court is requested to grant the property to the expropriator against payment of such compensation as the court may deem sufficient, the owner is party to the litigation and can dispute the necessity or the desirability of the expropriation as well as the amount of compensation offered⁷¹. The Roman-Dutch law expropriation method for local authorities is summed up by Huber⁷² as follows:

⁶⁵ *Ibid.*

⁶⁶ Act IV. Scene 1.

⁶⁷ *Van der Linden* 1.7.4.

⁶⁸ *Gr* 2.32.7.

⁶⁹ *Huber* 2.2.9.

⁷⁰ See cases cited in *Bynkershoek* 2.14 and 2.15 *Huber* 2.2.9.

⁷¹ *Lausa* 10 para 24.

⁷² 2.2.9.

Towns and bailiwicks have not this (overriding ownership) power; but if they want to bind their inhabitants for any such thing, they must have the consent of the States-General to that end; for example, to compel people to allow their lands or houses to be used for the making of roads, harbours and buildings, they must have a concession from the States-General, which must be confirmed before the Court, with summoning of the interested parties, who must be judicially heard in opposition to the proposal.

The prerequisites for a valid expropriation by a local authority were, therefore, firstly, authorisation by the state; secondly, notification of interested parties who had a right to be judicially heard in opposition to the proposal, and thirdly, confirmation of the expropriation order by the court. The validity of the expropriation itself, as has already been noted, was not contingent upon payment of compensation but the right to compensation emerges clearly as a derivative right. Huber emphasises the role of the court "on matters of this kind".⁷³

Concluding Remarks

Roman-Dutch law, as has already been shown, recognised wide state powers of expropriation but insisted on moderation in their exercise. Expropriation could take place on the grounds which ranged from extreme necessity (emergency), on the one hand, through ordinary necessity and utility to, on the other hand, even embellishment and adornment purposes. For all losses which involved permanent deprivation of property, the general consensus was that compensation should be paid. However, Roman-Dutch law writers were aware of the practical difficulties that a state could face in meeting the reimbursement expenses and in appropriate cases allowed for the postponement, but not extinction, of the obligation to such a time as when the state would be in a position to discharge it. Their search for a formula that would allow all losses sustained by private citizens for the common good to be compensated foundered on the practical difficulties of limited state finances and the conceptual difficulties of trying to gloss over distinctions that just cannot be ignored in society⁷⁴. Some modern writers have suggested that the solution to this conundrum lies in the drawing of the distinction between the beneficial and the managerial functions of property; allowing the state discretionary control of the managerial function but ensuring that the beneficial function is never taken away without compensation⁷⁵. It is submitted, however, that this scheme differs from the approach of Roman-Dutch writers in terminology only. It too cannot rule out exception. For example, the beneficial function can be breached without compensation in wartime and the managerial function may be exercised in a way which imposes so much restriction as to amount to a technical "taking".⁷⁶ Constitutional rights to compensation are invariably concerned with the protection of the beneficial function, leaving the managerial function constitutionally unprotected. In some jurisdictions, however, individual statutes do provide for compensation for damage caused by the exercise

⁷³ *Ibid.*

⁷⁴ Refer to section on "Compensation", *supra*.

⁷⁵ Stein, P and J Shand (n 2) p 225.

⁷⁶ Refer to section on "Compensation", *supra*.

of specified "police powers" (and rightly so in my opinion), but this is quite rare⁷⁷. Thus, the challenge posed by van Bynkershoek continues to reverberate across centuries and incessantly demands a solution: "But why should we not lay down a general principle that all loss sustained by private citizens for common necessity or utility should be shared by all and should be paid from the public treasury?"⁷⁸

⁷⁷ *Lawsa* 10 para 2 See also: Krasnowiecki J. *Cases and Materials on Ownership of Land* The Foundation Press, Brooklyn, 1965 p., 480 who states: "Our facile acceptance of the view that the power of "eminent domain" and the "police power" are separate powers of government may have inhibited the range of ideas available for the solution of modern problems."

⁷⁸ *Bynkershoek* 2.15.



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