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Constitutional Framework

The Dutch constitution contains no *explicit* right to property. The 'official' argument is such right is so fundamental that it is not necessary to explicitly mention it in the Constitution. However, the Constitution does contain provisions on expropriation (Article 14(1)) and on restrictions to property (Article 14(3)).

Article 14 of the Dutch Constitution (*Grondwet)* provides, translated in English, as follows:

1. Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament.

2. Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for.

3. In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it.

With respect to this provision the following remarks can be made.

1. The legal/practical significance of Article 14 *Grondwet* (like all Constitutional provisions) is limited due to the fact that Dutch courts are not allowed to review the constitutionality of Acts of Parliament. Article 120 *Grondwet*: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'
2. Expropriation, in the meaning of Article 14(1), is therefore governed by the Act on Expropriation (*Onteigeningswet)*. This procedure contains 3 stages. The first stage is that the public authority should try to reach an agreement with the proprietor. If a voluntary agreement is not possible, the next step is that by Royal Decree (mostly based on a proposal of the city council and after advice of the Council of State) a decision on expropriation is taken. Such a decision needs to be affirmed by the court and the court will be responsible to set the amount of compensation. The ruling of the court is subject to cassation (i.e. review on points of law only) by the Supreme Court. This 'heavy' procedure must be seen as *ultimum remedium* and should only be used if no other solutions are possible.[1]
3. Please note that expropriation is only possible with respect to 'property', i.e. physical objects. The procedure cannot be used to expropriate 'rights', such as lease rights. This implies that the substantive scope of this provision is more limited than Article 1, Protocol 1 ECHR. As we know, the property-guarantee of that provision is *not* limited to physical objects, but stretches to rights/interests with an economic value.[2] Also with another aspect the scope of Art. 14 *Grondwet* seems to be more limited than Article 1, Protocol 1 ECHR. Article 1, Protocol 1 ECHR does have certain 'horizontal' effects and its protective scope is not exclusively restricted to the relation state vs. individual. It seems that Article 1, Protocol

[1] Such as the imposing of public law obligations to tolerate certain restrictions in the use of land.
[2] See Bernhard Wegener's paper on the ECHR.

1 ECHR is also applicable in cases were property rights of an individual are affected by another individual and where the state has not taken sufficient measure to protect the affected individual.

4. Also note that in the Netherlands a permit/license is not regarded as 'property', nor is it defined in terms of 'subjective rights'. In other words, revoking a permit or *ex officio* changing permit conditions is not seen as 'expropriation' or as 'regulating property'. This is consistent case law.[3]
5. Restrictions on the *use* of property are governed by Article 14(3) *Grondwet*. The formulation (in the cases laid down by or pursuant to Act of Parliament) makes it clear that this provision does not in itself grant a right to full or partial compensation and cannot be used by an individual to claim such a compensation. Such a right can only be based on/by/pursuant an Act of Parliament. An example can be found in Article 6(1) of the Dutch Spatial Planning Act. If an individual suffers a loss of income or if there is a decrease of the value of (immovable) property caused by certain planning decisions the municipal public authority will provide for an allowance[4] *(' tegemoetkoming')* ,in so far the damage cannot be reasonably attributed to the individual and is not ensured otherwise. There is a prolific literature and case law on this provision (and similar provisions in other Acts). We will leave this aside. However, there seems to be a certain consensus that 'standard societal risks' will not be compensated, only excess risks (see below my remarks on the concept on "*égalité devant les charges publiques")*. Also the *foreseeability* of damage can lead to a limitation of the compensation.
6. In sum: the significance of 'expropriation' for day-to-day environment-based policy-making is limited. One recent example: in view of works in the Scheldt river estuary (in the Dutch/Belgium border area) it is necessary (in view of the obligation to compensate ex Article 6(4) Habitats directive) to flood the Hedwige-polder. That means that the proprietors of the land in the polder (mostly farmers) have to be compensated in full according the rules of the *Onteigeningswet*, since this flooding will let them no reasonable use of the land.

The European Convention on Human Rights

Earlier it was demonstrated that the Constitutional provisions on expropriation have only limited practical significance due to the fact that Acts of Parliament cannot be review on their constitutionality by the Dutch courts. Having said that, matters are different with respect to the property-guarantee of Art. 1, Protocol 1 ECHR. In view of Articles 93 and 94 of the Dutch Constitution 'self-executing' provisions of international treaties can be relied upon in Dutch courts and those provisions have precedence over conflicting national law. It is therefore no surprise that, once again from a practical perspective, the role of Art. 1 P1 is more important than Art. 14 *Grondwet.* Art. 1P1 has been relied upon in a couple of cases where individuals sought for judicial review of national environmental measures affecting their interests.

One of the most notorious cases in this respect is the so called *Pig Quota* case.[5] In order to reduce phosphate and nitrogen contamination in the environment the *Wet herstructurering varkenshouderij* (Whv)[6] introduced a system of pig quota's for individual pig rearing undertakings, by which *de facto* a

[3] Dutch Council of State 21 March 1996, ECLI:NL:RVS:1996:AP8216.
[4] The Act explicitly avoids the word '*schadevergoeding'* (compensation)!
[5] Dutch Supreme Court, 16 November 2001, AB 2002/25.
[6] Act on the Restructuring of Pig Rearing.

maximum number of pigs were set for individual pig rearers. This Act was challenged before the Dutch courts as being an 'illegal act of the legislator' and pig rearers relied upon Art. 1P1 in particular. The District Court Den Haag argued that this act, which resulted in a 25% reduction of the number of pigs, without offering adequate compensation was incompatible with Art. 1P1. According to the District Court this was a case of expropriation and therefore not allowed without compensation. This judgment was upheld in appeal. However, the Dutch Supreme Court thought otherwise. It argued that it was a case of 'regulation of property' and not of 'expropriation'.

Another example concerned a Governmental Decree (*Algemene Maatregel van Bestuur*) to create, in certain areas, crop-free and manure-free zones. As a result farmers are no longer a allowed to use their full property for their business-purposes. 'Biological farming', however, was still allowed. The Decree intended to limit the discharge into surfacewaters of phosphates and nitrogen. Some farmers challenged this decree and relied upon Art. 1P1. The District Court Den Haag argued that the objective of the legislation (protection against water pollution) is a legitimate objective and that the measures taken were not disproportionate to their aim.[7] The size of the crop-free and manure-free zones were limited, there was a special rule for 'small' properties and biological farming was excluded. In particular noteworthy was that the court did use the 'polluter pays principle' to argue that the costs for taking measures against water pollution had to be bear by the one who caused it (in this case the farmers). The district court ruled that there was no need for compensation.

A *Sahlsted*-like case was dealt with by the Dutch Council of State.[8] The decision to designate land as an SPA under the Birds Directive and the Dutch Nature Conservation Act, landowners argued that the decision violated Art. 1P1 as they were not longer allowed to hunt on their own property. According to the Council of State the decision could not be regarded 'expropriation', but as 'regulation' of property. It was also argued that the regulation of property served a general interest and that there were insufficient reasons to support the idea that the restrictions were disproportionate. Therefore no compensation was required, although the Council of State did not complete rule out that afterwards, in concrete and individual cases, the decision could have disproportionate effects and that in those cases compensation is required. However, there was no need to establish *a priori* a general compensation scheme.

A somewhat peculiar case where Art. 1P1 was relied upon concerned someone who lived in a nature conservation area.[9] According the rules applicable in the municipal zoning plan certain restrictions applied on the use of that property. After repeatedly having violated these user-restrictions the public authority issued a 'penalty payment order'. This order was challenged with the argument that the user-restrictions in the municipal zoning plan were incompatible with Art. 1P1. The Council of State was not impressed and ruled that 'even if' the user-restrictions were to be regarded as a restriction to enjoy property, these restrictions are deemed to be necessary to regulate property in the light of the general interests at stake and that no evidence was presented to argue that the applicable rule were disproportionate.

The *égalité*-principle

[7] District Court Den Haag 20 March 2002, M en R 2003, 79.
[8] Dutch Council of Sate 19 March 2003, M en R 2003, 70.
[9] Dutch Council of State 14 November 2001; ECLI:NL:RVS:2001:AD6818.

Although the basic rule in Dutch law is that, in absence of explicit statutory provisions, emanations of the state are only liable to pay/compensate for damages in case of *illegal* acts/omissions, it is now acknowledged by the courts that in specific circumstances there can be a duty to compensate[10] for *lawful* acts.[11] The legal basis for this obligation is principle of, derived from French law, "*égalité devant les charges publiques*". In short: the *égalité*-principle.[12] This, from origine unwritten, principle is now being codified in the Dutch General Administrative Law Act:[13]

> *Titel 4.5. Nadeelcompensatie*
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> *Artikel 4:126*
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> *1. Indien een bestuursorgaan in de rechtmatige uitoefening van zijn publiekrechtelijke bevoegdheid of taak schade veroorzaakt die uitgaat boven het normale maatschappelijke risico en die een benadeelde in vergelijking met anderen onevenredig zwaar treft, kent het bestuursorgaan de benadeelde desgevraagd een vergoeding toe.*
>
> *2. Schade blijft in elk geval voor rekening van de aanvrager voor zover:*
>
> *a. hij het risico van het ontstaan van de schade heeft aanvaard;*
>
> *b. hij de schade had kunnen beperken door binnen redelijke grenzen maatregelen te nemen, die tot voorkoming of vermindering van de schade hadden kunnen leiden;*
>
> *c. de schade anderszins het gevolg is van een omstandigheid die aan de aanvrager kan worden toegerekend of*
>
> *d. de vergoeding van de schade anderszins is verzekerd.*
>
> *3. Indien een schadeveroorzakende gebeurtenis als bedoeld in het eerste lid tevens voordeel voor de benadeelde heeft opgeleverd, wordt dit bij de vaststelling van de te vergoeden schade in aanmerking genomen.*
>
> *4. Het bestuursorgaan kan een vergoeding toekennen in andere vorm dan betaling van een geldsom.*

The basic idea behind this principle is that there should be equality for public charges. If an emanation of the state takes a measure in the 'general interest' and as a consequence an individual suffers in a 'specific' and 'abnormal' manner, this triggers liability. 'Specific' in this context means that only a *limited* group of individuals has carries the burden in the general interest. 'Abnormal' means that the burden exceeds what can be considered a 'normal societal risk'. The *égalité*-principle in essence means that although the measures taken by a public authority in the general interest, for instance for reasons of environmental protection, are as such valid and legal, there is a duty to compensate for the excess loss. By definition this does not mean full compensation.

Earlier we already mentioned Article 6(1) of the Dutch Spatial Planning Act as a specific 'legislative' application of the *égalité*-principle. With respect to environmental law a similar provision can be found in the Articles 15.20 and 15.21 of the Environmental Management Act (*Wet milieubeheer*). These provisions provide in essence that in the case a public authority takes a decision with respect

[10] Called "*nadeelcompensatie*".
[11] Dutch Council of State 6 May 1997, AB 1997, 229 and Dutch Supreme Court 30 March 2001, AB 2001, 412.
[12] On a theoretical level: there is abundant literature in the Netherlands on the question of the relation of the *égalité*-principle with the proportionality-principle. We will leave this, although interesting, aside.
[13] Not yet in force, but probably 1 January 2015.

to a permit-holder and as a result of this decision this permit-holder suffers damages, that reasonably should not be attributed to him, the public authority is required to compensate on a *bona fide* basis. Article 15.20 deals with compensation if damages occur due to a single administrative act; Article 15.21 (even more exceptional) provides for compensation if the damage is caused by general legal provisions.

In practice, this provisions are implemented via the use of 'policy-rules' ("*beleidsregels*"). Policy rules give rather detailed instructions to the public authority in question on all aspects of the compensation to be paid. According, to Art. 4:84 of the Dutch General Administrative Law Act (*Algemene wet Bestuursrecht*; Awb) these policy rules are binding for the administration, except for special circumstances. In environmental law compensation ex Articles 15.20 and 15.21 of the Environmental Management Act is governed by the so called *'Circulaire schadevergoedingen'*. With respect to that policy-rule the following aspects can be mentioned:

1. General idea is that whenever for environmental protection action is required the public authority in question is under an obligation to see if the consequences of this for individuals are not disproportionate. If the measures to be taken for environmental reasons are as such legitimate, the permit-holder must be compensated financially for the disproportionate burden he has to carry. However, this will be only the case in exceptional circumstances, particular in view of the polluter pays principle.
2. Key elements are: 'disproportionate burdens'; 'significantly' affecting the permit-holders competition capabilities in view of 'above normal' measures to be taken. Damage below 20% (benchmark is the costs other competitors have to make) will not be compensated.
3. Compensation is not full, but based on 'equity'. From the 'disproportionate burdens' under 2) 20% will be considered as a 'standard business risk'. So the maximum compensation is 80%.
4. Furthermore, there should be a direct causal link between the state-measures taken and the damage and subject to the requirement that there are no other possibilities to be compensated (*ultimum remedium*).
5. No compensation will be given for new activities.
6. No compensation will be given if permit-application is refused.
7. No compensation will be given after the expiration of temporary permits.
8. In general no compensation will be given if the permit-holder applies for the broadening/changing existing activities, unless these changes are necessary to comply with exceptional environmental standards.
9. Revision of 'old' permits can give ground for compensation. The 'older', the less compensation. Foreseeability of the damage is a key element. When making investment decisions reasonable and prudent actors have to be aware that changes in law and policy might occur. Accepting foreseeable damages will not be compensated ('active risk acceptance'). There is hardly any possibility to claim, based on the principle of legitimate expectations, to maintain the existing *status quo*.
10. *Ex officio* changes of permit-condition can give ground for compensation. The 'older', the less compensation. Foreseeability of the damage is a key element. Third parties are able to submit a request to the permitting authority for such changes. Remedies are available in case of a refusal.

11. Revoking a permit can give ground for compensation. The ‘older’, the less compensation. Foreseeability of the damage is a key element.

Summary Conclusions

1. Constitutional guarantee of ‘property’ is weak. The role of Article 1 Protocol 1 ECHR is more important.
2. The importance of transition/adaptation periods. In other words: nothing is ‘for ever’, but if changes are necessary for environmental reasons, reasonable transition/adaption periods are necessary in order to be able to adjust to the new situation.
3. There is reluctance, at the Courts, to argue that certain restrictive measures are ‘in general’ disproportionate and thus require compensation. But they are willing to entertain claims in individual and specific cases which show disproportionate effects.
4. The ‘polluter pays principle’ restricts the need for compensation, particular in cases of revoking/revision permits and/or *ex offcio* changes in permit conditions.
5. Forseeable damage will not be compensated compensated (‘active risk acceptance’).

Two cases

1. Assuming that the factory operates within the permit conditions the only obligation for the state is to consider whether there is a need for a revision of the permit. There are no public remedies available for the inhabitants if there is no violation of the permit(conditions). Revoking/revision can trigger liability (see above). The older the permit, the lesser the compensation.
2. If the waste dump is being built as a result of a change in the local building plan(s), compensation is possible ex Article 6(1) of the Dutch Spatial Planning Act (see above). If one buys a house next to an existing waste dump site, there is no compensation (‘active risk acceptance’). Assuming that the waste dump operates within the permit conditions, there is no compensation. Assuming that the factory operates within the permit conditions there are no public remedies available to the inhabitants. If the permit conditions are violated ‘standard’ enforcement remedies are available.