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Property and Environmental Protection in the Netherlands

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Content

A. Constitutional Framework

The Dutch Constitution (*Grondwet*; *Gw*) contains no explicit right to property. The 'official' argument is that such right is so fundamental that it is not necessary to explicitly mention it in the Constitution. We will not debate the lack of logic of this argumentation any further, but the premise of it is that the Dutch Constitution only provides for non-fundamental provision. However, the Constitution does contain provisions on expropriation (Article 14(1)) and on restrictions to the use of property (Article 14(3)).
Article 14 of the Dutch Constitution provides, translated into 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.

Procedure expropriation (14(1) Gw)

Expropriation, in the meaning of Article 14(1), is governed by the Act on Expropriation (*Onteigeningswet*). The procedure consists of 3 stages. The first stage is that the public authority should try to reach an agreement with the proprietor.[1] If a voluntary agreement is not possible, the next step is that by Royal Decree – in most cases based on a proposal of the city council and after advice of the Council of State – a decision on expropriation is taken.[2] 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, more amicable, solutions are possible.

Restrictions on the use of property (14(3) Gw)

Restrictions on the use of property are governed by Article 14(3) *Gw*. The formulation of the provision (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.[3] Such a

[1] Article 17 *Onteigeningswet*.

[2] Article 18 *Onteigeningswet*.

[3] See for example CBb 15 June 1990, AB 1992, 229, with case note R.M. van Male, ECLI:NL:CBB:1990:AN2397.

right can only be based by or pursuant to an Act of Parliament. But the provision does not require the legislator or the administration to provide for rules of compensation. 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 (‘*tegemoetkoming*’), in so far as the damage cannot be reasonably attributed to the individual and is not ensured otherwise.[4] There is 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 the remarks on the concept on ‘*égalité devant les charges publiques*’). Also the foreseeability of damage can lead to a limitation of the compensation.[5]

The scope of ‘property’

‘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.[6] In the Netherlands a permit/license is not regarded as ‘property’, nor is it defined in terms of ‘subjective rights’.[7] 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.

One recent example of ‘expropriation’ in its formal meaning concerns the Scheldt river estuary (in the Dutch/Belgium border area) where it was found 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 leave them with no reasonable use of the land as it had to be expropriated.

B. Article 1, Protocol 1 ECHR

Above it was demonstrated that the Dutch Constitutional provisions on expropriation have only limited practical significance due to the fact that the Constitution does not in *itself* grant a right to full or partial compensation and cannot be used by an individual to claim such a compensation. And such a right can only be based on an Act of Parliament. Also in view of the Dutch constitutional rule that Acts of Parliament cannot be reviewed on their constitutionality by the Dutch courts, the significance of Article 14 of the Dutch Constitution for day-to-day environment-based policy-making is limited. 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. In short, according to Dutch constitutional law one cannot claim compensation based upon Art. 14 *Grondwet*, but can claim the same damage by relying on Art. 1P1. Also, as shown by Bernhard Wegener’s contribution in this book, it must be noted that the Art. 1P1 definition on ‘property’ seems to be much wider than that of its Dutch equivalent. Furthermore, also shown by Wegener, Art. 1P1 is, to a certain extent, also applicable in ‘horizontal’ situations. While the Dutch constitutional guarantee is limited to the vertical relation state v. private individual.

It is therefore no surprise that, once again from a practical perspective, the role of Art. 1P1 is more important than Art. 14 *Grondwet*. Art. 1P1 has been relied upon in a couple of cases where individuals sought judicial review of national environmental measures affecting their interests.

Examples in Dutch case law concerning Art. 1P1
One of the most notorious cases in this respect is the so-called *Pig Quota* case.[8] In order to reduce phosphate and nitrogen contamination in the environment, the Act on the Restructuring of the Pig Rearing Industry (*Wet*

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[4] Article 6(1) and (2) Spatial Planning Act.

[5] Article 6(3) Spatial Planning Act. Cf. e.g. Dutch Council of State 27 December 2006, ECLI:NL:RVS:2006:AZ5163.

[6] See Bernhard Wegener’s paper on the ECHR.

[7] For example Dutch Council of State 21 March 1996, M en R 1997, 83, with case note Ch. Backes, ECLI:NL:RVS:1996:AP8216.

[8] Dutch Supreme Court 16 November 2001, AB 2002, 25, with case note P.J.J. van Buuren, ECLI:NL:HR:2001:AD5493.

herstructurering varkenshouderij; Whv) introduced a system of pig quotas for individual pig rearing undertakings, by which *de facto* a 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.[9] This judgment was upheld in appeal.[10] However, the Dutch Supreme Court thought otherwise. It argued that it was a case of 'regulation of property' and not of 'expropriation'.[11]
Another example concerned a Governmental Decree (*Algemene Maatregel van Bestuur*) to create, in certain areas, crop-free and manure-free zones.[12] As a result farmers are no longer allowed to use their full property for their business purposes. 'Biological farming', however, was still allowed. The Decree intended to limit the discharge into surfacewater 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. The size of the crop-free and manure-free zones was limited, and 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 borne by the person who caused it (in this case the farmers). The district court ruled that there was no need for compensation.

A *Sahlsted*[13]-like case was dealt with by the Dutch Council of State. 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.[14] According to the Council of State the decision could not be regarded as '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 completely rule out that afterwards, in concrete and individual cases, the decision could have disproportionate effects and 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.[15] According to 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.

C. The *Égalité*-Principle

The principle as such

Although the basic rule in Dutch law is that, in absence of explicit statutory provisions, the administration is 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 for lawful acts.[16] The legal basis for this

[9] District Court Den Haag 23 December 1998, M en R 1999, 28, ECLI:NL:RBSGR:1998:AA1085.

[10] Court of Appeal Den Haag 10 June 1999, M en R 1999, 72, with case note J.E. Hoitink, ECLI:NL:GHSGR:1999:AH6846.

[11] Dutch Supreme Court 16 November 2001, AB 2002, 25, with case note P.J.J. van Buuren, ECLI:NL:HR:2001:AD5493.

[12] District Court Den Haag 20 March 2002, M en R 2003, 79, with case note H.F.M.W. van Rijswick, ECLI:NL:RBSGR:2002:AE7269.

[13] Case C-362/06 P *Sahlstedt*, [2009] ECR I-2903, ECLI:EU:C:2009:243.

[14] Dutch Council of State 19 March 2013, M en R 2003, 70, ECLI:NL:RVS:2003:AF5992.

[15] Dutch Council of State 14 November 2001, ECLI:NL:RVS:2001:AD6818.

[16] Dutch Council of State 6 May 1997, AB 1997, 229, with case note P.J.J. van Buuren, ECLI:NL:RVS:1997:AA6762.

obligation goes back to the French principle '*égalité devant les charges publiques*', in short: the *égalité*-principle. This principle of unwritten origin is now being codified in Article 4:126 of the Dutch General Administrative Law Act (*Algemene wet Bestuursrecht*; Awb).[17]

The basic idea behind this principle is that there should be equality for public charges. If the administration takes a measure in the 'general interest' and as a consequence an individual suffers in a 'specific' and 'abnormal' manner, this might trigger liability. 'Specific' in this context means that only a limited group of individuals has carried 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.
Once again, the importance of Art. 1P1 must be noted. Acts of parliament cannot be challenged by relying on the *égalité*-principle, but can be reviewed against Art. 1P1.[18] On the other hand, the *égalité*-principle seems, in a certain way, broader than Art. 1P1. As shown by Wegener, certain 'hazards of economic life' do not qualify for compensation under Art. 1P1, but could qualify for compensation under the *égalité*-principle. One might think of the following example. As a result of the *Waddenzee*-judgment[19] the Dutch government decided to phase out cockle-fishing completely. It is debatable whether or not such a decision would qualify for compensation under Art. 1P1. Arguably not. Compensation under the *égalité*-principle might prove to be more promising. However, it can also be argued that compensation for the phasing out of certain economic activities (cockle-fishing, but in the Netherlands also mink-farming) is not required by law at all. That compensation has been given by the government in situations like these could be called: compensation by 'leniency'.

The égalité-principle in planning and environmental law

Earlier we already mentioned that Article 6(1) of the Dutch Spatial Planning Act is 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 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 environmental law compensation ex Articles 15.20 and 15.21 of the Environmental Management Act is governed by the so called '*Circulaire schadevergoedingen'*.[20] These policy rules give rather detailed instructions to the public authority in question on all aspects of the compensation to be paid. The requirements for compensation are the same in both articles. The scope of the articles can not be limited by policy rules.[21] According to Art. 4:84 of the Dutch General Administrative Law Act these policy rules are binding for the administration, except for special circumstances.

The general idea of the *Circulaire schadevergoedingen* is that whenever for reasons of environmental protection action is required the public authority in question is under an obligation to see whether or not the consequences of this for individuals are disproportionate. The *Circulaire schadevergoeding* is however rather restricted towards compensation. Broadly speaking, a request for compensation must meet four conditions, whilst the burden of proof is on the applicant. At first, there should be a *direct causal link* between the measures taken by the administration and the damage occurred.[22] 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

[17] Not yet in force, but probably 1 January 2016.

[18] Dutch Supreme Court 14 April 2000, AB 2001, 135, with case note T.A. van Kampen, ECLI:NL:HR:2000:AA5527.

[19] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405, ECLI:EU:C:2004:482.

[20] *Stcrt.* 1997, 246 jo. *Stcrt.* 1998, 168.

[21] Dutch Council of State 22 December 2000, AB 2001, 70, with case note F.C.M.A. Michiels, ECLI:NL:RVS:2000:AN6591.

[22] For example Dutch Council of State 14 January 2000, AB 2000, 142, with case note F.C.M.A. Michiels, ECLI:NL:RVS:2000:AA4973.

has to carry. The second condition is that the applicant must show that it is *unreasonable* that the applicant bears the full or partial burden of the cost of remedial or preventive action to be taken. However, this will only be the case in exceptional circumstances because, in general, undertakings have, in view of the polluter pays principle, to bear the costs of those measures necessary for environmental protection reasons. To show disproportionality the applicant must show that without compensation there will be a significant negative impact on his ability to compete on the market.[23] According to the *Circulaire schadevergoedingen* there is a disproportionate burden if the costs of the measures to be taken are at least 20 % higher than the costs of standard measures. The benchmark is the costs other competitors have to make. Damage below 20% is not be compensated, since this is considered as a 'standard business risk'. Compensation is excluded if any other possibility to be compensated exists. The compensation is meant as a *ultimum remedium*.[24] Finally, compensation under the *Circulaire schadevergoedingen* is not in full, but based on *equity*. The maximum compensation is 80 % of the total costs.[25] The criteria of the *Circulaire schadevergoedingen* are being applied – and upheld by the courts – rather restrictively. Derogation is only allowed if a strict application of the rules lead to an obviously unreasonable outcome.

The *Circulaire schadevergoeding* makes also clear under which conditions no compensation will be given. No compensation will be given for:

- new activities,
- if a permit-application is refused, and
- after the expiration of temporary permits.[26]

In general no compensation will be given if the permit-holder applies for the broadening/changing of existing activities, unless these changes are necessary to comply with exceptional environmental standards. Revision or revoking of 'old' permits or permit-conditions can give grounds for compensation. Third parties are able to submit a request to the permitting authority for such changes. 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.[27] The 'older', the less compensation. Accepting foreseeable damages will not be compensated ('active risk acceptance'). Finally, it is relevant to what extent a permit-holder had the opportunity to anticipate and to adapt to the changes in the legal regime, for instance by granting a period for the transition to take place.[28] There is hardly any possibility to claim, based on the principle of legitimate expectations, that the existing *status quo* must be maintained.

With respect to compensation for decisions of a general nature, Art. 15.21 *Wet milieubeheer* makes clear that only in exceptional circumstances compensation is required. The reason for this is that *general* measures hardly ever affect competition between individual persons and undertakings.[29]

D. The Two Cases According to Dutch Law

A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is more frequently present among them, also the frequent cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.

Assuming that the factory operates within the permit conditions the primary obligation for the state is to consider whether there is a need for a revision of the permit. This according to Article 13(5) and (7) of the IED

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[23] *Parliamentary Papers II* 1986/87, 19 752, nr. 3, p. 15.

[24] Dutch Council of State 3 September 2003, AB 2004, 51, with case note A.B. Blomberg, ECLI:NL:RVS:2003:AI1745.

[25] Dutch Council of State 23 October 1993, AB 1994, 653, ECLI:NL:RVS:1993:AN3939.

[26] Cf. also, prior to the *Circulaire schadevergoedingen*: Dutch Council of State 18 March 1996, M en R 1997, 26, with case note Ch. Backes.

[27] E.g. Dutch Council of State 23 October 1993, AB 1994, 653, ECLI:NL:RVS:1993:AN3939.

[28] Dutch Council of State 21 March 1996, M en R 1997, 83, with case note Ch. Backes, ECLI:NL:RVS:1996:AP8216.

[29] Dutch Council of State 18 January 1991, AB 1991, 241, with case note F.H. van der Burg, ECLI:NL:HR:1991:AC4031.

Directive 2010/75/EU.[30] Revising permit conditions can be triggered on the request of the inhabitants or *ex officio* by the administration. If the factory causes serious negative effects for the environment and a change of permit conditions do no provide a reasonable solution, the administration is required to close the factory. This, however, is rarely the case.[31]

A waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.
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). We can refer to older case law where the owner of a milkfarm had to be compensated in view of the location nearby of a waste site.[32] If one buys a house next to an existing waste dump site, there is no compensation ('active risk acceptance'). If the permit conditions are violated 'standard' enforcement remedies vis-à-vis the administration are available.

E. Summary

The Dutch Constitutional guarantee of Article 14 *Grondwet* concerning 'property' is rather weak. The procedure leading to expropriation is complex, but more importantly Art. 14 *Grondwet* does not in *itself* grant a right to full or partial compensation and cannot be used by an individual to claim such a compensation. The normative value of the Constitution for compensation is therefore very limited indeed. For day-to-day environmental policy-making the role of Article 1 Protocol 1 ECHR is more important. Art. 1P1 does provide a direct legal basis for compensation and also its scope – it encompasses 'rights' – is wider than the Dutch constitutional provision.

With respect to restrictions of the use of property, the *égalité*-principle is of some importance. The basic idea behind this principle is that there should be equality for public charges. If the administration takes a measure in the 'general interest' and as a consequence an individual suffers in a 'specific' and 'abnormal' manner, this might trigger liability. Recently, this principle has been codified in the Dutch General Administrative Law Act. In planning law and environmental protection law, specific legal provisions based on the *égalité*-principle apply.

[30] OJ 2010 L 334. And its implementation in Dutch law: Article 2.31(1) *Wabo*.

[31] Article 2.33(1)(d) Wabo. *Parliamentary Papers II* 2006/07, 30 844, nr. 3, p. 18.

[32] Dutch Council of State 17 December 1999, ECLI:NL:RVS:1999:AA4628.