7 The influence of Article 1 Protocol No. 1 on the Dutch legislation concerning expropriation

Some remarks on administrative measures and constitutional relations

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1 INTRODUCTION

Artic1e 1 Protocol No. 1 to the European Convention on Human Rights (ECHR) stipulates the right of every naturalor legal person to the peaceful enjoyment of his possessions. The text of this provision can be paraphrased as fol1ows:

> No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of intemationallaw. This, however, shall not hamper the State to enforce such laws as it deerns necessary to control the use of property (again: in accordance with the general interest) or to secure the payment of taxes and other contributions or penalties.

In this contribution we will not further elaborate on the levying of taxes and the summary execution which is sometimes necessary in this respect', we limit ourselves to expropriation. Long before Protocol No. 1 provided for the proteetion of property, the Netherlands - as well as many other European countries - already knew a constitutional provision concerning the protection of property. The first paragraph of this provision, Section 14 of the Constitution, reads:

> 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.

In which way does Artic1e 1 Protocol No. 1 add anything to this constitutional guarantee? To give an answer to this question we should explain

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1 See the contribution in this volume by Langereis.

something about the contents of Artiele 1 and on the applicability of international human rights instruments in the Netherlands legal order. We will start with the latter.

After having been approved by Act of 28 [uly 1954[2], the ECHR and Protocol No. 1 were ratified by the Netherlands on 31 August 1954.[3] The relationship between international law and domestic law is regulated in a monistic way by the Dutch Constitution (since the revision of 1953). Section 93 of the Constitution provides that provisions of treaties and resolutions by international institutions, the contents of which may be binding on all persons, shall have this binding effect after they have been published. The qualification *die naar hun inhoud een ieder kunnen verbinden* [the contents of which may be binding on all persons] is generally understood to refer to the self-executing character which is required for their application by Dutch courts. The rights contained in the ECHR are generally considered self-executing by the courts. For Artiele 1 this was fust determined by the *Afdeling Rechtspraak van de Raad van State* [judicial Division of the Councilof State] in 1979.[4] According to Section 94 of the Dutch Constitution statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions. The Dutch courts have therefore to give preeedenee to self-executing treaty provisions over domestic law that is not in conformity therewith, be it antecedent or posterior, statutory or constitutional law." This is an exception within the Dutch constitutional system, for the Constitution contains a bar on judicial review (Section 120, dating back to 1848). The odd consequence of this is that statutory law (i.e. Acts of Parliament) cannot be reviewed for compatibility with the Constitution, whereas it should be reviewed by the courts for compatibility with self-executing treaty law,"

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2 *Stb.* 1954, no. 335.

3 *Tractatenblad* [Dutch.Treaty Series] 1951, no. 154; 1952, no. 80; 1954, nos. 151 and 152.

4 ARRS31 July 1979, *AB* 1979, 539 (De Moor/Terschelling).

5 J.G. Polakiewicz, 'The Implementation of the ECHR in Western Europe. A Survey of National Law and Practice', in: E.A. Alkema *et al* (eds.), *The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe* (All-European Human Rights Yearbook (1992), vol. 2), Keh1/Strasbourg/Arlington: Engel 1993, p. 32-34. See also E.A. Alkema, 'The Effectsof the European Convention on Human Rights and Other International Human Rights Jnstruments on the Netherlands LegalOrder', in: R. Lawson & M. de Blois (eds.), *The Dynamics of the Proteetion of Human Rights in Europe* (Essays in Honour of Henry G. Schermers, vol. ill), Dordrecht/Boston/London: Martinus Nijhoff 1994, p. 1-14; P. van Dijk, 'Domestic Status of Human Rights Treaties and the Attitude of the Judiciary - The Dutch Case', in: M Nowak *et al* (OOs.), *Progress in the Spirit of Human Rights* (Festschrift für Felix Ermacora), Keh1/Strasbourg/Arlington: Engel 1988, p. 631-650; E.A. Alkema, 'Foreign Relations in the Netherlands Constitution of 1983', *NILR* 1984 (vol. XXXI), P: 307-331.

6 Alkema 1994, *supra* note 5, P: 3.

Coming to the contents of Artiele 1, we briefly reiterate that this Artiele contains three separate rules or principles. The fust is that of peaceful enjoyment of one's possessions. The second allows for the deprivation of possessions by the proper authorities under certain restrictions. The third concerns the control and regulation of the use of property by the administration. All governmental activities should be in accordance with the general interest, so it is only natural that this is explicitly mentioned as a essential condition for State interference with private property.

For further information on the structure of the Artiele and on the scope of proteetion we refer to the well-known commentaries to the ECHR.[7] and the contributions in this volume by Hartlief and Alkema: all rights which are well-founded in national law can basically benefit from the guarantee of Artiele 1; they may be claims, contractual rights with a certain economie value, immaterial rights or even rights granted under public law (such as a licence to serve alcoholic beverages or an exploitation concession). Even pension rights or social security rights may be protected by Artiele 1.[8]

The third principle of Artiele 1 is of importance, because in practice it applies to situations of *de facto* expropriation. A related and also important question is whether (partial) deprivation of (a) the power to dispose of certain possessions or (b) the possibility to use them, should always be accompanied by a tull compensation of damages.

In the following some aspects of the Dutch legislation conceming expropriation (including legislation that provides for obligations to tolerate and restrictions of use) will be further discussed from the perspective of Artiele 1. However, also Artiele 6 ECHR. plays a role in this respect. We will start our survey with this Article.

2 THE INFLUENCE OF ARTICLE 6 ECHR ON THE DUTCH LEGISLATION CONCERNING EXPROPRIATION

Since the Benthem judgment of the European Court of Human Rights (EcrtHR)9 - a judgment that, although it concerned a situation under the *Hinderwet* [Nuisance Act], regarded the position of the Crown as instanee of appeal in administrative cases -- the Dutch Supreme Court has radically

7 A.H. Robertson & J.G. Merrills, *Human Rights in Europe. A Study of the European Convention on Human Rights*, Manchester/New York: Manchester University Press 1993; D.J. Harris, M. O'Boyle & C. Warbrick, *Lato of the European Convention on Human Rights*, London: Sweet & Maxwell 1995; J.A. Frowein & W. Peukert, *EMRK-Kommentar*, Kehl/Strasbourg/Arlington: Engel 1995; P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague/Boston/London: Martinus Nijhoff 1998.

8 ECrtHR 16 September 1996 (Gaygusuz/Austria), *RJ&D 1996-N*, no. 14, p. 1129.

9 ECrtHR 23 October 1985 (Benthem/The Netherlands), *Series A* vol. 97.

altered its opinion on the degree of scrutiny to be applied by the courts when reviewing governmental expropriation decisions." The ECrtHR ruled that the Crown (the King together with the responsible Minister, in this case the Minister of Public Health and Environmental Protection) did not comply with the demands Artiele 6 sets out for judicial control of decisions concerning 'the determination of civil rights or obligations'. The Crown was designated as the appellate body by Section 29 of the Nuisance Act 1952. Decisions of the Crown (Royal Decrees) in appeal cases were final." Before the Crown made a decision, it had to consult the *Afdeling Geschillen van Bestuur* [Administrative Disputes Division] of the Council of State. This Division enjoyed the same independent statu.s as a court and conducted its proceedings in a more or less judicial marmer, However, the decision on appeal was not made by this Division but by the Crown itself, which in most cases followed the Division's advice, but had the possibility to deviate from it. Since, in actu.al fact it was the Minister who took the decision in appeal, the Crown was considered not to be a really 'independent and impartial tribunal' in the sense of Artiele 6(1) ECHR.[12]

The *Benthem* judgment had immediate consequences for all situations in which the Crown was the designated appellate body (mainly environmental cases and cases concerning *bestemmingsplannen* [local zoning plans]). The main consequence was that a new Act was enforced, the *Tijdelijke Wet Kroongeschillen* [Temporary Crown Litigation Act], which empowered the Administrative Disputes Division of the Council of State for an interim period of five years to take a binding decision in cases where appeal lied to the Crown (instead of only giving advice)." This matter now is regulated in a more permanent way in the *Algemene wet bestuursrecht* [General Administrative Law Act] and the (revised) *Wet op de Raad van State* [Act on the Council of State]. Since 1994 in most administrative disputes the newly formed *Afdeling bestuursrechtspraak* [Administrative Law Division] of the Council of State functions as appellate judge and in some cases as judge of fust (and final) instance. The latter is true for most cases in which the Crown formerly was

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10 See P.C.E. van Wijmen, *'De* rechter en het Koninklijk onteigeningsbesluit', in: Th.G. Drupsteen a.o, (eds.), *Rechtsvonning* in *de sociale rechtsstaat* (Essays in honour of P. de Haan), Deventer: Kluwer 1989, p. 307-323.

11 Appeal from Crown decisions to an ordinary court was excluded by the Dutch Supreme Court in its case law, based on the opinion that the Crown appeal procedure itself offered sufficient guarantees for a fair hearing in the last instance. Appeal to the *Afdeling Rechtspraak van de Raad van State* was expressly barred by Section 5(a) of the *Wet Administratieve Rechtspraak Overheidsbeschikkingen* [Administrative Jurisdiction Act].

12 P. van Dijk, 'The Benthem Case and its Aftermath in The Netherlands', *NILR* 1987 (vol. XXXIV), p. 5-24, especially p. 5-6.

13 The Temporary Crown Litigation Act entered into force on 1 [anuary 1989.

the appellate body, such as environmental cases and town & country planning cases.

So far, this had very little to do with expropriation procedures. The role of the Crown in the administrative expropriation procedure - the procedure for the administrative body that intended to expropriated something to obtain a writ of expropriation – was not even pseudo-judicial. The Crown simply sanctioned the expropriation decision of a lower administrative body (this was the case with expropriations on the basis of Title IV of the *Onteigeningswet* [Expropriation Act]) or took itself the expropriation decision (this was the case with expropriations on the basis of Titles Ila-c of the Expropriation Act). In both situations 'the Council of State' was being 'consulted', meaning the full Council and not only (like before) the Administrative Disputes Division of (like today) the Administrative Law Division. Nowadays, someone who's goods have been expropriated can put rus complaints before the Crown, but there will be no procedure before the Council of State. The Minister concemed will be directly responsible himself for the Royal Decree permitting for the expropriation.

In the perspective of the oid situation and in the face of the *Benthem* judgment it is easy to understand that the Supreme Court came to the opinion that courts judging in expropriation cases should not only review formal and procedural aspects of the decision (such as the plans being left open for inspeetion by the public, the observance of fixed terms and time limits), but also material aspects, whenever the appellant so desires. According to the Supreme Court the judge should answer questions such as: Is the expropriation necessary and in accordance with the general interest? Is it urgent and imperative?

However, what if the expropriation decision is part of a broader order", for instanee a *tracébesluit* [order of an administrative authority on the route of a motorway or railroad] or *projectbesluit* [order of an administrative authority on the planning of an important infrastructure, such as an airport] that could have been judged by an independent and impartial court in an earlier instance? In such a case the court that is called to judge the expropriation order does not need to scrutinise the material aspects of that order again. This will already have been done by another court in a procedure against the broader order, which makes that the demands of Artic1e 6 ECHR have been met with. Or it could have been done, had the appellant appealed against the broader order. If the appellant did not do so, the order of which the expropriation order is a part will have *formele rechtskracht* [1egal force]. A

14 According to Dutch administrative law an 'order' can be defined as a written ruling of an administrative authority constituting a juristic act under public law. A 'decision' is an order which is not of a genera! nature.

court called upon to judge such an order will not quash it anymore, neither for procedural failures nor for reasons of its content."

3 DE *FACTO-EXPROPRIATION* BY MEANS OF AN OBLIGATION Ta TOLERATE

Especially in the sphere of public facilities (railroads, telecommunication, energy supply, the mains system, other cable and pipe networks, water management) the Dutch legal system imposes on owners the obligation to tolerate that certain structures or constmctions are build on or under their estate. Sometimes such an obligation to tolerate comes close to a *de facto* expropriation. An example of this is the provision in Section 4 of the *Belemmeringenwet Privaatrecht* [Act on the Removal of restrictions under Private Law 1927].16 One could say that with this Act the legislature anticipated on situations where Artiele 1 could have consequences. Section 4 of the Act provides that whenever it is decided that an obligation to tolerate should be brought to rest upon a certain property, everyone who is entitled to this property can dispute this order before the court of appeal and ask to quash it on the ground that it has been unjustly considered that (1) the interests of the ones entitled to the property do not reasonably demand that the property be expropriated completely, or (2) the use of the property is not obstmcted more then reasonably necessary for building, maintaining, changing or transferring the structure of construction.

For us now the first clause is the most interesting one, Owners or others entitled to a certain property can appeal to the court and ask to quash the decision on the obligation to tolerate because this decision *de facto* mounts up to expropriation. If the responsibie administrative authority nevertheless wants to build the structure or construction on this property, it should follow the procedure of the Expropriation Act, which includes the guarantee of a full compensation.

Other Acts that impose obligations to tolerate (such as the different Acts on public works and water management and the *Wet op de Telecommunicatievoorzieningen* [Telecommunications Facilities Act]) do not contain such a provision." In our opinion a court that is confronted with a plea as meant in Section 4 of the Act on the removal of Restrictions under Private Law 1927,

15 HR 16 May 1986, *NJ* 1986, no, 723, annotated by M. Scheltema (Gem. Heeseh/Van den Akker).

16 Act of 13 May 1927, *Stb.* 1927, no. 159. See also *Stb.* 1991, no. 607 (new publication after revision of the Act).

17 However, Section 12 of the *Waterstaatswet 1900* [Act on Pulic Works and Water Management 1900] holds a provision similar to that of Section 4 of the Act on the Remaval of Obstructions of a Private Law Character. See ARRS 25 [une 1990, AB 1991, *228j* ARRS 24 August 1991, AB 1992,169.

should scrutinise the decision on the obligation to tolerate to see whether it should be quashed. This all as a consequence of Artiele 1 Protocol No. 1. The court that will have to do this, will be the court that is designated to judge on the damages that are caused by the obligation to tolerate. All Acts imposing obligations to tolerate provide for a procedure to settle disputes on the amount of damage caused by building and maintaining the structure or construction. In these procedures advisory opinions by experts play an important role, but they always end with a 'day in court'. Sometimes this is the *kantongerecht* [subdistrict court], sometimes it is the *rechtbank* [district court]. Before this court the appellant can object to the decision to place him under an obligation to tolerate and demand to be expropriated on the basis of the Expropriation Act. His claim can be based on a reasoning that is comparable to Section 4 of the Act on the removal of Restrictions under Private Law 1927 and he can also refer to the self-executingness of Artiele 1 Protocol No. land Artiele 6 ECHR. In our opinion, in such a case the court will have to judge on this objection or claim fust, before (possibly) coming to a judgment on the amount of damage resulting from the obligation to tolerate.

Developing this line of reasoning somewhat further, it can be argued that also in some other situations Artiele 1 Protocol No. 1 can be part of a ground for 'a right to expropriation'.[18] On of these situations is the one in which the Government has decided to expropriate a certain property and has published this intention (which is obliged by the Expropriation Act), but does not start the court procedure to obtain the official title for expropriation (or cancels this procedure altogether). This may lead to damages on the side of the owner of the property, for the publication of the intention to expropriate will certainly decrease the value of the property or even make it impossible to sell it.

Another situation is the one in which a certain neighbourhood in a large city is subject to urban renewal. The process of urban renewal is costly and develops only slowly. During this process, owners of shops and other businesses in the neighbourhood often experience a decrease of income and a decrease of the value of their property as a result of the high number of people moving from the neighbourhood (on the instigation of the authorities) and a high number of unoccupied houses. It may take years before it is the turn of their street or their premises to be renewed. What should the owners do in such a situation? If they leave the neighbourhood they no longer have a right to compensation in an expropriation procedure." If they stay - running the risk of bankruptcy in the mean time - they can

18 E. van der Schans, 'Recht op onteigening', BR 1993, p. 433-435.
19 HR 17 February 1954, *NJ* 1954, no. 212 (Grootebroek/Rood).

only hope that when the expropriation procedure for their premises finally commences they will be compensated not only for the loss of their property but also for the lack of income in the 'waiting period', Sometimes, however, this kind of compensation is not offered for it is held against theowners that they did not reduce their losses by moving their business from the neighbourhood to another place."

The Strasbourg case law makes clear that a Government that leaves its civilians insecure for years on the exact action that it is going to undertake towards certain property, may very well violate Artiele 1 Protocol No. 1 by doing this," FoIlowing this line from the case law it could also be argued that Artiele 1 - in certain circumstances - obliges the authorities to start formal expropriation procedures in court at an earlier stage, thus opening the door to full compensation on the basis of the Expropriation Act.

4 DEPRIVATION OF POSSESSIONS WITHOUT FULL COMPENSATION?

In principle and apart from additional reimbursements, the ca1culation of the compensation to be paid in case of expropriation is based on the 'full market value' of the property. Deprivation of property without a compensation based on this principle will normally be seen as a disproportionate interference with the right to peaceful enjoyment of property and thus as a violation of Artiele 1 Protocol No. 1. However, Artiele 1 does not guarantee a right to full compensation under all circumstances, since

> legitimate objects of public interest, such as pursued in measures of economie reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."

In our view the criteria for deprivation of possessions without full compensation should also include measures to proteet the environment and measures to preserve nature. It is our opinion that measures in these fields may justify deprivation of property or patrimonial rights without full compensation, except when the measures mount to deprivation of property *senso strictu* or of rights as meant in Section 3 of the Expropriation Act.[23] In these two situations full compensation is obligatory.

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20 Van der Schans 1993, *supra* note 18, P: 434; The existing practice of administrative compensation in The Netherlands focuses on compensation for disproportional suffering by an interested party as a result of a certain governmental order or decision. The behaviour of that interested party playsa role in the assesment of the amount of compensation. See further § 5 of this Article.

21 ECrU-IR 23 September 1982 (Sporrong and Lönnroth/Sweden), *Series A* vol, 52.

22 ECrtI-IR 21 February 1986 (James & others/UK), *Series A* vol. 98; ECrtHR 8 July 1986 (Lithgow & others/UK), *Series A* vol. 102, § 121.

23 The rights meant in this Section are La. building and planting rights, rights to leasehold,

Such a system holds an advantage for 'victims' of deprivation decisions. It will be easier to accept a causal conneetion between the fact or decision causing the damage and the damage itself. On the other hand this system will imply acceptance of criteria like 'accepted risk within society' and 'entrepreneur's risk' to moderate the sum of compensation which is impossible in the current expropriation procedures. Because it is easier to establish a causal connection, compensation will be paid earlier. This compensation may however be moderated when the fact or decision causing the damage faUs within the victim's normaUy accepted risk within society.

5 ARTICLE 1 PROTOCOL No. 1 AND SECTION 3:4, PARAGRAPH 2 OF THE GENERAL ADMINISTRATIVE LAW ACT

Referring to the travaux préparatoires, it can very well be said that Section 3:4, § 2 of the *Algemene wet bestuursrecht* [General Administrative Law Act] (Awb) gives ground to the payment of administrative compensation when an interested party suffers disproportionately from a certain order. Section 3:4, § 2, provides that the adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes served by the order. This principle of (dis)proportionality can also be found in Artiele 1 Protocol No. I, for instanee *Holy Monasteries/Greece* of 9 December 1994:[24]

> Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a totallaek of eompensation ean be eonsidered justifiable under Artiele 1 only in exeeptional circumstances.

Seen from this perspective Section 3:4, § 2, Awb forms a solid base for the payment of administrative compensation. This already was mentioned in the explanatory memorandum to the Bill holding general rules of administrative law," Dutch legal literature describes several principles of proper administration on which Section 3:4, § 2, Awb could be based: the duty of care principle, the obligation to balance interests, the principle of equality *(égalité des individues devant les charges publiques),* the principle of proportionality (as it can be found in the *Holy Monasteries-judgment* and therefore in Artiele 1 Protocol No. 1). By explicitly considering Section 3:4, § 2, Awb as a consequence of the proteetion of property in European human

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usufruct and tenancy rights.

24 ECrtHR 9 December 1994 (Holy Monasteries/Greece), *Series A* vol. 310-A.

25 *Kamerstukken* 11 [Official Reports of the Lower House of the States General] 1991-1992, 21221, no, 3, p. 70-71.

rights law - specifically in case of an interference by an administrative authority that mounts up to *de facto* expropriation - this basis can only be strengthened.

6 OWNERSHIP FLOWING FROM PUBLIC LAW DECISIONS OR PRIVATE LAW REGULATIONS

For the question whether a full or only a limited compensation should be paid it might make a difference whether the deprivation of property concerns possessions based on public law decisions or on private law regulations. When someone is being deprived of a public law concession or permit, the payment of only a limited sum of compensation may be acceptable. In case of a 'classic' expropriation (based on the Expropriation Act) this is impossible. The 'rights' that may be expropriated can be found in Section 3 of the Expropriation Act. These rights are all based on private law regulations and they may - according to the Act - not be expropriated without full compensation, even when the expropriation is instigated by measures of economie reform, measures designed to achieve greater social justice or measures to proteet the environment and measures to preserve nature.

An aspect that may be relevant in this respect is the question whether one has become owner of certain 'rights' - for instanee the right to exploit a gravel pit - without having to do something in return or not. Also, when someone has paid certain amounts of money to an administrative authority (for instanee retributions or municipal taxes on encroachments over public land) to obtain 'rights' flowing from a certain permit, license or concession there is a good reason to pay compensation in case of a *(de facto)* deprivation of these 'rights'.

7 THE INFLUENCE OF ARTICLE 1 PROTOCOL No. 1 IN THE NETHERLANDS LEGAL ORDER: THE EXAMPLE OF THE PIG-BREEDING CONFLICT

In the Netherlands we have experienced (and still are experiencing) a conflict between the Minister of Agriculture and the pig-breeding industry in which the questions mentioned in the foregoing paragraph are highly topical. At the heart of the conflict lies the *Wet herstucturering varkenshouderij* [Restructuring Act for the Pig-Breeding Industry]. This Acts aims to reduce the number of breeding pigs in the Netherlands by some 25% by

introducing 'pig-breeding rights',[26] These 'rights' are distributed to the pig breeders in such a way that each breeder obtains a number of rights equal to the number of pigs that were bred at his farm in 1995 or 1996. The rights can be traded from one breeder to another.

Subsequently, the Act regulates that there will be a general reduction of breeding rights of first 10% and later another 15%, thus gradually decreasing the number of pigs breeders are allowed to produce. From the beginning, the breeding industry complained that this reduction would make it impossible for large numbers of breeders to acquire enough income, so they would be threatened with bankruptcy. The breeding industry pleaded that - at the very least - there should be some kind of compensation (in money) for the reduction of the breeding rights. Although some amendments were made during the parliamentary debate, when entering into force at 28 September 1998 the Act did not provide for any form of compensation."

The result was a tort procedure before the District Court in The Hague, in which the pig-breeding industry *inter alia* claimed that the State of the Netherlands constituted a violation of Artiele 1 Protocol No. 1 by the entering into force and the enforcement of the Restructuring Act. The court went along with the argument of the pig-breeding industry that the breeding rights should be seen as 'possessions' in the sense of Artiele 1. Referring to the *Holy Monasteries* judgment the district court decided that deprivation of possessions without payment of an amount reasonably related to its value normally constitutes a disproportionate interference and a totallack of compensation could be considered justifiable under Artiele 1 only in exceptional circumstances. Since the Government had not urged such exceptional circumstances, the district court judged the Act indeed constituted a violation of Protocol No. 1 and decided that the part of the Act regulating the breeding rights should not be enforced without a fair compensation to the pig-breeding industry for their losses."

Soon after this judgment, which was taken to the Court of Appeal by the State, a discussion started in Dutch legalliterature whether it was right to interpret the reduction of breeding rights as a 'deprivation' of possessions.

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26 A reduction that is necessary to comply with EC Directive 91/676/EEC on the protection of water against pollution by nitrates from agricultural sources.

27 Although there were some fierce debates in parliament on exactly this aspect of the government's plans, the BID was accepted by bath Chambers of the States General. Same time later the press revealed stories of Members of Parliament from the coalition parties being put under heavy pressure from the Minister of Agriculture to accept the BID.

28 Rb Den Haag, 23 December 1998, *NfCM-Bulletin* 1999, p. 494-511, annotated by T. Barkhuysen and M.L. van Emmerik. Also published in *JB* 1999, no. 35.

Should it not be seen as 'control of use' of property? If the latter were the case, it was argued that compensation would be less obligatory."

Indeed, the Strasbourg case law seems to indicate that where State interference with property is deemed to take the form of a control of use, there is no presumption in favour of (full) compensation. The availability of compensation is just one of the factors that has to be taken into account in determining whether a fair balance has been struck between the public interest and the individual's rights." However, it is difficult to distinguish c1ear lines in the case law of the Strasbourg organs. One the one hand there are some cases where it has been conc1uded that a fair balance has been struck between private and public interests notwithstanding a failure to compensate for a reduction of the value of the property affected." The subject-matter of such cases inc1udes leasehold reform legislation which reduced the value of the applicants' freehold property": the revocation of a gravel extraction permitf: the withdrawal of planning permission": the forfeiture of an airliner used to carry drugs"; and public health legislation which made it impossible for the applicants to carry on their business of de-boning cattle heads." On the other hand the court has stated on numerous occasions that the question whether compensation has been paid – whether the interference with the property was a matter of 'deprivation' or 'control of use' - is an important ingredient in the assessment of the proportionality of the interference.

The Strasbourg case law holds no c1ear indications whether the reduction of pig-breeding rights should be interpreted as 'deprivation' or as 'control of use'. Anderson rightly concludes that 'the distinction between deprivation and control, in the context of the duty to compensate, is an untidy and unsatisfactory one'." For the time being, we tend to agree with the view that the reduction of breeding rights should be seen as a form of *de facto* expropriation and thus deprivation, because of the fact that the breeding rights can be traded separately from other parts of the breeder's businesses.[38]

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29 J.E. Hoitink & caw. Backes, 'Eigendom van 'milieuvervuilingsrechten', *NJB* 1999, p. 1759-1763.

30 D. Anderson, 'Compensation for Interference with Property', *European Human Rights Laui Review* 1999, p. 543-558, particularly p. 550.

31 Idem., p. 551.

32 ECrtHR 21 February 1986 Games and others/UK), *Series A* vol. 98.

33 ECrtHR 18 February 1991 (Fredin/Sweden), *Series A* vol. 192.

34 ECrtHR 29 November 1991 (Pine Valley Developments/Ireland), *Series A* vol. 222.

35 ECrtHR 5 May 1995 (Air Canada/UK), *Series A* vol. 316-A.

36 EComHR 21 October 1998 {pinnacle Meat Processors/UK), Appl. no. 33298/96. The measures complained of were taken because of the British BSE crisis.

37 Anderson 1999, *supra* note 30, p. 553.

38 Cf. P. de Haan, G.MF. Snijders & D.W. Bruil, 'Wet herstructurering varkenshouderij:

Even if the reduction of breeding rights should be interpreted as control of use, this form of control could hardly be compared to the Strasbourg cases mentioned above, in which control without compensation was allowed. In the case that resembles the Dutch situation best, the one of the cattle de-boning businesses", the applicants were not compensated for the losses" they complained about in Strasbourg, but did receive a considerable amount of compensation on the basis of a genera! emergency aid scheme for the slaughtering industry. Furthermore, the Commission considered that the applicants were able to use their slaughtering plants for other de-boning activities besides cattle de-boning," We cite a few passages from the Commission's decision:

> The Commission notes that in respect of 'eligible bovine products' owned by the applicants on 9 April 1996, compensation was available under the Beef Stocks Transfer Scheme element of the Slaughtering Industry (Emergency Aid) Scheme at a rate of 65% of the pre-crisis value of the stocks. As the Govemment submit, six of the applicants received payments under the scheme to a total value of over f430.000. (...)
> [T]he Commission again notes that there is no agreement between the parties as to the impact of the 1996 Orders on the applicants' material assets. However, (...) some of the assets were such as premises and motor vehicles whose value was largely independent of the nature of the business. At least some of the specialised plant and tools were capable of being used in the context of other meat operations, (...)
> Whilst it is true that some of the applicants have now ceased their businesses as cattle head de-boners, The Commission notes that they remain owners of all their tangible assets, and that those assets can either be used in new or related businesses, or they can be sold. Further, in respect of eligible beef stocks held on 9 April 1996, the applicants have in fact received compensation totalling over f430.000.
> *Given these circumstances* [italics added], the Commission does not accept that, overall, the applicants can be said to have suffered an excessive burden.

All in all, the Strasbourg case law gives mixed signals as to the matter of compensation in cases like the Dutch pig-breeding conflict. Perhaps this is why the Court of Appeal in The Hague - which recently delivered judgment in the appeal procedure – does leave the question whether a 25% reduction of breeding rights without any form of compensation is justified somewhat in the middle.

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onrechtmatig en ondoelmatig', *NJB* 1998, p. 256-261; T. Barkhuysen & M.L. Van Emmerik, 'Eigendom en verkensrechten: de vervuiler betaalt', *NJB* 1999, p. 2024; P. de Haan, 'Begripsverwarring: varkensrechten zijn geen vervuilingsrechten', *NJB* 1999, p. 2022-2024; A.W. Heringa inhisannotation to Rb Den Haag 23 February *1999,JB* 1999, no, 61.

39 EComHR 21 October 1998, (Pinnacle Meat Processors/UK), Appl. no. 33298/96.

40 These losses, according to the applicants' claims, consisted of their stock at the time of the impugned measures, the assets of their businesses, and the goodwill, or the 'present value of the future income stream which the company can be expected to derive'.

41 According to our information it is not quite that easy to use a pig-breeding sty for other purposes besides pig-breeding. For pig-breeders to develop altemative activities on their highly specialised premises very large investments will be necessary; most of the pig-breeders will not be able to raise the needed amount of money.

The Court of Appeal does not interpret the reduction as deprivation of possessions, but as control of use, Despite of the fact that the breeding rights can be traded to other breeding businesses, the court considers that the introduetion of breeding rights might best be compared to (conditions attached to) public law permits. According to the court, the first 10% reduction of breeding right envisaged in the Restructuring Act can not be judged disproportionate, even without a form of financial compensation. However, the second reduction of 15% the Restructuring Acts provides for is judged 'unnecessary' to attain the objects of the Restructuring Act" and therefore as a disproportionate interference in the right to property guaranteed by Artiele 1.[43] 50, if the necessity of a further 15% reduction of breeding rights could be established, this appeal judgment does not resolve the question whether financial compensation for this second reduction would be needed to strike a 'fair balance' between the general interest and the right to property of the pig breeders.

The pig-breeding industry has announced to lodge an appeal with the Supreme Court and continue proceeding to the European court of Human Rights. 50 it remains to be seen what the exact consequences of Artiele 1 in this conflict will be.

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42 Reduction of nitrates from agricultural sources.

43 Hof Den Haag 20 January 2000, *TB* 2000, no. 59, annotated by F. Vemimmen-de Jong, also published in *NT-KORT* 2000, 18. It is remarkable to see that the Court of Appeal scrutinises so strictly the necessity of the governmental interference with the right to property. In expropriation cases based on the Expropriation Act the courts leave a wide margin of appreciation to the administrative authorities as to the assessment of the necessity of the expropriation. Although the ECHR does not prohibit such a marginal review by domestic courts and indeed the European case law on Artiele 1 Protocol No. 1 underlines the wide margin of appreciation that should be left to the national authorities when it comes to the necessity of the interference, it can be argued that the existence and application of the margin of appreciation doctrine at the European level should not be invoked to justify judicia! restraint by domestic courts. On the contrary, the *rationale* of the doctrine (subsidiarity, better position of national authorities) shows that it must be regarded as an implicit recognition of the duty of national authorities (including the courts) to conduct a careful review on points of fact and law. Another attitude might lead to an unacceptable decrease of the level of human rights protection by the judiciary (J.G.c. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het Europees Verdrag tot bescherming van de rechten van de Mens. Een onderzoek naar de toetsing van de beperkingsclausules bij de Europese vrijheidsrechten in de Europese en in de Nederlandse rechtspraak* (Diss, Leiden), Zwolle: W.E.J. Tjeenk Willink 1996, P: 517-519). In this light the strict scrutiny applied by the Court of Appeal can be applauded.