EXPROPRIATION AND THE SOCIAL CONTRACT

WITH REFERENCE TO

THE RELATION BETWEEN CITIZENS AND THEIR PROPERTY

A THESIS

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BY

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UNDER THE SUPERVISION OF
PROFESSOR A.S. MATHEWS
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DEDICATED TO

M R A B O O B A K E R I S M A I L

IN RECOGNITION OF THE
GUIDANCE HE HAS GIVEN ME,
IN APPRECIATION OF ALL HE
HAS DONE FOR ME,
AND IN STATEMENT OF THE
INSPIRATION HE HAS BEEN
TO ME.

DECLARATION

THE CANDIDATE DECLARES THAT
THE RESEARCH THESIS SUBMITTED
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AN INTRODUCTORY PREFACE:

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PREFACE : SECTION P.1: THE NATURE OF THE ISSUE TO BE INVESTIGATED:

In the analysis of *'Expropriation and the Social Contract, with reference to the relation between Citizens and their Property'*, it emerges that there are (along with certain ancilliary investigations), three principal and interrelated ideas, to the assessment of which this research has been directed:

1. *Expropriation:* The State's expropriation power permits it to interfere significantly with any Citizen's rights to the private property he owns. (For purposes of this exposition it is noted that the word 'Citizen' is used in its sense as being correlative to the word 'State', and not in its strict and more conventional sense of nationality). Since a liberalist and naturalist stance is adopted by this writer, the statutory (positivist) interpretation of expropriation is herein supplanted by the common-law *dominium eminens* orientation, in an effort to focus on what expropriation *ought to be* rather than to state merely what it *is* at present. The inquiry is conducted largely in the public law.

2. *The Social Contract:* The Social Contract, the foundation upon which the State's *dominium eminens* power is based, is the agreement entered into by all men in terms of which the State is created, and as a result

of which the State's power of *dominium eminens* (in the public law forum), and the Citizen's rights of property ownership (in the private law forum), know existence. This Contract defines the nature of the agreed relation between State and Citizen, and the derivative relation between Citizens and their Property - a considerable jurisprudential debate attaches to its parameters and extent. The effect of the Social Contract with particular reference to property law has been investigated.

(It is noted that the above is not intended as, nor does it constitute, a definition of 'Social Contract'- no single definition is possible, since each contractarian philosopher adopts a different inflexion).

3. *The relation between Citizens and their Property:* Since, in terms of contractarianism, the institution of private ownership devolves and derives from the Social Contract, this relation is best considered from that standpoint, both in general jurisprudence, and in South Africa in particular. The assessment in this regard translates the public law principles into their parallel private law context.

(It is noted that 1 2 and 3 supra and infra correspond to Chapters 1 2 and 3 of this exposition).

Essential to these considerations (respectively) are:

1. the public law proprietary powers that attach to the State[1] in consequence of the Social Contract, and specifically, the power

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[1] Section 1.3.

vesting in the State to expropriate private property.[2] Central here are the origin, meaning, evolution and effect of the State's power of *dominium eminens*[3] as enunciated by Grotius; the jurisprudential debate that arises in this regard;[4] the definable characteristics[5] of the power; the questions of nomenclature;[6] and the naturalist view of the compensation entitlement upon expropriation.[7]

2. The Social Contract[8] foundation is assessed in the writings of philosophers and jurists through the ages. From its early foundations[9] to the emergence of a theory[10] of a Social Contract proper[11] in the seventeenth century, and thereafter to its reassessment under the German school of transcendental idealism[12] and in the recent writings of John Rawls[13] and others, the contractarian movement (notwithstanding objections[14] to its validity), yields a valuable insight regarding the nature and limits of the State's public law power of *dominium eminens*.[15]

3. The analysis of *dominium eminens* (and the other public law proprietary power of the State) against the contractarian backdrop, contributes significantly to the deeper understanding of the changing relation between Citizens and their Property.[16] The Hegelian and naturalist

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(2) Sections 1.1 and 1.4.

(3) Chapter 1. (4) Section 1.2 (5) Section 1.4.

(6) Section 1.5 (7) Section 1.6 (8) Chapter 2

(9) Section 2.2 (10) Section 2.3 (11) Section 2.4

(12) Section 2.5 (13) Section 2.6 (14) Section 2.1

(15) Section 2.7 (16) Chapter 3

standpoint[17] adopted herein of a synthetic tripartite historical continuum unfolding in accordance with universalisable maxims, is utilised to trace the development of private ownership and expropriation from its dawn in Greece and Rome,[18] its evolution in mediaeval[19] and English[20] law, to the modern era with its new vision of property.[21] Thereafter, the nature of the real right of private ownership in South African law is considered, along with its apparently antithetical correlation with the State's power of dominium eminens.[22]

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(17) Sections 2.5.4 and 3.1 (18) Section 3.2 (19) Section 3.3

(20) Section 3.4 (21) Section 3.5 (22) Sections 3.6 and 3.7

PREFACE : SECTION P.2 : RESEARCH OBJECTIVES

The following research objectives underlie this exposition:

(i) to inquire into:

(1) the origin, meaning, evolution and effect of *dominium eminens* as the common law foundation for the State's expropriation power;

(2) the writings of contractarian theorists from the earliest times to the present day, with a view to assessing in the forum of property law whether the Social Contract affords a rationale for the State, and for the proprietary rights of its Citizens;

(3) the changing nature of private ownership as a determinant of the relation between Citizens and their Proeprty, and the effect thereof upon the nature and exercise of the State's power of *dominium eminens*.

(ii) to consider the thought framework presented by the jurists and philosophers and by the traditions of legal history, and to formulate a concept of *dominium eminens* reflecting these understandings;

(iii) to develop and assess:

(1) the concept of *dominium eninens* in relation to the jurisprudential debate attending its rationale, and in relation to the other public law proprietary powers of the State;

(2) the theory of Social Contract (largely unexplored in prior writings as a basis for *dominium eminens*), and to extend

this theory to the relation between State and Citizen, and between Citizens and their Property in a South African context;

(3) the nature of private ownership in South African law in terms of a Hegelian model of history.

(iv) to analyse relevant research material, to assess the significance of findings, to report on conclusions, to consider possible future developments, and where appropriate, to make recommendations for statutory reform.

PREFACE : SECTION P.3 : RESEARCH METHODS AND ACKNOWLEDGEMENTS:

The examination of the Social Contract in the sphere of the expropriation of private property, involves principally a jurisprudential inquiry into the nature of the reciprocal contractarian undertakings between State and Citizen, the powers thereby conferred upon the State, the limits upon their exercise, and the nature of the institution of property thereby created. The writings of inter alia Grotius, Locke, Rousseau, Hegel and Rawls are accorded a high level of significance.

The inquiry herein conducted is, by its nature, interdisciplinary. *'Expropriation and the Social Contract, with reference to the relation between Citizens and their Property'*, requires not only the consideration of legal thought (within jurisprudence, property law, legal history and philosophy, and to a degree[1] within compensation theory), but also its synthesised assessment in relation to relevant aspects of political theory and sociology. The range of reference is accordingly considerable.[2]

To do justice to the broad development and yet to distil the essence of its trend, a selective reading of texts must necessarily be undertaken. The

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(1) In regard to the limitation of scope introduced regarding expropriatee compensability: although the broad questions of the entitlement in principle (under naturalism) to compensation, and of the question of expropriation without compensation, remain germane (vide Section 1.6 infra), it is noted that no detailed assessment of (positivist) compensation provisions in expropriation statutes or enactments, is *brevitatis causa* permitted (or even contemplated) in an enquiry of this nature. Comprehensive positivist analysis in this regard has already been undertaken in South African law in Gildenhuys Onteieningsreg (1976), Jacobs The Law of Expropriation in South Africa (1982), and Joubert The Law of South Africa (1979).

(2) Cf Bibliography infra.

caution has however been exercised not to consider in isolation an extract, without conditioning the observations made by reference in general to the body of writing in which it appears. For instance, in respect of Social Contract theory, the issue of civil disobedience is excluded from this exposition, although it is against an awareness of this broad background that the fundamental focus has been upon the proprietary consequences of that Contract, since it is to these primarily that this exposition is directed. Furthermore by way of illustration, naturalist criticism requires an understanding of the positivist statutory framework - although the analysis of enacted provisions is not undertaken in detail herein, the present exposition has been entered upon against the background of the former expropriatee compensability analysis conducted by this writer in 1981 (referred to in the Bibliography infra).

Where possible, reference has been made to primary texts to overcome deficiencies in translation and reproduction (cf Section 1.5 supra). In instances however where the consideration of translations or extracts has been acceptable (by reason of their accuracy) or necessary (by reason of the non-availability in South Africa of the original scripts), such reference to primary texts has not been undertaken. Moreover, where possible, extensive photostat copies of relevant materials have been made to facilitate research and to permit annotation and cross-referencing - this technique has proved to be invaluable to the writer.

The inquiry and research herein has been both theoretically-based and practically directed. Reference to expropriation in a situational context permits and enhances both an awareness of the significance of conclusions

drawn, and in itself stimulates many of the questions pertinent to the inquiry. In the University forum, the writer has worked under the supervision of Professor A S Mathews and Professor L J Boulle of the Howard College School of Law, University of Natal; in addition, certain sections have been discussed with Professor R I Wacks, Mr M Robertson, Mr P Glavovic and Ms R Naidoo - the writer appreciates greatly their encouragement. The writer records also the substantial assistance and guidance he has received from Dr A Gildenhuys of Gildenhuys and Liebenberg, Pretoria, from Advocate M S Jacobs of Cape Town, and from three Senior Counsel in Durban, with whom he has worked during 1979 to 1983. In his association with Hattingh and Hattingh, Expropriation Consultants, and D McCarney of King and Fuller, the writer has received furthermore the opportunity to consult in expropriation law and some of the practical experience he has gained in expropriation matters. In total, the writer has, through medium of these associations during the past five years, had the opportunity to research (and recently to present) some forty expropriation cases with claims in aggregate in the region of ten million rand.

The writer expresses also his gratitude and appreciation to Mrs E Charnas (for her tireless efforts in typing this thesis, and for the care and concern she has shown in its presentation and completion); to certain students at the University of Natal, who were engaged by the writer to assist in many of the laborious tasks that attended the preparation of this thesis (inter alia, P Lavoipierre, M Frantzen, H Woker, J Burns, C Bush, D Anderson, and several others); and to the Human Sciences Research Council and the A. Baker Group of Companies (for the bursary and scholarship assistance received).

Above all, however, the writer remains deeply indebted to Mr Aboobaker Ismail, Chairman of the A Baker Group of Companies, who, against a lifetime of experience in property development, and whose property has been expropriated on more than twenty occasions, has contributed vastly to the writer's understanding. In overview it is submitted that the importance of assessing law in its operation cannot be overstated in its value as a research medium.

PREFACE : SECTION P.4 RESEARCH DIFFICULTY : LIMITED MATERIAL ON EXPROPRIATION LAW IN SOUTH AFRICA

The difficulty that any researcher in expropriation encounters in South Africa, is that research materials in this field in South African University libraries are severely limited.(1) The writer has examined texts at the Universities of Natal (Durban and Pietermaritzburg), the Witwatersrand and Cape Town, and has requested some works from other University libraries. In addition, the writer has obtained material from overseas sources. Were it not however for the access granted to certain private libraries (inter alia those of Dr A Gildenhuys and Advocate M S Jacobs, which were collected by them for purposes of their publications in 1976 and 1982 respectively), much of the research herein contained, would not have been possible. The writer records accordingly his sincere gratitude for having been permitted the use of these facilities.

Without in any way denying the vast (positivist) merit in Dr Gildenhuys' treatise Onteieningsreg, in Advocate Jacobs' work The Law of Expropriation in South Africa, and in the article on expropriation by Dr Gildenhuys and Advocate G Grobler in Joubert The Law of South Africa, it seems that further research in South African expropriation law is justified and necessary, particularly in respect of compensation and recommendations for statutory reform.

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(1) Cf Bibliographical Note infra at Section B.1 of Bibliography.

CHAPTER 1

THE STATE'S POWER OF DOMINIUM EMINENS IN THE WRITINGS OF HUGO GROTIUS AND ITS PLACE IN MODERN SOUTH AFRICAN JURISPRUDENCE

CHAPTER 1

THE STATE'S POWER OF DOMINIUM EMINENS IN THE WRITINGS OF HUGO GROTIUS AND ITS PLACE IN MODERN SOUTH AFRICAN JURISPRUDENCE

1.1 AN INTRODUCTION TO THE JURISPRUDENTIAL DEBATE

The nature and characteristics of the State's power of dominium eminens found crystallisation and direct expression for the first time in the locus classicus of the Roman Dutch jurisprudence, Grotius' De Iure Belli ac Pacis:(1)

> *"The property of subjects is under the eminent domain (dominium eminens) of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded our society must be supposed to have intended that private ends should give way. But it is to be observed that when this is done, the state is bound to make good the loss to those who lose their property, and to this public purpose, he who has suffered the loss must if needs be contribute."* (2)(3)

In these words, Grotius amplified his statement in an earlier *liber* that dominium eminens, the common law foundation of expropriation, is fundamentally a public law power of the State:

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(1) De Iure Belli ac Pacis (1625) : Hugo Grotius (1583-1645). The major consulted translations of this work are W Whewell (1853), A C Campbell (1901) and F Kelsey (1925) (tercentenary edition). Vide Section 1.5.3 at footnote 8.

(2) Ibid, III.20.7. Vide discussion under Section 1.4 infra. Cf III.19.7 and 11.14.7-8 (quoted in Section 1.6 infra at footnote 3).

(3) This principle has found judicial recognition in South African law in Corporation of Pietermaritzburg v Dickinson and McCormick (1897) 18 NLR 233 at 245. Also cf: Puffendorf, De Jure Naturae et Gentium, 1.1.19.

> *"Directe publica sunt actiones, ...;*
> *in quibus comprehenditur dominium eminens,*
> *quod cititas habet in cives et res civium*
> *ad usum publicum."* (4)

As translated by Whewell (1853)[5] this extract reads:

> *"Directly public are public acts.....;*
> *among which is comprehended the eminent dominion*[6]
> *(dominium eminens) which the State has, for public uses*
> *over its Citizens and the property of its Citizens."*

Although the dominium eminens concept accordingly found its lexical origin in Grotius' writings,[7] its jurisprudential foundation rests upon and dates from the institution and the instituting[8] of the State itself.[9] In view of the paucity of emphasis that has been accorded to the eminent domain enquiry in modern South African jurisprudence, and in view of the extensive significance in practice of the jurisprudential orientation adopted and its effects on any expropriation legislation promulgated, it becomes essential that a study of the origin, meaning, evolution and effect of the State's power of

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(4) Grotius, op cit, I.3.6(2).

(5) Ibid, Whewell translation (1853).

(6) Regarding the alternative translation of 'dominium eminens' as 'eminent domain'(Campbell and Kelsey) and 'eminent dominion'(Whewell), it would seem that the former is preferable - vide Section 1.5 infra.

(7) In Attorney General v Tamlane, Ch.D. 214 (1878) (England), it was noted

> *"The phrase itself (dominium eminens) was not known to the (early) common law nor was the doctrine itself in any other application of it than was found in the exercise by the Sovereign of the prerogative right to enter upon lands for the defence of the realm."*

(8) As is indicated in the last clause of the first sentence quoted from III.20.7. Refer footnote (2) supra.

(9) Cf the rationale of the Social Contract theorists discussed in Chapter 2 infra.

dominium eminens be undertaken, since such a study in the context of expropriation will yield a greater understanding of the relation between Citizens and their Property and a perspective into the living law in South Africa in its operation. Authority and guidance must necessarily be sought inter alia in the writings of contractarian philosophers and jurists throughout the centuries, and in modern times, within the naturalist parameters of the American legal system, since it is in that country in particular that considerable focus has been placed upon the study of eminent domain, in antithetical contrast to the way in which this topic has been almost entirely ignored in South African law. In American jurisprudence, where the provisions of the Constitution elevate and almost sanctify property rights and interests, and where property is a cornerstone of the capitalist ethic we espouse, it is natural that the "oughts" in property legislation will there be indicated.

A consideration of the historical and natural law background to the controversy regarding the origins of and authority for the State's dominium eminens permits a most important insight. Historicity in the context of eminent domain and the social contract is not prompted by antiquarian fervour nor by the potential sterility of pure academia - rather, it is the tracing of the strands of legal history through the millenia that enables a balanced assessment and an awareness of the perpetual and dynamic historical continuum of which our contemporary stage represents merely a phase. We stand both at the conclusion of the past development and at the threshhold of the unfolding future movement, and our present South African expropriation legislation evidences this state of flux which characteristically attends any evolving branch of the law. An historical, naturalist and comparative jurisprudential approach is accordingly desirable to avoid the misplaced emphasis and unorientated stance consequent

upon a bland positivist[10] acceptance of the law as it is, and to avoid a denial of the unfolding patterns which have emerged and which are also presently manifesting themselves in the law.

Although the existence of the State's power of dominium eminens was highlighted in Grotius' writings and an attempt was made there to outline its nature and characteristics, the origins of and authority for this power were not conclusively nor satisfactorily determined by Grotius, and remain the subjects of a continuing, albeit gradually resolving, jurisprudential debate.[11] Does dominium eminens derive its existence and acquire its jurisprudential substance as a corollary and extension of the State's capacity as original proprietor of all property; or does this power find its rationale in a theory of a State expediency manifesting itself as a compulsory purchase, or alternatively, in a theory of a State formation based upon a Social Contract arising in misty antiquity at the conception of any society?

The resolution of these questions is fundamental in natural law in the understanding of the concepts involved and in the assessment of the orientation which our legislature ought to adopt. It is principally towards the elucidation of the power of dominium eminens,[12] the Social Contract,[13] and the relation between Citizens and their Property[14] that this exposition is accordingly directed.

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(10) The positivist standpoint in South African law is severely criticised herein. Vide eg Section 1.3.8 infra. As instances of positivist acceptance in expropriation law, vide inter alia Joubert, The Law of South Africa, Vol X p 8 para 10 first subparagraph thereof; and vide 5 Encyc.Soc.Sciences p 494: "... which could be easily remedied by legislation if inconvenience (to the expropriator) should result therefrom...."

(11) Vide Section 1.2 infra.

(12) Discussed principally in Chapter 1 hereof.

(13) Discussed principally in Chapter 2 hereof. Vide also Section 1.2.5.

(14) Discussed [illegible]

1.2 THE ORIGIN IN JURISPRUDENCE OF DOMINIUM EMINENS - AN ASSESSMENT OF THE CONFLICTING INTERPRETATIONS

1.2.1 INTRODUCTION

The jurisprudential origin of the power of eminent domain is a vital determinant of the nature of the relation of Citizens to their Property and of the legislation that governs this relationship. On the one hand, have existed the proponents of the state-centred theories of proprietary power, even among whom controversy has arisen as to whether the original proprietary theory(1) or the sovereignty theory(2) is the correct jurisprudential interpretation. At the other end of the scale, debate has taken place among the theorists of an individualistically-based, and alternatively socialist, conception of property, and the competing Social Contract theory(3) and the compulsory purchase postulate(4) respectively emerge. Whereas the sovereignty approach has in modern times been widely acclaimed as the resolution to this jurisprudential dilemma, it is submitted herein, without denying the weight of the sovereignty interpretation, that a far greater merit exists in the Social Contract view than is frequently contemporarily recognised.

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(1) Discussed in Section 1.2.2 infra.

(2) Discussed in Section 1.2.3 infra.

(3) Discussed in Section 1.2.5 infra.

(4) Discussed in Section 1.2.4 infra.

1.2.2 THE ORIGINAL PROPRIETARY THEORY

Under the original proprietary theory, it is postulated that title to all property vested originally in the State, and that any title passed to private individuals was transferred only suspensively in that the State retained a reversionary interest therein. The exercise of dominium eminens accordingly entailed the invoking by the State of the necessary power to resume its original proprietary title. Dominium in the private law was therefore qualified by, subordinate to and co-existent with the State's power of resumption of its former ownership. This idea is enunciated in Beekman v Saratoga[1] where the Court held that there is a property right "remaining" in the State to "resume" private property for public purposes:

> *"Eminent domain is the highest and most exact idea of property remaining in the government, or in the aggregate body of the people.... It gives the right to resume[2] the possession of the property in the manner directed by ... the laws of the State, whenever the public interest requires it."*

The theory of an original and absolute State-based ownership of all property is consistent with the naturalism of Grotius in that he saw the right of private ownership as having been created by and deriving from an original grant from the State. It was in the words of Puffendorf an "exercise of transcendental property",[3] and to Huber an "overriding ownership".[4] The

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(1) 3 Paige 45, 22 AM Dec 679, USA; (Emphasis added).

(2) In Agg's and Wharton's Law Lexicon (1911) eminent domain is similarly defined as "the right which a government retains over the estates of individuals to resume them for public use."

(3) De Jure Naturae et Gentium Lib VIII C.5 S3.

(4) Heedendaegse Rechtsgeleertheyt (Gane transl.) 2.8.27.

theory found consistency also with the writings of the early Social Contract theorists, in that firstly the institution of private property could in their view have known existence only from the time that the State itself had come into being; and secondly, as a tacit condition of the original grant of property by the State to the private sector, the right of State resumption was agreed upon where public purposes so predicated. Several of the early United States decisions gave judicial endorsement to the proposition of a reserved right vested in the State:

> *"The right to take property for public use, or of eminent domain, is a reserved right attached to every man's land, and paramount to his right of ownership. He holds his land subject to that right and cannot complain of injustice when it is lawfully exercised."*(5

Dominium eminens under the original proprietary theory accordingly involved the reassertion by the State of its postulated original proprietary rights. It is upon this basis that the power is defined in Black's Law Dictionary(6) as:

> *"the right of the State, through its regular organisation, to reassert, either temporarily or permanently, its dominium over any portion of the soil of the State on account of public exigency and for the public good."* (7)

Against the background of the historical sources that the original proprietary theory appears to find in both the Roman law and in the system of feudal tenure in mediaeval Europe, the reliance that Grotius placed upon this jurisprudential orientation can be understood. In Expropriation in Roman Law,(8

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(5) Todd v Austin 34 Conn 78; vide also United States v Jones 109 US 513, 27 L ed 1015, 3 S Ct 346; Walker v Gotlin 12 fla 9; Harding v Goodlett 3 Yerg 40, 24 AM Dec 546.

(6) 4 ed 1951 p 616.

(7) Cf: Macveagh v Multonomah County 126 Ore 417, 270 P 502 at 507 (1928, USA); and Costa Water Company v Van Rensselaer 155 F 140.

(8) 1909 LQR 512 at 514 - 515.

J Walter Jones considers the *ager publicus*[9] which "was not allocated to individuals outright, but so far as it was occupied by them at all, was held subject to some undefined superior right vested in the people and capable of being invoked if the need arose". Whereas, as was generally the case in primitive societies, "the *Populus* was (then) regarded as existing in, rather than above, its members", the divergence that arose between private use and public advantage promoted the idea that "the community as a whole had interests distinct from the private interests of its individual members". The agrarian reforms instituted in Rome were accordingly capable of interpretation as "attempts rather to enforce an implied condition of re-entry attached to grants made by the *Populus*, than to effect a compulsory transfer of ownership". In mediaeval times, the original proprietary theory finds a congruence also with the feudal structure of land tenure, in that all property was vested in the Crown; and as pointed out by Blackstone in his Commentaries,[10] its possession could be resumed by the Crown's exercise of its inherent prerogative. Foreign judicial recognition exists in New York City Housing Authority v Muller[11] where it was held that "eminent domain is a remnant of the ancient law of feudal tenure".

The original proprietary theory has been criticised in modern times and several objections to its acceptability arise. Firstly, if the theory is to have validity, then it must have general application. Since, for instance

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(9) Cf: Buckland Roman Law and Common Law 2 ed pp 83 and 95; Kunkel An Introduction to Roman Legal and Constitutional History (transl. by Kelly) 2 ed pp 32, 44 and 46. The agrarian reforms (infra) took place in 111 BC.

(10) 2 Bl. Comm pp 408 - 409.

(11) 155 Misc NY 681, 279 NYS 299.

specificatio (defined by Sohm Institutes of Roman Law[12] as "the working up of a thing into a new product ")[13] would constitute an exception to the proposition that all property was originally owned by the State, the general theory loses credence. Secondly, as inter alia Seneca and Heineccius pointed out, to kings belong the control of things, and to individuals their ownership.[14] Furthermore, the theory tends to promote a social concept of property that is not consistent with the liberalist and individualist ethic and spirit of Western ideologies. In the words of Bloodgood v Mohawk:[15]

> *"Such a doctrine is bringing the social system back to the slavish theory of Hobbes, which however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly granted by it to individuals, it is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments."*

Jurisprudence moved accordingly towards an alternative rationale of dominium eminens, and the competing sovereignty theory emerged. Although the sovereignty theory is at present generally regarded as providing the principal rationale for the dominium eminens power, the original proprietary approach retains a limited relevance in South African law in view of the nature of the title acquired[16] by the expropriating authority in instances of a divided ownership;

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(12) P 324.

(13) Discussed by Silberberg and Schoeman The Law of Property 1983 ed p 226 - 227.

(14) Heineccius, Elementia Juris Naturae et Gentium Liber 1 Caput 8 Section 168.

(15) 18 Wend (NY) 9, 31 AM Dec 314. Cf Section 3.5 infra.

(16) Vide authorities cited in Section 1.4 infra at footnotes 26 and 27. Cf also the 'bundle of sticks' approach discussed in Chapter 3 infra.

and in Australia today, where expropriation is termed 'resumption'.(17)

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(17) Cf Brown Some Aspects of the Law of Expropriation in Canada and Australia (1973) (6) Ottawa Law Review 78; McVeagh and Babe Land Valuation Casebook; O'Keeffe Legal Concept and Principles of Land Value; Gildenhuys op cit p 30. Vide also Burland v Metropolitan Meat Industry Board (1969) 120 C L R 400 (Australia) and Magennis v The Commonwealth (1949) 80 C L R 382 (Australia), discussed in Brown Land Acquisition.

1.2.3 THE SOVEREIGNTY THEORY

Standing in contrast to the original proprietary view, is the sovereignty theory under which it is postulated that dominium eminens is a power inherent in sovereignty that is necessary for the fulfilment of the sovereign function, and which is superior to all private property rights.(1) The sovereignty approach is accordingly based upon the premise that the sovereign power is subordinate to neither person nor property, and the Sovereign's justified exercise of its power in the social interest knows no restriction. In West River Bridge Company v Dix(2) it was held:

> *"In every political sovereign community, there inheres necessarily the right and the duty of guarding its own existence and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the 'eminent domain' of the State, is, as its name imparts, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power and must yield in every instance to its proper exercise."*

The existence of dominium eminens is an aspect of sovereignty that is founded upon political necessity and expediency.(3) Its existence is predicated notwithstanding the absence of express legislative (or constitutional) provision

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(1) Cf Corpus Juris Secundum 1965 Vol 29A para 2 at 162.

(2) 6 How US 507, 12 L ed 535.

(3) Joiner v City of Dallas 380 F Supp 754, affirmed 95 S Ct 614, 419 US 1042, 42 L ed 2d 637, rehearing denied 95 S Ct 818, 419 US 1132, 42 L ed 2d 831: "The power of eminent domain is an offspring of political necessity and is an inherent power inseparable from sovereignty unless denied by fundamental law

(4) Small v Ives 296 F Supp 448: "The right to condemn property is an inherent aspect of sovereignty which does not depend for its existence on any express provision of constitutional or statutory law; it is limited only by the requirement that the State pay just compensation."

Dillon v US 230F. Supp 487: "The power of eminent domain is an inherent essential attribute of sovereignty and is one of the prerogatives of the sovereign to aid it in performance of its constitutional or organic activities under premise and purpose that no person or group or classification of persons should bear economic losses in operations of government, but that such losses and expenses should be borne by all of the people equally and equitably."

Seneca in De Beneficiis[5] adds: *"Omnia rex imperio possidet, singuli domino"*. Dominium eminens, as an unavoidable *sequitur* of sovereignty, would accordingly and in light of Grotius' writings, appear under common law undeniably to be a power of the sovereign.[6] This is not however to say that the exercise of that power by a non-sovereign organ or branch of government (as distinct from the existence of that power in the political sovereign itself) does not require statutory authority. In the Appellate Division decision in Joyce and McGregor v Cape Provincial Administration,[7] it was held accordingly that:

> *"I entertain no doubt that in South Africa today all rights of expropriation must rest upon a legislative foundation."*[8]

These dicta voice the crucial *caveat* that expropriation at common law is not recognised in South Africa - extreme caution must accordingly attend the application of general common law theoretical principles to South African expropriation law. The exercise of the dominium eminens power by the administrative branch of government (which is distinct from the legislative sovereign),

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(5) 7.5.5.

(6) Cf Fourie v Minister van Lande en 'n Ander 1970 (4) SA 165 (O).

(7) 1946 AD 658 at 671. Per Schreiner JA (with a full bench concurring: Watermeyer CJ Tindall JA Greenberg JA and Feetham AJA).

(8) Cf Winds of Change and the Law of Expropriation in (1961) 39 Canadian Bar Review 542 at 543, where Professor Todd describes the State's expropriation power as "the legal rules, derived from statutes and judicial decisions, which regulate the rights and liabilities of persons authorised to acquire property, without the owner's consent, for express statutory purposes." In English law, Cf: I Blackstone Commentaries 139; 5 Encyc. Soc.Sci. 493. Similar authority exists in the United States: vide 26 American Jurisprudence p 643 at footnote 6; 31 West's Federal Practice Digest p 108; Green Street Association v Daley 373 F 2d 1 (1967): "eminent domain is legislative in character"; Board of Commissioners v Blue Ribbon Ice Cream and Milk Corporation 123 Ind 436, 109 NE2d 88:

> *"... the time manner and occasion of the exercise of the power of eminent domain are wholly in the control and discretion of the legislature...."*;

Aldridge v Tuscumbia 2 Stew & P (Ala) 199; Cf Section 1.6 infra at footnote 11.

and impliedly the expropriatee's compensation entitlement, both require a prior legislative authorisation (and a delegated Ministerial approval procedurally) before an expropriation can be lawful and before compensation (permitted statutorily only) can be justified. The words "all rights of expropriation" can perhaps also be read as "all rights flowing from expropriation", in which sense they are an indication of the present positivist approach in South African expropriation law. It is submitted however that by these dicta, the Court did not purport to nor intend to deny the existence in itself of the sovereign's eminent domain power nor of the sovereignty of the legislature - to the contrary, the judgement contains an implied affirmation of these aspects. Perspective is provided in American Jurisprudence:(9)

> *"... under the customary division of governmental power into three branches, executive, legislative and judicial, the right to authorise the exercise of the power (of eminent domain) is wholly legislative, and there can be no taking of private property for public use against the will of the owner without direct authority from the legislature... it is the province of the legislature to prescribe how and by whom the power of eminent domain is to be exercised... the executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses.... Once authority is given, the matter ceases to be wholly legislative. The executive authorities may then decide whether the power will be invoked and to what extent... and the fixing of compensation is generally a judicial question".* (10)

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(9) Vol 26, S5, pp. 643 - 644.

(10) Precedents supporting these propositions are found in American law in the following cases.

United States v Rauers DC Ga 70 F 748: "The power of eminent domain residing in the Government is a legislative power, and no executive officer can lawfully undertake to exercise it in the absence of express authority conferred by a (statutory) act."
Little v Loup River Public Power District 150 Neb 864, 36 NW 2d 261, 7 ALR 2d 255 "It is for the legislature to authorise the exercise of the power of eminent domain and the mode of its exercise".

In short, it is not the existence itself at common law but the exercise (without statutory foundation and justification) of the power of dominium eminens, that was denied in Joyce and McGregor's case supra. Consistently with this judgment, it appears that dominium eminens, while being inherent in the sovereign legislature, lies dormant in the hands of the executive until called into motion by express legislative authority.(11) It is noted that a contrary view was adopted in Cape Town Municipality v Abdulla(12) where Baker J went as far as to suggest that failing a statutory right to compensation the expropriatee will have a claim to compensation under the common law. Although Baker J was prompted by naturalist considerations of equity and fairness, although he was guided by the principle in Belinco v Bellville Municipality,(13) and although his judgment is consistent with a wealth of similar persuasive dicta,(14) it is submitted, with respect and great regret, that the position in South African law appears to remain regulated by the positivist rigour of Joyce and McGregor:(15)

> *"...(t)he passages in the Roman Dutch writers which say that expropriation can only take place against reasonable compensation... appear to me to be ... irrelevant to the construction of our modern statutes."*

Of fundamental significance for purposes of this exposition, is the realisation that this Appellate Division rejection of the Roman-Dutch authorities is confined strictly to a denial of their relevance vis-a-vis compensation upon

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(11) Cf Rogers v Toccoa Power Company 161 Ga524, 131 SE 517, 155 p 680; State by State Highway Commission v Stumbo 222 or 62, 352 P 2d 478, 2ALR 3d 1028; Corpus Juris Secundum (1965) Vol 29 A para 2.169.

(12) 1974 (4) SA 428 and 1975 (4) SA 375(C); decision a quo reversed on appeal 1976 (2) SA 370(C).

(13) 1970 (4) SA 589 (A) at 597(C): "... a legislative intention to authorise expropriation without compensation will not be imputed in the absence of express words or plain implication"; discussed in Section 1.6 infra at footnote 25.

(14) Vide Section 1.6 infra at footnote 26.

(15) 1946 AD 658 at 671. Per Schreiner JA. A similar view was expressed by Van Winsen AJP (with Diemont J and Van Heerden J concurring) on appeal

expropriation. Without here commenting upon the 'oughts' in this matter, it is noted that expropriatee compensability in South Africa is regulated by purely statutory formulae. These dicta do not however dispute or deny the valuable jurisprudential orientation that the Roman-Dutch treatises provide, nor do they nor can they question the desirability and value of undertaking a naturalist investigation of the nature and origins of the dominium eminens power. When Dr Gildenhuys in his monumental work Onteieningsreg[16] states: "Dis verkeerd om ... 'n vergoedingsplig uit die gemenereg te probeer haal, soos gedoen is in Cape Town Municipality v Abdulla", he sides clearly in favour of Joyce and McGregor, and although his interpretation is unquestionably correct when tested against the prevailing South African law of expropriation, it is noted with respect that such 'verkeerdheid' is consequent only in the event of an antecedent positivist standpoint.

Nichols, on the other hand, in The Law of Eminent Domain[17] finds a basis for the consistency of the sovereignty theory, with the principles of naturalism. He suggests that dominium eminens as an attribute of sovereignty, has developed from two schools[18] of legal thought. The first is based upon the natural law theory that the State, without the need for any constitutional vesting or limitation thereof, by its very nature, has an inherent and superior right over private property. The second approach focusses on the idea of sovereignty itself, and deduces that in order that the State may fulfil its intended functions, the power of eminent domain must necessarily have known

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[16] Page 10, footnote 69.

[17] Vol I, S 1.14, p 1 - 21.

[18] Discussed further infra under S 1.2.5.

existence *eo instante* with the inception of government. Nichols unfortunately however does not undertake a reconciliation of these divergent movements.

It would seem that although the distinction between the two schools is fine, significant differences do however emerge: firstly, in the rationale of sovereignty adopted (the former infers the power 'prospectively' from the nature of the State, whereas the latter deduces its existence 'retroactively' from the functions the State must fulfil); secondly, in the treatment of the question of compensation (whereas the former would regard compensation as a reciprocal product and inescapable consequence under natural law, the latter would require a legislative (or constitutional) positive assertion of the right to compensation before this would be conceded as a limitation and a *sequitur* of the exercise of the power of eminent domain); and thirdly, in the limits or qualification attached to the extent of this sovereign power (the former would qualify the exercise of the power with the naturalist entitlement to compensation, while the latter would hold the power to be unlimited and absolute). Contemporary South African expropriation law in its positivism[19] manifests clearly an adherence and subscription to the second interpretation of the sovereignty theory of eminent domain. The former is however herein supported as being more consistent with naturalist and contractarian principles.

In recent times, although no clear guideline for the relative ranking of these two schools within the sovereignty theory has surfaced, a consensus has ultimately emerged among modern writers that the power of eminent domain

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(19) Vide inter alia Sections 1.3.8 and 1.6 infra and discussions thereat.

is principally an attribute of sovereignty and is not a transcending suspensive property right as was advocated under the original proprietary theory. In Shoemaker v United States[20] it was held:

> *"It is now generally considered that the power of eminent domain is not a property right or an exercise by the State of an ultimate ownership in the soil, but that it is based upon the sovereignty of the State".*

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(20) 147 US 282, 37 L ed 170, 13 S Ct 361.

1.2.4 THE COMPULSORY PURCHASE POSTULATE

In English law, the principal jurisprudential rationale for the State's acquisition (by expropriation) of private property rests in the compulsory purchase postulate,(1) which is based upon the following premises. Firstly, although private ownership is clearly recognised, present English law imbues it with a 'socialist' flavour; and it is considered subordinate to the Sovereign's plenary power to compel the private owner to surrender up his rights over his property (as distinct from surrendering up the object itself of his right, as under the '*in rem*' view in South African law) where the public need so requires, and against payment of full compensation by the State in consideration for such surrender.(2) Secondly, although in English law the proceedings are necessarily deemed participative or derivative, they are regarded as being involuntary - for this reason a 'sale' under compulsory purchase is not equivalent to a sale by *traditio*, yet the former differs also from the original mode of acquisition that exists in an expropriation in South African law. Thirdly, compulsory purchase proceedings could be considered effectively to be *in personam* (and not *in rem*), since the right acquired by the State under compulsory purchase is co-extensive with the title of the person who was obliged to surrender his ownership - to this extent, compulsory purchase gives expression to the '*nemo dat qui non habet*' principle of *traditio*. For this reason, under compulsory purchase, if the identity of the owner is incorrectly determined, re-expropriation would be

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(1) Vast statutory and judicial authority in this regard exists in English law. Vide inter alia Cripps Compulsory Acquisition of Land and Davies Law of Compulsory Purchase.

(2) In English law, 'full compensation' in early times extended even to the recognition of a *pretium affectionis*, eg in the case of the expropriation of ancestral homes. South African law by contrast recognises only a *verum pretium* - vide Union Government v Jackson 1956(2) SA 398 (A) at 347 D-E; Tongaat Group Limited v Minister of Agriculture 1977(2) SA 961 (A) at 964 D.

necessitated since the true owner would be entitled to oust the expropriator.[3] (Contra: Kendrick v Community Development Board and Another 1983 (4)). The compulsory purchase postulate accordingly would find a greater consistency with the interpretation of dominium eminens as 'eminent dominion' than with its more accurate translation in South African law as 'eminent domain'.[4]

In the early part of this century, several noted non-British jurists (inter alia McNulty in Eminent Domain in Continental Europe[5] and Lenhoff in Development of the Concept of Eminent Domain;[6] also Dormat in Les Lois Civiles dans leur Ordre Naturelle[7]) took a stand in favour of the compulsory purchase postulate, by reason of the consistency that its attendant obligation to pay reasonable or full compensation, found with principles of equity and fairness and with the natural law. Blackstone in his Commentaries on the Laws of England[8] had previously said: "All that the Legislature does (by compulsory purchase) is to oblige the owner to alienate his possessions for a reasonable price." Early judicial authority for this proposition that expropriation is merely a form of 'compulsory'

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(3) Contra: South African law, where although notice to the owner is required under Section 7 of the Expropriation Act 63 of 1975, provision is made for deemed or constructive notice by publication in the Government Gazette and local newspapers. Vide also Sections 13(1) and 22 which provide that all unregistered rights (save as specified in Section 9(1)(d)), terminate upon expropriation. Furthermore, by operation of law under Section 8, the property is released from all mortgage bonds (subject to the mortgagee's preferent claim against compensation awarded).

In Kendrick v Community Development Board and Another 1983(4) 532(W), it was held that the purchaser of a sectional title unit under Act 66 of 1971 is not entitled to be served with notice of expropriation.

(4) Vide Section 1.5 infra, where this submission is discussed.

(5) (1912) 21 Yale Law Journal 556; Cf: Ibid at 639: The Power of Compulsory Purchase under the Law of England.

(6) (1942) 42 Columbia Law Review 596 at 601 et seq.

(7) S 1.2.13.

(8) Vol 1, 139 referred to in Gildenhuys, op cit, p 4.

purchase or sale, came also in Grimbeek v Colonial Government:[9]

> *"I think it is clearly proved that the Expropriation of land, though compulsory, is a sale, and when effected, the ordinary results of the transference of ownership follow, as a matter of course, just as in the case of voluntary sale and purchase."* [10]

It is respectfully submitted however that the Court in Grimbeek's case erred in equating expropriation with sale. The element of compulsion

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[9] 1900 17 SC 200 at 204; vide also Graaff-Reinet Municipality v Jansen 1916 CPD 486; Durban Corporation v Lewis 1942 NPD 24; and City of Cape Town v Union Government 1940 CPD 193, where Van Zyl JP held: "... (the expropriation) ... was a voluntary transaction on the part of the (expropriator), and although it lacked the element of mutual agreement essential to transactions of purchase and sale, it had so much of the quality of a purchase that it will not be inept to describe it as a compulsory purchase."

[10] Further precedent in this regard can be found in the United States in the following judgments - they are of interest since the United States like South Africa, has now moved to a rejection of the compulsory purchase postulate:

City and County of Honolulu v A S Clarke Incorporated 587 P 2d 294:

> *"A taking by the government in a condemnation action is characterised as a 'sale', albeit a forced one".*

In Langston v City of Miami Beach 242 So 2d 481 at 483 (Fla App 1971) citing Geist v State 3 Misc 2d 714 at 719 and 156 NYS 2d 183 at 189 (Ct Cl 1956)

> *"Moreover a condemnor attains the status of a bona fide purchaser for value, and stands towards the owner of the property as buyer towards seller"*

City of East Orange v Palmer 47 NJ 307 at 314; 220 A 2d 679 at 683 (1966) (Hall J)

> *"Indeed, such a thesis (that acquisition by condemnation should be treated differently than by voluntary conveyance) could bring about otherwise needless resort to the 'rugged remedy' of condemnation, contrary to the universally accepted policy of encouraging acquisition through voluntary conveyance".*

Thompson v Willis 202 Okl 538; 215 P 2d 850:

> *"... there is no element of duress in the reasonable requirement of the government..."*

In later American law, inter alia in San Antonio v Grandjean 91 Tex 430, it has been held that "eminent domain is not a compulsory conveyance".

present in the concept of a 'compulsory sale' defeats the very consensual essence of contract - from the Digest:[11]

> *"nihil consensui tam contrarium est quam vis atque metus".*

In Pahad v Director of Food Supplies and Distribution[12] (and in subsequent decisions),[13] the Court has reaffirmed its rejection of the interpretation of expropriation as being a 'compulsory sale':

> *"The distinctions between the two concepts leap to mind. Consensus is the foundation of sale .... A party to the contract may safeguard his interests by seeing to it that adequate provisions are incorporated in it, for conventio legem dat contractui. In expropriation that is obviously not the case. The purchaser pursues his private interests and is himself to blame if he ineptly neglects them; the expropriating authority aims at the wellbeing of the State or community and the conditions governing expropriation are beyond the control of either party. Consequently, the analogy of sale is completely false..."*

There are further distinctions between Expropriation and Sale. In the exercise of its power of Eminent Domain, the State acquires original title[14] to the land expropriated, whereas sale (by *traditio*) involves a voluntary and participative acquisition of a derivative form of ownership. Also, whereas

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[11] Dig. 50.17 116.

[12] 1949(3) SA 695 AD at 711.

[13] Similar dicta can be found in Etna Stores v Van Eck NO and Another 1946 NPD 651-652 Stellenbosch Divisional Council v Shapiro 1953 (3) SA 418 (C) at 425; John Wilkinson and Partners v Berea Nursing Home 1966 (1) SA 791 (D) at 795 H to 796 C.

[14] In Stellenbosch Divisional Council v Shapiro 1953 (3) SA 418 C at 423 G, Van Winsen J held: "The expropriating authority does not derive its title from the previous owner but obtains its title by reason of the consequences attached by law to the operation of a valid notice of expropriation." Vide also Grimbeek v Colonial Government 17 SC 200; Mathiba and Others v Mosche 1920 AD 354 at 364-5 (Juta AJA's judgment); Union Government (Minister of Justice) v Bolam 1927 AD 467; Robertson v City of Capetown 1937 CPD 213 at 218; Huletts SA Refineries Ltd v SAR&H 1945 NPD 413 at 418; Pahad v Director of Food Supplies and Distribution 1949 (3) SA 695 A at 700. Vide also Section 1.3.7 infra at footnote 26 and Section 1.3.9 infra at footnote 6.

a derivative acquisition of ownership requires the participation of the former owner, this is not required in respect of acquisition by an original mode. Compulsory purchase by contrast, although derivative, is deemed an involuntary alienation of property.

English law, notwithstanding its adherence to the compulsory purchase postulate, has too found unison with the Pahad judgement in Kirkness v John Hudson and Company[15] where it was held that it is "an illegitimate use of language to say that because an acquisition under the procedure of the Land Clauses Act is spoken of as a compulsory sale, therefore this transaction is a sale". Davies, however, in The Law of Compulsory Purchase and Compensation, although no longer equating the two concepts, turns the matter virtually full circle again in the English law in supporting the analogy, notwithstanding the Kirkness decision. His argument is contested however on the basis that the "only cause of difference"he distinguishes is of so fundamental and material a nature in South African law, that the validity there of the comparison must collapse. Davies states:[16]

> *"The analogy with the common law goes much deeper than the question of rules evolved by judges, thrown back on their own resources by statute, when solving compensation disputes. The entire process of compulsory purchase itself rests on an analogy with common law. Indeed, virtually the only cause of difference is the element of compulsion; and so the factors which distinguish the process of compulsory purchase from that of a sale of land by agreement at common law, are traceable to the need for compulsion."*

The principal distinction between the compulsory purchase postulate and the other interpretations of the jurisprudential origin of dominium eminens, and accordingly the primary basis upon which this postulate has been rejected

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[15] 1955 AC 696 at 709.

[16] At Chapter 2, para 3.

outside the British legal system, rest in the final analysis in the nature of the title that is acquired - a 'compulsory sale' can confer upon the expropriator only the title (in whatever limited form it may exist) that the expropriatee ('seller') has at the time of the expropriation ('sale'). Since expropriation in South African law is clearly a proceeding *in rem*, and since the title acquired is independent of the title of the expropriatee, defeat accordingly ensues for any attempt to apply the compulsory purchase postulate in our legal system. (17)

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(17) As appears in Lloyd's discussion of Compulsory Purchase in The Idea of Law (at p 317 f), it is apparent that the distinction (in regard to expropriation) that exists between South African and English law is on both a substantive and a procedural level - caution must accordingly attend the unconsidered extension of modern English principles to a South African analysis.

1.2.5 THE SOCIAL CONTRACT THEORY OF THE ORIGIN IN JURISPRUDENCE OF DOMINIUM EMINENS

Social contract theory provides a valuable, yet seldom considered,(1) rationale for the origin in jurisprudence of the State's power of dominium eminens. This theory in one sense stands opposed to the sovereignty approach in that it contests the proposition that proprietary power is State-centred, submitting instead an individualistic conception of property. In another sense, however, the social contract theory finds consistency with the sovereignty interpretation, since both approaches hold as a common denominator the view that the *de iure* sovereign necessarily has the power to expropriate private property for public purposes where the public interest so requires. A difference remains however in the fact that the social contract proponents initiate the logical development from an origin one step antecedent to that from which the sovereignty view commences - namely from the primary level of the individuals who contract to aggregate into a collective, rather than from the evolved level of the State that is thereby formed.

As regards the reconciliation of social contract theory with the other alternative jurisprudential orientations possible: the social contract theory would not be inconsistent with the original proprietary approach if the

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(1) The Social Contract Theory is overlooked in, rejected by, or omitted from all the major treatises on expropriation law that have been consulted. In South African law, it is omitted by Gildenhuys Onteieningsreg, by Jacobs The Law of Expropriation in South Africa, and by Joubert The Law of South Africa Vol. X. A similar position exists in Cripps, Davies, Orgel, Todd, et al. Nichols in The Law of Eminent Domain touches very briefly on the theory, and rejects it.

jurisprudential deficiencies (recorded supra) in the latter could know resolution, since the State's reserved right of resumption could be considered to have been impliedly agreed in the broad Social Contract; secondly, with reference to the compulsory purchase postulate, reconciliation with Social Contract theory is here less feasible since a fundamental conflict arises between their respective socialistic and individualistic visions of property, and in the nature of the title acquired by the expropriator.

Characteristic of the writings of pure Social Contract theorists (in particular John Locke - see detailed discussions infra),[2] clothed in the dictum of the Rationalist School, was an espousal of the individualist ethic and a subscription to the sanctity of private property. Although private property was unwaveringly conceded as being subject to the State's dominium eminens, their jurisprudential conclusion that this proprietary power stemmed from the original sovereign - the body of individuals comprising the society, or in what Rousseau termed the 'Volonte Generale'- is justified under the thesis that each member of the organised community has subordinated his personal rights, powers, duties and immunities to the needs of government, by an implied consent embodied in the Social Contract. Although the South African case law on expropriation contains no known direct assessment of the Social Contract theory, fairly extensive debate has taken place in the United States. No resolution of the arguments for[3]

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(2) Vide Chapter 2 infra.

(3) United States judgments in support of the social contract theory include the following - it is noted that authority is found principally in New York
Secombe v Railroad Company 23 Wall 108, 23 L ed 67;
Embury v Connor 3 Conn 511;
Thatcher v Dartmouth Company 18 Pick 501;
Livingstone v Meyer 8 Wend 85;
Matter of Central Park 16 Abb 566;
Buffalo and New York Railway Company v Brainard 9 NY 100;
People v Smith 21 NY 595;
In re Ely Avenue in City of New York 217 NY 45, 111 NE 266;
In re Townsend 39 NY 171;
Matter of Fowler 53 NY 60;
In re City of Brooklyn 143 NY 596, 38 NE 983, 26 LRA 270.

and against[4] the theory appears to have emerged, although it is noted that certain of the State Courts (notably New York) lean slightly in favour of an acceptance of this theory. This uncertainty in orientation has arisen principally perhaps from the fact that since the widely accepted sovereignty interpretation shares a similar developmental trend to that of the Social Contract theory (albeit a different starting point and accordingly a different emphasis), the urgency attending further enquiry has perhaps been considered to have been defused.

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(4) Criticism of the view that Social Contract theory is based upon an implied contract with the expropriatee (condemnee) is found in the following judgments:

North Carolina Railroad Company v Lee 260 US 16, 67 L ed 104, 43 S Ct 2;

Omnia Communications Company Incorporated v United States 261 US 502, 67 L ed 773, 43 S Ct 473;

Garrison v New York 21 Wall 196, 22 L ed 612;

Liggett and Myers Tobacco Company v United States 274 US 215 71 L ed 1006, 47 S Ct 581;

Park District v Zech 56 ND 431, 218 NW 18;

Dorsett v State 422 SW (2d) 828.

It is noted further that the general support in New York for the Social Contract theory is not unanimous. It was held In re Public Parking Place in Village of Hempstead 207 Misc 402, 140 NYS 2d 341:

> *"It seems clear that acquisition of real property by condemnation possesses no contractual attributes",*

although these dicta may well constitute more a denial of the analogy with the 'sale' than a denial of the Social Contract theory itself.

There is a further important factor motivating the consideration of the social contract theory as the jurisprudential basis and origin of the eminent domain power, in preference to the sovereignty interpretation - namely that dominium eminens is an incident of the grant of governmental powers whether or not sovereignty is simultaneously conferred upon the legislature. As Nichols notes in The Law of Eminent Domain:[5]

> *"A general grant of Governmental power, even without sovereignty and without any special mention of eminent domain, carries the power to take or to authorise the taking of private property for the public use."*

It appears accordingly in Nichols' view that under common law, dominium eminens is an inherent attribute of organised government that exists notwithstanding the absence of sovereignty in that governing body, and underlies and qualifies the otherwise-apparent indefeasibility and unviolability of private ownership. In light of Nichols' assessment of the two schools of legal thought discussed supra[6] regarding the sovereignty theory - the first being based upon natural law theory and the second upon the idea of sovereignty itself - it would accordingly appear that the former is jurisprudentially preferable, notwithstanding the fact that it is the latter which is clearly embodied in the South African positivist legal approach. The social contract theory, in its expression of naturalist principles, presents an avenue which permits the retention of the merit in the sovereignty approach without requiring a continuing adherence to the positivism that frequently attends its implementation under the second school - the adoption of Social Contract theory as a jurisprudential justification for dominium eminens is accordingly advocated.

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(5) S 1.14.4 p 1 - 32.

(6) Under Section 1.2.3 hereof; relating to Nichols Vol I, S 1.14, p 1 - 21.

A detailed examination of the tenets of the Social Contract theory, and its evolution in the writings of philosophers through the ages, is undertaken infra[7] in order to elucidate its propositions and submissions, and in order to promote a deeper understanding of the concepts upon which this alternative rationale of the dominium eminens concept is centred.

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(7) Vide Chapter 2 infra.

1.2.6 CONCLUSION - AN ASSESSMENT OF THE CONFLICTING JURISPRUDENTIAL THEORIES IN PERSPECTIVE

Within the American legal system, the jurisprudential conflict between the original proprietary theory and the sovereignty approach, has in modern times found almost universal resolution in favour of the latter. The British system has evolved a compulsory purchase postulate, which although suited to the socialist norms prevailing there, lacks application in a South African context. Dr Gildenhuys' treatise Onteieningsreg[1] considers these three interpretations, and concurs impliedly and in advance with the opinion expressed in Advocate Jacobs' later detailed study The Law of Expropriation[2] that the right of expropriation is "a necessary incident of sovereign power." South African law however has not yet contemplated the Social Contract as a feasible and perhaps optimal rationale for dominium eminens, or if it has done so indirectly, it appears to have rejected this interpretation and omitted to furnish its consideration thereof.

Whereas the sovereignty approach has accordingly been widely acclaimed as the solution to the jurisprudential dilemma, it is submitted in overview, without denying the weight of the sovereignty interpretation, that a far greater merit exists in the Social Contract theory as a rationale for the jurisprudential origin of dominium eminens and as a vital determinant of the relation between Citizens and their Property, than is frequently contemporarily recognised.

To place dominium eminens and the Social Contract in perspective in the public law forum in which they operate in South African law, a comparative analytical assessment of other similar proprietary powers of the State is now undertaken.

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(1) Gildenhuys, op cit, pp 2 - 6.

(2) Jacobs, op cit, at p 2.

1.3 A COMPARATIVE ANALYTICAL ASSESSMENT OF THE POWER OF DOMINIUM EMINENS IN RELATION TO OTHER PUBLIC LAW PROPRIETARY POWERS OF THE STATE

1.3.1 INTRODUCTION

The fuller understanding of the nature meaning and characteristics of dominium eminens is promoted by its comparative consideration and analysis in relation to the other public law proprietary powers of the State to which it bears a resemblance.

It is stressed that the analytical assessment herein conducted not only is confined to the proprietary forum and linked to eminent domain (for this reason, a consideration of nonproprietary powers of the State, such as the power to compel the rendition of personal services,[1] is excluded), but is restricted also to the study of only those powers which have a direct bearing upon and which elucidate the relationship of Citizens to their Property (on this basis, no analysis is undertaken for instance of the State's power to control the public domain,[2] albeit that such has a proprietary nature). Where analysis is undertaken, it is noted furthermore that non-proprietary aspects of the particular power in question are not included in the detailed discussion infra, but are best understood by referral to other

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(1) Examples under this power include conscripted military service; attendance in Court as a subpoenaed witness; and in certain foreign jurisdictions, jury service; etc.

(2) This power contemplates the control the State may exercise over the various forms of res extra commercium, eg: the power to control the res publicae vide Silberberg and Schoeman, The Law of Property 1983 ed, 17 et seq.

sources - in respect of the power of destruction by necessity and the war power, for instance, reference is not made to emergency powers legislation in the broad (nonproprietary) sense, since a comprehensive and commendable insight in this regard is available for instance in Mathews Law Order and Liberty in South Africa.[3] The effect of the delimitation hereby placed upon the scope of this analysis, is that an in-depth focus on the powers germane to the theme at hand is permitted, and further that their development in relation to dominium eminens is facilitated.

Although there is no *numerus clausus* of such powers, it appears that the following are the principal members:

(1) Dominium eminens[4]

(2) The Power of Taxation [5]

(3) The Police Power [6]

(4) The War Power[7]

(5) The Power of Destruction by Necessity [8]

(6) The Power of Forfeiture [9]

(7) The Power of Dominium over Bona Vacantia (or the Power of Escheat)[10]

(8) The Group Areas Power (sui generis in South Africa) [11] and

(9) The Power to construct public improvements.[12]

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(3) Chapter XIII, p 221 et seq.

(4) S 1.4.

(5) S 1.3.2. (6) S 1.3.3. (7) S 1.3.4.

(8) S 1.3.5. (9) S 1.3.6. (10) S 1.3.7.

(11) S 1.3.8 (12) S 1.3.9.

The inquiry regarding the analytical comparison and contrast of dominium eminens with other such powers,[13] casts an informative clarity upon dominium eminens itself,[14] and has particular relevance to the relation between Citizens and their Property. It is undertaken accordingly

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[13] Report by the Judicial Council of Michigan on Condemnation Procedure (January 1932) (quoted by Gildenhuys, op cit, p 1): "Among the many limitations or restrictions which have been placed upon private property, are the taxing power, the police power, and the power of eminent domain. These are some of the sledges which have struck away whole sections of the Gibralter of private property, and made incessant inroads thereon." In American jurisprudence, the power of escheat is frequently appended to this list - vide Section 1.3.7 infra at footnote 2.

[14] To illustrate the importance of drawing a distinction between dominium eminens and the other powers supra, it is appropriate to consider an example which illustrates the difficulties which may arise. Under the State's police power for instance (as is more fully elaborated under Section 1.3.3 infra), the State is permitted to regulate the property of its Citizens, but an analysis of the case law (particularly in the United States), reveals that considerable dispute can arise where such "regulation" assumes the features of "taking" of property under dominium eminens. For this reason, it is vital to delineate the boundaries of each of the respective powers.

5 Encyc. Soc. Sci. at 495-7 develops this example of the police power further in the following words: "Difficulties begin when it is attempted to draw a sharp distinction between the police power and the power of eminent domain..... The Supreme Court (USA) has ruled, for instance, that property is held subject to a continuing public power to subordinate it to public uses; eg: that by virtue of its power of regulating commerce, the federal government may make river and harbour improvements in the interest of navigation without liability for compensation for the removal or damage of existing structures.

(Greenleaf Lumber Company v Garrison 237 US 251 (1915)).
In such a case the equitable claim to indemnification is extremely strong; it is hardly less so if property is destroyed to check the course of a conflagration, or if exposed herds of livestock are killed to check the spread of contagious disease; it seems even stronger if cedar trees are destroyed to protect apple orchards (Miller v Schoene 276 US 272 (1928)). In all these cases, there is no appropriation, no transfer of title to the public, and hence no exercise of the power of eminent domain..... .....(In short), what "taking" does the police power justify?"

Cf. Encyclopaedia Britannica Vol 8 p 336.

infra along with an assessment of the proprietary aspect of each of these powers. Since precedent for submissions, particularly in certain cases, is either not available in South African law or is undeveloped, comparative references are frequently made to persuasive American authority.(15)

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(15) Cf: Van Zyl, Beginsels van Regsvergelyking (Butterworths Durban 1981), in particular Section 3 (p 17ff), Section 4 (p 34ff), Section 13 (p 196ff) and Section 25 (p284 ff)

1.3.2 THE POWER OF TAXATION

The State's power of taxation, the first of the public law powers considered, comprises several branches, each of which may have proprietary consequences and which may accordingly affect the relation between Citizens and their Property. Incorporated within South Africa's system of taxation are inter alia income tax, donations tax, immovable property tax (or rates), estate duty, undistributed profits tax (in the case of companies), various non-resident taxes (such as non-resident shareholders' tax and tax on interest), and other forms of levy or contribution required by the State from its members.

An extensive body of jurisprudential authority exists which explores the parameters of the State's taxation power. John Stuart Mill in Political Economy[1] draws a distinction between direct and indirect taxation, and observes that the person taxed is not only intended but also expected to pay the tax levied. Further classical authority can be found in Adam Smith's celebrated canons of taxation[2] - fairness, certainty, convenience and

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(1) Book V, Chapter 3: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed he will recover the amount by means of an advance in price."

This definition has received judicial approval in de Waal N O v North Bay Canning Co Ltd 1921 AD 524-5; Clarke and Co v de Waal N O 1922 AD 624; and Bank of Toronto v Lambe 12 App Cas 575. The distinction between direct and indirect taxes receives consideration also in Bell's SA Legal Dictionary 3 ed p 803 and in the cases cited thereat.

(2) An Inquiry into the Nature and Causes of the Wealth of Nations (1776)

inexpensiveness - but in recent times in South Africa as Kaufman[3] and Livingston[4] have noted in relation to these principles, noncompliance therewith by the legislature will not remove the citizen from his taxation liability to the State. Meyerowitz notes this spirit of positivism in Income Tax in South Africa:[5]

> *"Like any levy, income tax is essentially a creature of statute, and whatever policy the Legislature may have pursued in imposing the tax, it is the statute alone which must be consulted in order to ascertain the tax position of a person."*

The broad taxation liability of South Africans is accordingly regulated today by statutes, provincial ordinances and municipal rates determinations. In respect of income tax for instance, the position of the taxpayer is governed by the provisions of the Income Tax Act 58 of 1962, as amended.[6]

Dominium eminens and the State's power of taxation bear a close resemblance in certain respects - both powers have a jurisprudential origin in common-law but are based today in their exercise upon statute; both are proprietary powers which are invoked in the public interest, which serve a public need, and which promote the wellbeing of the State and its members; in addition, both it is submitted originate in or devolve from the Social Contract and emerge as attributes or powers inherent in the political sovereign. It is these similarities that have given rise to a measure of confusion, particularly where principles applicable to only one of these powers, have been

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(3) 1954 Taxp 15.

(4) 1961 Taxp 2

(5) Page 1 para 3.

(6) A detailed assessment of the provisions of this Act is contained in Silke on South African Income Tax, Silke, Divaris and Stein, (Juta and Company), Cape Town, 10 ed 1982.

given an expression extended beyond the confines of that power into the forum of the other. Grotius' words supra,[7] that when property is expropriated, "the State is bound to make good the loss to those who lose their property, and to this public purpose, he who has suffered the loss must if needs be contribute", accordingly, when correctly understood, do not suggest that the State has the power (under dominium eminens) to levy or require a noncompensable contribution from its Citizen of his Property (as would be the case under its power of taxation) - rather these words suggest that the Citizen's expropriation loss (under natural law) is compensable, but that, since compensation is made from the public revenues, the expropriated Citizen contributes indirectly and as a constituent of the social collective, via his taxation liability, to the compensation he as an individual receives upon expropriation. It is accordingly that it has been held in County of Mobile v Kimball[8] that:

> *"The power of eminent domain is clearly distinct from the power of taxation, and each is goverened by its own principles."* (9)

The distinctions between dominium eminens and taxation emerge principally in four respects - in whether exemption from the exercise of the power is possible; in whether the power by its nature is alienable (subject to the qualification infra); in whether a proportionate or disproportionate liability accrues to affected individuals; and in whether a compensation claim against the State results from the exercise of the power.

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(7) Vide first extract under Section 1.1. Cf Section 1.6 infra at footnote 7.

(8) 102 US 691, 26 L Ed 238.

(9) Similar dicta exist in State v Texas City 303 SW 2d 780 (affirmed in Winship v City of Corpus Christi 373 SW 2d 844), in which it was held:

> *"The inhibition against taking private property for public use (without just compensation) has reference solely to the exercise of the right of eminent domain and not to taxation for public use."*

In regard to the first point of distinction - whether exemption from the exercise of the power is possible - it is noted that under the provisions of Section 10(1) of the Income Tax Act,[10] certain income is exempt from taxation.[11] In addition, in accordance with the spirit of the broad Social Contract in its operation in South Africa, as manifested in the enactments of the legislature, the State has effectively under the provisions of Sections 10(1)(c) and 10(1)(t),[12] contracted with certain institutions and corporations considered beneficial to the public interest,[13] that their receipts and accruals (and in some instances, their property) shall be exempt from tax. No such similar provisions exist in expropriation legislation exempting property from its subjection to the State's dominium eminens.

The second distinction - whether the power by its nature is alienable - appears closely linked to the first distinction in that an exemption from the exercise of the power *prima facie* seems similar in practice to an alienation of the power. However it is noted though that whereas the State in its contract with an institution (as supra) may contract away by statute its ability to exercise its power of taxation, and although in the United States in New Jersey v Wilson [14] it has been held that:

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[10] S8 of 1962, as amended.

[11] Vide discussion in Silke, 10 ed, Chapter 6, p 273 et seq.

[12] Income Tax Act 58 of 1962.

[13] For example, the CSIR, the South African Inventions Development Corporation, the South African Gas Distribution Corporation Ltd, the South Atlantic Cable Company (Pty) Ltd, the Armaments Development and Production Corporation of South Africa Limited. SAFTO, the South African Special Risks Insurance Association, institutions that "... conduct scientific technical or industrial research ... (subject to certain provisions) ...", and others.

[14] 7 Cranch 164, 3 L Ed 303. Vide also Gordon v Appeal Tax Court 3 How 133, 11 L Ed 529; State Bank of Ohio v Knoop, 16 How 369, 14 L Ed 977; Home of the Friendless v Rouse, 8 Wall 430, 19 L Ed 495; Farrington v Tennessee 95 US 679, 24 L Ed 558; Mobile Railroad Company v Tennessee 153 US 486, 38 L Ed 793, 14 S Ct 968; Wright v Georgia Banking Company 216 US 420, 54 L Ed 544, 30 S Ct 242.

> *"(g)enerally recognised in the case of an exemption from taxation, there is an exception to the rule that each legislature assumes the legislative power as fully and completely as its predecessors,*(15) *... the legislature may (accordingly) ... bargain away a portion of the Sovereign power of taxation as it is handed on to succeeding legislatures....",*

it appears in South African law, notwithstanding this precedent, that the power of taxation, like that of eminent domain, is inalienable; and that a statutory suspension by the State of its ability to exercise its power of taxation, does not constitute an irrevocable alienation in principle of that power itself. As Cockram notes in The Interpretation of Statutes,(16)

> *"(t)he South African Parliament can make and unmake any law whatever, with one exception - it cannot bind its successors, for this would mean that a successor Parliament would not be sovereign."* (17)

It would appear accordingly, that although both powers are delegable,(18) neither power (contrary to the American dictum in respect of taxation) is alienable,(19) and further, that a distinction in South African law between the two powers on the basis of alienability, is more of appearance than of

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(15) Cf: Fertilising Company v Hyde Park 97 US 659 24 L Ed 1036.

(16) Page 2, as supported by authorities cited at pp 2 - 3 thereof.

(17) A similar principle is expressed in Steyn, Die Uitleg van Wette.

(18) In respect of eminent domain, vide inter alia the provisions of Sections 4 and 5 of the Expropriation Act 63 of 1975 (as amended) regarding delegation.

(19) In respect of dominium eminens, it was held in Waynesburg Southern Railroad Company v Lemley that "if there is any attempt to contract away the power, it may be resumed at will".

substance.[20]

In whether a proportionate or disproportionate loss or liability accrues to affected individuals, a third distinction exists between the taxation power and dominium eminens. Whereas under the former, all individuals contribute in terms of the statutory formulae, under the latter the contribution is required from a particular individual. Cooley in Taxation,[21] states:

> *"Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by the right of eminent domain is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case because the government is a debtor for the property so taken; but not in the former because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual and without reference to the amount or value exacted from any other individual or class of individuals."*

The fourth distinction - whether a compensation claim against the State results from the exercise of the power - is alluded to in the above extract, and is developed by Cheng in The Rationale of Compensation for Expropriation:[22]

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(20) The difference in this regard between American and South African law is to an extent however reconciled in the judgment in Wellington Petitioner 16 Pick (Mass) 87, 26 Am Dec 361:

> *"All acts of legislation not in terms limited in their operation to a particular term of time, are in legal contemplation perpetual or declared to be in force forever; which means, until duly altered or changed by competent authority."*

(21) Volume 1,3 ed, Sections 1 and 30, citing People v Mayor of Brooklyn 4 NY 419, 55 AM Dec 266.

(22) 1958 and 1959 44 Grotius Transactions, 267 and 297

> *"... (Expropriated) individuals without their being in any way at fault, are being asked to make a sacrifice of their private property for the general welfare of the community, when other members of the community are not making corresponding sacrifices. The compensation paid to the owners of the property taken, represents precisely the corresponding contributions made by the rest of the community in order to equalise the financial incidence of this taking of individual property."*

Whereas the benefits of taxation flow from the fact of organised government and accrue to all members of the State to the extent that they share in the public works thereby executed, an expropriation without compensation would prejudice disproportionately the particular expropriatee, and create a benefit (unjustified in natural law) for the community at large. Just compensation would accordingly appear a necessary consequence of expropriation (subject in South African law to the positivist proviso of statutory recognition), since the individual's disproportionate liability or loss is determinable. (Compensation is regulated in South Africa under the formulae in Section 12 of the Expropriation Act). The application of a similar princip in respect of taxation although perhaps desirable in theory, is as Cooley[23] observes, not feasible in practice:

> *"If it were possible to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him, but this is manifestly impossible. The value of life and liberty and of the social and family rights and privileges, cannot be measured by any pecuniary standard."*

In the final analysis, although dominium eminens and the power of taxation share considerable similarities, the points of distinction that exist between them are sufficiently substantial (as is the case too with the

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[23] Taxation Vol I 3 ed p 24. Cf: Puffendorf, De Officio Hominis et et Civis II 15 4 quoted in Section 1.6. infra at footnote 7.

further powers that follow),[24] to preclude the direct transferability of principles applicable in the one forum to the other, and to qualify necessarily any unconsidered reliance upon an analogy between the two, that may be advanced. Their similarities, and the use of considered analogy between the two, however justifies the assessment of general principles of taxation in relation to eminent domain.

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[24] Vide infra.

1.3.3 THE POLICE POWER

The State's police power is far broader in its compass than its name may suggest. It reaches beyond the 'policing' of the conduct of members of the State and the enforcement (as an administrative organ) of the directives of the legislative and judicial branches of government, extending into the forum of property law in regulating the use to which private property may be put. In this regard, zoning regulations are a significant example of the police power. Rent control, licencing regulations, the law of nuisance, price controls and the requirements relating to the contribution of endowments(1) by subdividers and township developers, are inter alia further such illustrations in South Africa in the field of property.

The determination of where the dividing line lies between what constitutes an expropriation (under the power of dominium eminens), and what is merely a regulated or controlled use of property (under the police power), remains the source of a jurisprudential controversy(2) which will assume an escalating significance as our society evolves socially and economically. The considerable debate in this regard that has taken place in American jurisprudence, presages the issues that South Africa will face; and the attendant question as to whether a compensation entitlement ought to flow from the deprivation that results, highlights the relevance of this inquiry.

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(1) The American equivalent of 'endowment'is a 'dedication'eg in respect of land made available for parks, roads, schools et al.

(2) Goldblatt v Hempstead 369 US 590, 82 S Ct 987, 8 LED 2d 130 (1962) "A determination of where regulation ends and taking begins is not capable of any set formula or definition... Each case must turn on its own set of facts." Vide also Section 1.3.1 supra at footnote 14.

Dominium eminens and the State's police power share certain common features - both are inherent and necessary attributes of sovereignty,[3] devolving upon the State, it is postulated, from the Social Contract,[4] and vitalised in their exercise by a prior legislative enactment;[5] both recognise the superior right of the community against the caprice of private individuals;[6]

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(3) In Miller v Board of Public Works 195 Cal 477 at 484; 234 p 382 at 383 (1925), it was held: "The police power of the State is an indispensible prerogative of sovereignty and one that is not to be lightly limited."

People v Byers 153 Cal Reporter 249 "It is clearly established that the property ownership rights reserved to the individual ... must be subordinated to the rights of society. It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid social detriment."

(4) Vide Sections 1.2.3 and 1.2.5 supra and Chapter 3 infra. Also, Sheppard v Village 300 NY 115, 89 NE 2d 619 at 620: "Cardinal in regard to the police power is the principle that what is best for the body politic in the long run, must prevail over the interests of particular individuals." It was held further in Cities Service Oil Company v City of New York 5 NY 2d 110, 154 NE 2d 814: "... we deem it fundamental that, in this area of governmental action, what is best for the body politic in the long run, must prevail over the interests of particular parties.... The interference here complained of, must be shouldered by the plaintiffs as one of the inconveniences to be borne by the individual for the larger benefit of the community and the public in general."

(5) Southern Pacific Company v City of Los Angeles 242 Cal App 2s 21, 51 Cal Reporter 197: "... (it is a) well settled rule that the determination of the necessity and form of zoning regulations, as is true with all exercises of the police power, is primarily a legislative function."

(6) Astra Limited Partnership v City of Palo Alto 401 F Supp 962:

> *"Care must be taken to distinguish between the power of the community to zone and the power to condemn. Both powers have their source in the authority to act in the public interest, but the nature of the public interest is considered differently depending upon which of the two powers the public authority is purporting to exercise."*

both entail an exercise by the State of a vested right or power of control over property within its jurisdiction (notwithstanding that the nature and extent of that exercise varies under each of the powers);[7] and both involve a sacrifice by or detriment to a particular individual contraposed by a benefit to the community at large.[8]

Notwithstanding these similarities, crucial considerations differentiate dominium eminens from the police power. Fundamental among these is the realisation that the former deprives the owner of his title, while the latter merely inhibits the owner in his exercise thereof, without any alienation of that title. In the words of Nichols in The Law of Eminent Domain:[9]

> *"The distinguishing characteristic between eminent domain and the police power is that the former involves the taking of property ... while the latter involves the regulation of such property..."* [10]

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(7) Potomac Sand and Gravel Company v Governor of Maryland 266 Md 358 293 A 2d 241: "The exercise of the police power is legitimate to regulate and restrain a particular use, that would be inconsistent with or injurious to the rights of the public, of property within the control of the State."

(8) Gray v Reclamation District 174 Cal 622 at 642: "the police power of a state embraces regulations designed to promote the public health morals or safety ... even when attendant with inconvenience or peculiar loss, ... each member of the community is presumed to be benefited by that which promotes the general welfare".

(9) 3 ed S 1 - 42 p 1 - 127.

(10) Similar dicta are found in Deputy v City of Waco 396 SW 2d 103 at 107 (Tex Supp) (1965). Vide also: Searles: Eminent Domain - A Kaleidoscope View, 1 Real Estate Law Journal, 226 at 234; Jahr Law of Eminent Domain p 8f.

These are further distinctions between the powers. Mercer in Regulation (under Police Power) v Taking (under Eminent Domain)[11] considers the aspect that the exercise of dominium eminens promotes a public purpose (directly), whereas the police power prohibits a particular use of property in a manner prejudicial to the public interest (and thereby indirectly serves the general wellbeing). Alternatively expressed, "the taking of private property for public use and for the public benefit under the power of eminent domain, is distinguished from a proper exercise of the police power which is to prevent a perceived public harm."[12] In short, a distinguishing criterion lies in the motivation for the respective interferences with private property rights - whether the property in its proposed prospective use is directly beneficial to public purposes, or whether in its existing use it is injurious to the general wellbeing. It was held accordingly in Franco-Italian Packing Company v United States:[13]

> *"The distinction ... is that in the exercise of the eminent domain power, a property interest is taken from the owner and applied to the public use because such use is beneficial to the public; and in the exercise of the police power, the owner's property interest is restricted or infringed upon because his continued use of the property is or would otherwise be injurious to the public welfare."*

In the words "taken" as opposed to "restricted or infringed upon" in the extract supra, is indicated also another point of contrast[14] - whether or

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(11) 6 N C Central Law Journal 177 (1975).

(12) Fesjian v Jefferson 399 A 2d 861.

(13) 128 F Supp 408.

(14) Cf: East Side Levee and Sanitary District v Mobile 279 Ill 319, 116 NE 727: "The distinction between regulations and condemnations is that under the latter doctrine, private property is appropriated for public use, while under the former, the use and enjoyment of the property by its owner is merely regulated by laws enacted to protect the general health and welfare."

not ownership passes as a result of the exercise of the respective powers. While under the provisions of Section 8(1) of the Expropriation Act, "(t)he ownership of property expropriated in terms of the provisions of this Act shall ... on the date of expropriation, vest in the State", it has been held generally that the exercise of the police power "does not take away from the owner any title, essential dominium or ownership; these elements remain inviolate."(15) It could furthermore be observed that whereas dominium eminens has operation in the proprietary forum only, the State's police power has operation over both persons and property, as discussed supra.(16)

Blust in the University of Illinois Law Review(17) formulates as 'rule of unique attrition' as a basis for differentiating the powers in the context of contributions or endowments required from subdividers and township developers. Although it is noted that ownership of the contributed endowment passes to the municipality, when viewed in the context of the broad township scheme, it is submitted(18) that this illustration does constitute an exercise of the police power (and not of eminent domain) notwithstanding the noncompliance with the general feature of the police power regarding ownership. In determining whether the developer (or the municipality) is to bear the cost

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(15) State v McKinnan 153 Me 15 133 A 2d 88 S

(16) Vide introductory paragraph S 1.3.3.

(17) 318 at 325, 1967.

(18) It is noted that this reasoning conflicts perhaps with the judgment in Johannesburg City Council v Victteren Towers (Pty) Ltd 1975 (4) SA 334 (W) where it was held that a development contribution in essence is a tax. By reason however of the fact (as discussed supra under 1.3.2) that taxes are proportionately levied from the whole nation, the writer respectfully disagrees with this judgment.

of essential services and new facilities, it was held in Department of Public Works v Exchange National Bank,[19] that it is necessary to consider whether the burdens or costs created are "specifically and uniquely attributable to the developer's activity ". Blust's concluding remarks appear consistent with the South African approach:

> *"When the State takes property (under dominium eminens) to meet the needs of the general public, it should compensate the owner. When the State makes a person bear the cost of his own activities, only regulation (under the police power) occurs."*

A final and prominent difference[20] between the exercise of dominium eminens and that of the police power arises in relation to whether a compensation entitlement accrues to the prejudicially affected party. Whereas compensation upon expropriation is statutorily permitted under the provisions of Section 12 of the Expropriation Act,[21] the general rule is that regulatory interference with private property rights under the police power of the State, is non-compensable,[22] since any loss or detriment resulting is *damnum absque*

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[19] 334 NE 2d 810.

[20] Cf: Todd, The Law of Expropriation and Compensation in Canada p 24 - 5. Vide also Section 1.6 infra, footnote 20.

[21] Act 63 of 1975.

[22] Lamm v Volpe 449 F 2d 1202: "Police power should not be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorising its regulation without compensation, whereas the latter takes property for public use and compensation is given."

injuria,[23] being an incident of, or risk inherent in, the nature of ownership itself.[24]

The fact that the State's police power can be exercised without giving rise to a compensation entitlement, can be criticised from a standpoint of equities and the natural law. To the contrary, an attempt is frequently made to justify such noncompensability upon the basis that "each member of a community is presumed to be benefited by that which promotes the general welfare."[25] This rationale is however subject to certain crucial

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(23) East Rutherford Industrial Park v State 119 NJ Super 352, 291 A 2d 588 (and Union v Boldt 481 F 2d 1392):

> *"The exercise of appropriate regulatory powers has never been held to constitute a taking which would require compensation ... Injuries resulting from such exercise must be considered incidents of ownership and are* damnum absque injuria".
>
> Lees v Bay Area Air 238 Cal Reporter App 2d 850, 48 Cal Reporter 295: "... just compensation attached to an exercise of the power of eminent domain does not extend to the State's exercise of its police power, and damage resulting from a proper exercise of the police power is simply *damnum absque injuria.*"
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> Vide also: Independence Savings Bank v 290 Madison Corporation 167 NJ Super 473, 401 A 2d 259; Happy, Damnum Absque Injuria: When Private Property may be damaged without Compensation 36 Missouri Law Review 453 (1971); Cities Service Oil Corporation v City of New York 5 NY 2d 110, 154 NE 2d 814.

(24) In People ex rel. Department of Public Works v Ayon 54 Cal 2d 217 at 224, 5 Cal Reporter 151 at 154, 352 P 2d 519 at 522, it was held:

> *"... the exercise of the police power ... is simply a risk the property owner assumes when he lives in modern society under modern conditions."*

(25) Gray v Reclamation District 174 Cal 622 at 642 (1917); vide also: CBQ Railway v Drainage Commissioners 200 US 561 at 593 (1906).

deficiencies - firstly, this reasoning, if endorsed, could apply equally well to the exclusion of compensation upon expropriation; secondly, the share of the prejudiced party in the general benefits is so disproportionate in relation to his contribution, as almost to necessitate the payment of compensation.(26)

American jurisprudence has accordingly evolved the principle that where a regulatory interference with the use of property, although in form falling short of an exercise of the power of dominium eminens, is in fact and in substance so extensive an inroad into private ownership as to constitute a 'taking', then the prejudiced owner has available to him the procedural remedy of 'inverse condemnation',(27) whereby it is he (and not the

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(26) In HFH Ltd v Superior Court (116 Cal Reporter 436), it was held:

> *"the loss to the individual property owner (may be) so great that he is forced to bear more than his fair share of the improvement of the public welfare ... individual property owners should not reasonably be forced to carry the cost of achieving goals which are to the benefit of the entire community ... it is to be expected that the public will bear the costs of public improvements."*

(27) Vide : Lindas, Inverse Condemnation in American Right of Way Association Journal (1969) Chapter 4;
also : Wittke v Kusel 215 Kan 403 at 405, 524 p 2d 774 at 776 (1974), where it was held:

> *"Inverse condemnation has been characterised as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings."*

In Saunders v State Highway Commission 211 Kan 776 at 781, 508 P 2d 981 (197

> *"Inverse condemnation actions are in the nature of a suit on implied contract. When a public entity appropriates and uses property or rights therein, without compensating the owner, an implied contractual obligation arises to pay the owner the reasonable value of the property or rights taken without compensation".*

(Continued over)

expropriator) that institutes the expropriation process. When the socio-economic structure of South African society has advanced to a comparable level to that of the United States, (or if even the use of such a procedure is justified in particular circumstances in South Africa at present), the adoption and implementation of 'inverse condemnation' in our legal system is advocated, in order that the inequity attendant upon a noncompensable taking, might thereby be alleviated or obviated.

The dichotomy that emerges between dominium eminens and the police power is a "conflict between the public interest manifested through the exercise of the police power on the one hand, and on the other hand, the property interest of the landowner which is disclosed through the exercise of eminent domain."(28) The resolution of where the dividing line lies between these two forces is in short a question of degree. In Just v Marienette it was held:(

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(27) continued:

Vide also: Ventures in Property v City of Wichita 594 P 2d 671; Schaeffer v State, 22 Cal app 3d 1017, 99 Cal Reporter 861.

In relation to endowments and inverse condemnation, it was held in Selby Realty Company v City of San Buenaventura (104 Cal Reporter 865) that:

> "... *under certain circumstances, a governmental body may require the dedication of property as a condition of its development ... and it may not be necessary for the county to acquire the land by eminent domain even if it is ultimately used for a public purpose. In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses, and the invasion or appropriation must directly and specially affect the landowner to his injury.*"

(28) Bringle, 13 Hastings Law Journal 401; also Wine v Council of City of Los Angeles 177 Cal App 2d 157, 2 Cal Reporter 94.

(29) 56 Wis 2d 7, 201 NW 2d 761; discussed by Haik in Police Power Versus Condemnation, 7 Natural Resources Law Journal 21 1974 .

"To state the issue in more meaningful terms, it is a conflict between the public interest ... and an owner's asserted right to use his property as he wishes. The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is its power of eminent domain. The distinction between the exercise of the police power and condemnation ... (is accordingly) ... a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense. Whether a taking has occurred depends upon whether the restriction practically or substantially renders the land useless for all reasonable purposes." (30)

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(30) Vide also: Home Building and Loan Association v Blaisdell 290 US 398, 54 S Ct 231, 78 L Ed 413:

"... where the restrictions imposed by the socalled regulations are so broad that the owner of the property regulated is deprived of most or all of his interest in the property, for all practical purposes there has been a 'taking' of that property."

Auto Transit Company v City of Fort Worth 182 SW 685 at 692 (1916):

"... (where) the pecuniary loss that the plaintiffs will suffer from the enforcement of the ordinance is not so out of proportion to the benefit that the public will receive so as to render it invalid, ... (the regulation will be noncompensable)...."

Wandermere Corporation v State 79 Wash 2d 688, 488 P2d 1088:

"... where the character of governmental interference with private property rights is planned deliberate and substantial, such interference upon proper factual showing, should be deemed a 'taking'."

State v Johnston 265 A 2d 711:

"... (where) their compensation by sharing in the benefits which this restriction is intended to secure, is so disproportionate to their deprivation of reasonable use, such exercise of the State's police power is unreasonable."

Bayside Warehouse Company v Memphis 470 SW 2d 375:

"... if regulation goes too far, it will be recognised as a taking."

It emerges that valid governmental action under authority of the State's police power, requiring private adherence to statutes, ordinances and bye-laws which promote public order, safety, health and general welfare, does not constitute an exercise of dominium eminens, and consequential loss or damages thereby suffered will accordingly in general be noncompensable.(31) It would however appear under principles of natural law that where governmental interference with the owner's use and enjoyment of the specific property affected, is so substantial, unreasonable and arbitrary, to the extent that it effectively and in substance constitutes an expropriation, and provided that such is factually determinable and proved by the landowner,(32) compensation ought in such circumstances to be payable. However regard must be had to, and recognition must not be forgotten of, the purposes for which the police power exists:(33)

> *"The power which the State has of prohibiting a use by individuals of their property, as will be prejudicial to the health morals or safety of the public, is not, and consistently with the existence and safety of organised society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."* (34)

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(31) Cf: State v Ensley 160 Ind 472, 164 NE2d 343 (1962); Also: Kucera, Eminent Domain v Police Power - A Common Misconception in 1959 Institute of Eminent Domain Vol 1.

(32) Vide Indiana and Michigan Electric Company v Stephenson 363 NE2d 1254 (1977).

(33) Mugler v Kansas 132 US 688 at 689.

(34) Cf: Carruthers v Board of Adjustment 290 SW2d 340 at 346 (1956):

> *"... legislation regulatory of the use of property pursuant to the police power, is to be sustained regardless of even severe hardship in particular cases, whenever the public health safety morals or general welfare outweigh the equities of the individual property owner."*

Although it is acknowledged finally that a landowner does not have an absolute and unlimited right to change the essential character of his property so as to use it for a purpose for which it was unsuited in its natural state, and by which the rights of others would be substantially injured or prejudiced,[35] the *caveat* that is here voiced is that a deep awareness of naturalism must remain, in order to avoid permitting the positivist trend[36] of noncompensable exercises of the police power in South African law, to escalate to encompass excesses, the proportions of which are inconsistent with the naturalist foundation of compensability.

In overview, the distinction between the police power and dominium eminens will assume a pressing significance as social,economic,cultural and political advancement and development take place in South African society. The

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(35) As was held in Sibson v State 336 A 2d239; discussed by Waite in Ransoming the Environment, 23 Maine Law Review 117 (1971).

(36) A similar trend has been evident in American law (although consciousness there of the need for safeguards against abuse, is much greater). In Euclid Ohio v Ambler Realty Company 272 US 365, 47 S Ct 114, 71 L Ed 303 it was held:

> *"Regulations, the wisdom validity and necessity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."*

Similar dicta are found in Brown v Tahoe Regional Planning Agency 385 F Supp 1128:

> *"As public welfare and necessity dictate more and more restrictions upon the uses and abuses of private exploitation of private property, decisions will have to be made whether the impact of the regulations constitutes* damnum absque injuria *or whether just compensation should be forthcoming."*

relevance of the inquiry and the value that is contained for South Africa in the assessment of the American experience, is presaged and foreshadowed in the dicta of a United States Court:(37)

> *"In a changing world ... it is apparent that the police power is not a circumscribed prerogative, but is elastic,*(38) *and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.... (It) thereby keeps pace with the social economic moral and intellectual evolution of the human race."*

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(37) Miller v Board of Public Works 195 Cal 477, 234 P 381 at 387.

(38) Board of Supervisors of James City County v Rowe 216 SE 2d 199:

> *"... the police power is elastic but its stretch is not infinite."*

Southern Pacific Company v City of Los Angeles 242 Cal App 2d 21 51 Cal Reporter 197:

> *"... (it is) a flexible police power that is necessary."*

1.3.4 THE WAR POWER

Characteristic of Grotius writings in De Iure Belli ac Pacis, is that the distinction he draws between dominium eminens and the other public law proprietary powers of the State is not as clearly defined as in modern jurisprudence. In respect of the war power of the State however, its separation by Grotius from dominium eminens, by virtue of the nature of his work, is in general far less blurred. War is, as Grotius observes,(1) "the state of persons contending by force." Although dominium eminens is essentially a peacetime municipal power of the State, there is some overlap and parallel with the interrelated war power, that warrants consideration and contrast and justifies analysis. In his opening words,(2) Grotius foreshadows this realisation, and through his commitment to naturalism, displaces the focus of his enquiry from the positivist dictates of institutions:

> *"Questions of Rights among Citizens of the same State are settled by the instituted law of the State; and therefore do not belong to our subject, which is Rights by Nature, not Rights by Institution. Between persons who are not bound by a common instituted Right, as those who have not yet formed a state; or between those who belong to different states - whether private persons, or Kings, or those whose mutual Rights (and Obligations) resemble those of Kings, such as Rulers of peoples, or free Peoples themselves - questions of Rights pertain either to time of war or time of peace; on the other hand, there is no question of Rights which may not issue in war...."*

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(1) De Iure Belli ac Pacis Liber 1, Caput 1, Section 2.

(2) Ibid, Liber 1, Caput 1, Section 1, Whewell translation.

Although the war power has in common with dominium eminens, a recognition of a link with sovereignty, a capacity to take private property, and a focus on the common good and wellbeing of the Citizens, certain fundamental distinctions emerge. Differentiation is possible on the basis of whether the power in question is essentially an international wartime power or an intranational (or municipal) peacetime power; but a significant question which arises (in the event that it is accepted as detailed infra that dominium eminens originates in the Social Contract), is whether the war power shares a similar source. On the one hand, it is noted by both Hobbes and Locke[3] (and impliedly by Grotius in the extract supra) that although individuals have passed into societies, nations themselves remain *inter se* still in a noncontractarian or 'natural' state (a state of "Warre", to use the Hobbesian dictum). From this, it might appear that the war power, being a *sequitur* of the 'natural' state, existed prior to the Social Contract, and is accordingly not created by that Contract. On the other hand however, Hobbes, Locke and others[4] submit that the State itself is formed by the Social Contract, whereby men transferred to the State those powers they had in their 'natural' condition; from this it appears that the powers the State has, were conferred originally by that Contract. Under this alternative latter view, the war power would be seen as having a direct link to the sovereignty conferred upon the State under the Social Contract, and would be consistent with the contractarian principle that a function of the State is the protection of its Citizens;

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[3] This is not to say however, that Hobbes and Locke regard the war power of the State as being unrelated to the Social Contract or as being caused by any other factor. Vide infra Sections 2.4.3 and 2.4.4.

[4] Inter alia this writer.

furthermore, although it would be conceded that the war power existed in *individuals* prior to that Contract, it would be disputed that this proves that the war power could not have originated in the hands of the *State* under that Contract - although not *created* thereby, it would be *conferred* thereby, and to this extent, the war power of the *State* could validly be said in theory to originate in the Social Contract. Unfortunately as is noted infra, South African law in its practice may not display the degree of adherence to these tenets of theoretical jurisprudence that would be desirable.(5)

The principal distinction however between dominium eminens and the war power lies in that a taking under the war power is frequently noncompensable (although it is noted that modern interpretation in English and American law has moved in favour of the recognition of a compensation entitlement if appropriation by dominium eminens is possible, and further that *ex gratia* payments are on occasion made even where urgency justifiably motivated the noncompensable exercise of the war power). That the war power can in its valid operation preclude an entitlement to compensation, is based upon two jurisprudential sources - the doctrine of sovereign immunity, and the principle *salus populi est suprema lex.* There has been a fairly substantial enunciation of the war power in the United States case law, where it has been held that:(6)

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(5) Vide inter alia Didlow v Minister of Defence and Provost Marshal 1915 TPD 549. CF: English law: Kawasaki etc of Kobe v Bantham Steamship Company (1939) 2 KB 544 at 559; Re Cooper's Estate : Bendall v Cooper and others (1946) I A E R 28; Ruffy-Arnell Company Limited v The King (1922) 1 KB 599.

(6) United States v Pacific Railroad 120 US 227, 30 LEd 634, 7 SCt 490.

> *"The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in war, ... (has) to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy ... (is) lawfully ordered by the commanding general. Indeed it (is) his imperative duty to direct their destruction. The necessities of war call( ) for and justif(y) this. The safety of the state in such cases overrides all considerations of private loss."* (7)

American judgments[8] in respect of the war power, in general mark a curious departure from their customary naturalist lead over the British precedents, and although still recognising the desirability in general of compensation, tend to accept wider inroads into private property under the war power than do their English counterparts. The American writer Nichols,[9] for instance sets out seven factors which have a bearing upon whether or not compensation is payable, but in their irreducible form, two dominant factors emerge. The

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(7) The same judgement held further:

> *"The principle that for injuries to or destruction of private property in necessary military operations during war, the government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been ... 'a matter of bounty rather than of strict legal right'... (T)he government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency...."*

(8) Inter alia: United States v Caltex Incorporated 344 US 149; Bell v Louisville and Nashville Railway Company 1 Bush 303, 89 AM Dec 632; Ford v Surgent 46 Miss 130; Central Eureka Mining Company v United States 138 F Supp 281; Jurugna Iron Company v United States 212 US 297, 53 L Ed 530, 29 S Ct 385.

(9) The Law of Eminent Domain Section 1.44 p 731 - 735.

first is the nationality (or status) of the prejudiced owner: if enemy property is affected, its destruction is noncompensable; if neutral property is affected, then in the absence of an international provision for indemnity, its appropriation without compensation is permitted under 'the right of angary';[10] if property belonging to Citizens is affected, then although the State has the right to appropriate such property for defence purposes, the mere fact that a state of war exists does not justify the failure to pay compensation where possible.[11] The second factor is the location of the property: if it is situated in enemy territory, irrespective of the nationality of the owner, it is subject to appropriation or destruction without compensation; if situate at "the theatre of the war", (at "the actual seat of the struggle"), a similar rule applies; if situate within the territorial jurisdiction of the State in question, the remedy of compensation under modern usage presents itself to the Citizen owner.

English law, although in broad agreement, has however adopted a different inflexion, supporting in certain circumstances a presumption of 'no expropriation without compensation' even in wartime. Founded on the liberalist ethic and the Lockesian Social Contract theory as recognised in Entick v Carrington (1765),[12] the property relationship between State and Citizen came in English law to know the naturalist refinement of the ratio in Attorney General v De Keyser's Royal Hotel,[13] in which it was held that

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(10) Vide: International Law Situations: Naval War College (1926) 65. Oxford English Dictionary Vol 1 at p 70 defines angary as "(t)he right of a belligerent to use and destroy neutral property".

(11) Authority in the last regard may be found in Todd v United States 292 F 2d841 and Mitchell v Harmony 13 How US 115, 14 LEd 75.

(12) Common Pleas (1765) 19 State Trials 1029, discussed infra under Section 2.4.4

(13) Attorney General v De Keyser's Royal Hotel 1920 A C 508 (H L); 1920 All E R 80; 89 L J Ch 417; 122 L T 691; 36 T L R 600; 64 Sol Jo 513; 17 Digest (repl) 437, 91.

the Sovereign prerogative to expropriate private property without compensation yields to the statutorily conferred power of expropriation subject to compensation:

> *"The Crown is not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the land or buildings of a subject for administrative purposes in connection with the defence of the realm, without paying compensation for their use and occupation."* (14)

English authority[15] accordingly reinforces the proposition that the sovereign prerogative embodied in the war power, should be exercised (noncompensably) only in the event that an exercise (compensably), based upon statute and under the power of dominium eminens, is not possible by reason of the impelling and cogent nature of the prevailing wartime circumstances. This view finds consistency also with the naturalist dicta of Grotius: [16]

> *"... a right, even when it has been acquired by subjects, may be taken away by the king.... But to do this ... there is required in the first place, public utility; and next, that, if possible, compensation be made to him who has lost what was his, at the common expense. And as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract."*

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(14) Ibid, headnote, 1920 A C 508 (H L).

(15) Ibid. Vide also: Re Petition of Right 1915 3 KB 649; Universities of Oxford and Cambridge v Eyre and Spottiswood (1964) Ch 736, (1963) 3 All E R 289; Minister of Housing and Local Government v Hartnell (1965) AC 1134; (1965) 1 All E R 490; contra Burmah Oil Co (Burma Trading) Ltd v Lord Advocate (1965) AC 75, 1964 2 All E R 348, which last decision was however in a different context, and in any event was nullified by the War Damage Act (1965) (England). Vide also discussion under Section 1.6 infra at footnote 24.

(16) De Iure Belli ac Pacis 2.14.7. Vide also Sande Dec.Fris. 7.7.4 and Van Bijnkershoek Verhand. van Staats. 2 15, cited with approval in Krause v SAR&H 1948 (4) SA 554 (O) at 562 - 563.

The principles of international law that Grotius first enunciated, have been developed in modern times by convention between nations. Bouvier notes (cited by Nichols, Law of Eminent Domain p 1 - 732), that "an indirect recognition, *a fortiori*, of the duty of the belligerent to pay indemnity, may be found in Articles 52 - 53 of the IV Hague Conference 1907[17] which require the payment of such indemnity when private property is requisitioned", provided that such personal property was not "hostile property". Oppenheim on International Law[18] (similarly to Wheaton on International Law)[19] observes that "Article 46 of the Hague Regulations, which says that private property may not be confiscated, does not prevent the utilisation of private buildings temporarily, as hospitals barracks and stables, without compensation". To this extent that there is flux present in international law, these dicta are not inconsistent with the judgment in the De Keyser's Royal Hotel case supra, although necessarily, the validity of transgressions of internationally-recognised Regulations must involve a question of degree based on the attendant facts and circumstances. In Seery v United States[20] it was held:

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(17) The text of the IV Hague Conference 1907 Respecting the Laws and Customs of War on Land is reprinted in Roberts and Guelff, Documents on the Laws of War, Oxford, 1982, p 43 et seq.

(18) Vol II, Section 140 6 ed (1940).

(19) 7 ed (1944) p 248.

(20) 127 F Supp 601

> *"...(although) it would seem that departures from the Hague Regulations are permitted in order to enable a commander in the field to meet emergency situations relating to his troops and supplies, they would hardly seem to be applicable to the taking of a luxurious estate, at a remote location in a resort area, for use as an officers' club some months after hostilities had ended."*

In final analysis, although this writer supports the desirability of the view expressed by Dr Gildenhuys[21] that "(d)ie prerogatiewe bevoegdheid van die Staat om privaateiendom toe to eien, mag vandag slegs in noodtoestande uitgeoefen word", on the other hand since present South African law characteristically displays a denial of naturalist 'oughts' (as evidenced by inter alia Joyce and McGregor v Cape Provincial Administration[22]) it is questioned whether Dr Gildenhuys' statement will actually receive in the context of the war power, the practical translation its theoretical foundation would predicate. In consequence of the fact that the war power would, in our law as practised, appear based more upon direct sovereignty and less upon the naturalism that a Social Contract grounding would require, South Africa may here regrettably tend to follow rather the noncompensability approach that is possible under an extreme positivist interpretation of the sovereign immunity doctrine and the *salus populi* principle.

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[21] Onteieningsreg p 1 footnote 4.

[22] 1946 AD 658.

1.3.5 THE POWER OF DESTRUCTION BY NECESSITY

The State's power to destroy private property by necessity, although similar in certain respects to both the war power and to dominium eminens, is distinct from both, principally in the motivation and in the rationale (respectively) of its exercise. In Grotius' classification however, this power is, incorrectly it would seem, subsumed under the broad dominium eminens encapsulation he advances, in terms of which:

> *"(t)he property of subjects is under the eminent domain of the State, so that the State or he who acts for it, may use and even alienate and destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility...."* (1)

The power of destruction by necessity is invoked in circumstances which, by the impelling necessity and cogency of their nature, warrant the destruction of private property in order that a greater harm to the public at large may thereby be averted or avoided - in this it differs from dominium eminens which promotes public purposes in another manner.

> *"In the case of fire flood pestilence or other great public calamity, when immediate action is necessary to save human life or to avert an overwhelming destruction of property, any person may lawfully enter another's land and destroy his property, real or personal, providing he acts with reasonable judgment."* (2)

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(1) Vide extract from De Iure Belli ac Pacis 3.20.7 referred to under Section 1.1 supra; emphasis added.

(2) Bowditch v Boston 101 US 16, 25 LEd 980; cited in Nichols, The Law of Eminent Domain S 1.43(1) at p 1 - 722. Vide also Case of the Prerogative 12 Commonwealth Reporter 13: "For the Commonwealth a man shall suffer damage, as for saving a city or town, a house shall be plucked down if the next one be on fire, and a thing for the Commonwealth every man may do without being liable to an action."

Customarily, such destruction is authorised by prior statutory enactment in the form of a general enabling provision,[3] but it would seem in modern South African usage, that the powers of destruction by necessity that are statutorily conferred, are not in our law of an unlimited general nature. Rather they are qualified by the requirements that principles of natural justice must where appropriate have expression; that reasonableness attends their invocation; and that due regard must where possible be had to the interests of the prejudiced party. This refinement was applied in De Jager v Farah and Nestadt[4] where although the slum clearance regulations clearly authorised the demolition of slum buildings, such action by the authorities without prior notice to the inhabitants and without appropriate ejectment proceedings, was held to be an unlawful exercise of the power conferred.[5] This decision critically qualified the opportunties for governmental abuse that had been presented by the earlier decision in Louvis v Municipality of Roodepoort-Maraisburg[6] in which a contravention of the building regulations in itself had been held to justify the demolition of a house.

A common law parallel of the power of destruction by necessity is found in the destruction of property in situations of emergency. Burchell and Hunt

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(3) Vide Silberberg and Schoeman The Law of Property 1983 ed p 200 - 202 and at p 344: "... an owner may be deprived of property if its destruction has been authorised by statute". The South African case law contains several precedents, inter alia: English v British South Africa Company 1913 AD 76, in which cattle suspected of carrying African coast fever, were held to have been justifiably destroyed in Terms of Ordinance 9 of 1904; also Ostrawiak v Pinetown Townboard 1948(3) 584(N).

(4) 1947 (4) SA 28 (W).

(5) The position in American law appears similar. In City of Rapid City v Boland 271 NW 2d 60 (South Dakota) it was held that "(t)he abatement of a public nuisance does not entitle the owner to compensation; however he is normally entitled to due process... a summary abatement is allowed only where (1) the property constitutes a public nuisance that is an imminent hazard to the public health safety or welfare; and (2) destruction is the only adequate method of eliminating the hazard".

(6) 1916 AD 268.

in South African Criminal Law and Procedure[7] set out the defence of necessity in the criminal law, in which the prospect of imminent bodily injury or death can justify what would otherwise have been an unlawful destruction of property - justified private defence can render an act to be not '*reus*'. Several judgments have elucidated this field of South African law, but prominent among these is the landmark decision in Ex parte Minister van Justisie: in re S v Van Wyk,[8] in which a full bench of the Appellate Division unanimously[9] held that the protection of private property can extend to include and justify not only the destruction of other property, but also the wounding or killing (in appropriate circumstances) of another person. Van der Merwe and Olivier in Die Onregmatige Daad in die Suid-Afrikaanse Reg[10] and McKerron in The Law of Delict,[11] consider those circumstances in delict in which the destruction of the property of another in situations of emergency may be justified on the basis

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(7) 1 ed, Vol 1, p 285 and 1972 Supplement p 18 - 21; or Ibid, 2 ed, Vol 1, p 328 et seq. Vide also Olmesdahl, Cases on Criminal Law 1978 ed p 770 ff (where inter alia certain Roman Dutch authorities are cited); 1971 Acta Juridica 205 at 211; 1967 T H R H R 110 at 154; 1970 T H R H R 431; 1970 SALJ 467. precedents of interest include S v Goliath 1972 (3) SA 1 (A); S v Rabodila 1974 (3) SA 324 (0); S v Pretorius 1975 (2) SA 85 (SWA).

(8) 1967 (1) SA 488 (A).

(9) It is noted however that it was a 3-2 split majority that held that this principle had valid operation in the facts of Van Wyk's case, affirming the point that regard must be had to all relevant facts and circumstances.

(10) 4 ed 184 et seq.

(11) 7 ed 74.

that it is not 'wrongful'.[12][13] However, detailed analysis of these criminal and delictual aspects is not germane to the theme of this exposition, and is accordingly not undertaken here - reference to the material in the footnotes herein will suffice, if necessary.

What are however relevant are the points of distinction that exist between the State's power of destruction by necessity and an individual's right to destroy property belonging to another in situations of emergency; and for this reason, care must be taken to differentiate them. In the first place, the former is a public law power whereas the latter is best viewed from a private law perspective. A second distinction is found in the respective nature of the circumstances of necessity and of emergency. Thirdly, under Social Contract theory, whereas the former power is conferred upon the State under the Social Contract, the latter represents the justified revival of the individual's[14] natural instinct for survival (as it had existed in his original condition prior to that Contract), in circumstances in which the State has failed to

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(12) Vide also: Greyvenstein v Hattingh 1911 AD 358, in which a swarm of locusts was prevented from entering a farmer's land by action detrimental to his neighbour's property.

(13) Silberberg and Schoeman The Law of Property 1983 ed pp 200 - 202 explore the further question of the extent to which an owner may refuse the use of his property by others in situations of emergency they face, and conclude that although American authority indicates that the right to use the property of another in such circumstances, is limited "to those who are in a financial position to make good any damage they may cause to it", it appears conceivable in South African law that "situations may arise in which such a limitation might not be justified".

(14) In City of Rapid City v Boland, 271 NW2d 60 (South Dakota), it was held that "(t)he right to destroy life or property for selfpreservation differs from eminent domain ... (and) ... when it is exercised by a public officer, he must justify his conduct as an individual whose position makes him a natural leader, rather than as an agent of the governnment".

discharge its function of protecting its members. Fourthly, *salus populi est suprema lex* links to the latter, whereas the focus of the former is upon the *'salus'* of the individual. Finally, the former is a 'natural' right, the exercise of which requires no statutory foundation, while the latter is an attribute of sovereignty (with a contractarian origin), which requires the sanction of the legislature to warrant its operation.

Destruction by necessity by the State differs also from destruction by mobs during riots,(15) although both give rise to no common law claim for compensation against the State. Certain jurisdictions have however by legislative action recognised such a claim by Citizens.(16) In South Africa however, *vis major* and *casus fortuitus* are frequently excluded from general insurance policies; and the prevailing uncertainty of domestic stability has contributed to a widespread use of additional political riot premiums in property insurance.

Between the power of destruction by necessity and dominium eminens, apart from the difference in the respective rationale(17) of each, a primary contrast surfaces in whether there is an entitlement to compensation for the disadvantaged owner. When property is taken by the State under circumstances

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(15) Vide: Municipal Liability for Riot Damages under Eminent Domain 28 Washington and Lee Law Review 103 (1971).

(16) For example 1855 Laws of New York, c 428.

(17) In re Cheesebrough 78 BT 232: "... the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification (of the power of destruction by necessity): salus populi (est) suprema lex".

of imminent necessity, it incurs no obligation to compensate the owner justly or even at all,[18] unless such is stipulated in the enabling legislation. It would appear though that for the State to be able to invoke this power, there must be:

> *"a necessity, extreme imperative or overwhelming, ... (so as to) constitute such a justification; but mere public expediency or public good or utility, will not answer."* [19]

In final analysis, the power of destruction by necessity, although conferred originally upon the State under the Social Contract, in its modern South African usage, requires in general an authorisation of its exercise by prior statutory enactment. In this and in the regard that a compensation entitlement arises in positivist law for the owner only where such is statutorily provided, this power shares a similarity with dominium eminens. In regard to whether compensation *ought* to accrue however, it would seem (unlike situations of expropriation), that such is not mandatory, in view of the nature of the public necessity that here attends the destruction of property.

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(18) United States v Caltex Incorporated 344 US 149, 73 S Ct 200, 97 LEd 157 (1952); Annotated 14 A L R 2d 73.

Vide also Decker's note to Van Leeuwen's Commentaries 2.2.1 where it is stated: "... in case of need, (a Citizen can be compelled) to give his property up without payment. But this cannot last longer than the necessity, for then compensation may justly be claimed".
Cf: Jooste v The Government 4 Off Rep 147.

(19) Hale v Lawrence 21 NJL 714, 47 AM Dec 190 (1848), cited in Boland's case supra, which judgment continued: "Thus the destruction of sound and substantial buildings has been allowed without due process and without compensation where the destruction or damage was, or reasonably appeared to be, necessary to prevent an impending or imminent public disaster from fire flood disease or riot. Once the impending disaster has passed, the government may not rely upon the doctrine of necessity to justify the subsequent destruction of property".

1.3.6 THE POWER OF FORFEITURE

The State's public law proprietary power to require the noncompensable forfeiture of private property used in the transgression of public purposes, is an attribute of sovereignty vested in the State under the Social Contract. This power flows from the contractarian premise (enunciated principally by the philosophers of the German School of transcendental idealism) (discussed infra)[1] that property is an object into which men project their personality. Furthermore, although property ownership is traditionally indefeasible in the private law, as does the inviolability of the uninhibited freedom of individual men yield in the public law forum to the general will, so may the property of those men become subject to public appropriation when its use represents a gross violation of collective wellbeing. Fichte and Hegel developed this initially Kantian view in submitting that although the State ought to be minimally interventionist in disturbing property rights, the freedom that men find in society, is not unrestrained or unqualified in an absolute sense, since one man's free activity is necessarily conditioned by the equal free activity that must rationally be ascribed to others.

The power of forfeiture[2] appears to have had a parallel in early law in

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[1] Vide Section 2.5.

[2] It is noted that in South African law, "'forfeited' and 'forfeiture'... mean actual forfeiture and not liability to forfeiture ...": per Greenberg J in Boberg v Ettlinger and Grimwood 1937 WLD 34. In English law, the power of forfeiture is on occasion termed the power of confiscation.

the concept of deodand,[3] it having been held in a United States judgment[4] that forfeiture is an "anachronistic relic" thereof. This historical basis and the writings of the German transcendental idealists, contributed to the prominence at the turn of the century of a justification of forfeiture on the ground that the property itself is 'guilty'. This doctrine[5] of '*in rem* guilt' was however unintended by the German philosophers: although they submitted that the owner projected himself into his property, they did not suggest that a personality separate or divisible from the owner was imparted thereby to the inanimate thing. Recent judgments[6] have accordingly discarded the *in rem* approach and adopted an alternative rationale of forfeiture,[7] the fundamental justifications of which are: that the owner is often partially to blame because, notwithstanding that the illegal use may have been unintentional,

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(3) An analysis of the Shorter Oxford English Dictionary definition (Vol I p 520) provides interesting background: "Deodand (1523) [-law Fr deodande - AL deodanda - um ie Deo danda - um, that is to be given to God; dative of deus (God), gerundive of dare (give)]. A thing to be given to God; (specially in English Law), a personal chattel, which having been the immediate occasion of the death of a person, was forfeited to the Crown to be applied to pious uses. (Abolished in 1846). (Loosely) a sum taken in lieu of the deodand (1831)."

(4) United States v One 1969 Plymouth Fury Automobile 476 F 2d 960.

(5) Admiralty Courts applied this doctrine for instance in The Palymyra 12 Wheat 1, 6 LEd 531, in holding that a ship itself was the transgressor.

(6) Inter alia, United States v One 1970 Buick Riviera 463 F2d 1168, and authorities cited therein; also Calero-Toledo v Pearson Yacht Leasing Company 416 US 663 94 S Ct 2080 40 LEd 2d 452 (1974).

(7) Adapted from the judgments in State ex rel Patterson v Weaver 254 NW2d 68; Calero-Toledo case supra; and State v One 1968 Volkswagen 251 NW 2d 666.

such invariably is (alternatively) due to his negligence; that forfeiture prevents later re-use of the property for a similar criminal purpose; that the previous criminal use is penalised and made unprofitable by forfeiture (which on this basis, is a punishment imposed by the society for the use of private property that violates the spirit of the Social Contract); and that a deterrent to offenders, and an inducement to owners, to control their property with greater care, is thereby created.

Consistently with the principles supra, modern American law has evolved the standpoint that an owner surrenders control of his property at his own risk,(8) and in the event that it is used by another *contra bonos mores* or in a manner that subverts public wellbeing, the owner cannot in theoretical jurisprudence raise his innocence as a defence against the forfeiture of his property. A similar approach would appear to prevail in South African law. In United States v United States Coin and Currency(9) it appears from *obiter* however that in the administrative exercise of the power of forfeiture, leniency ought to attend the treatment of innocent owners, and that forfeiture would seem best invoked in practice only where the owner "has significantly participated in the criminal enterprise". Public policy considerations would tend to reinforce the propositions that "... this claim ... to deprive totally innocent people of their property, would otherwise hardly be compelling", and that in reasonableness and equity, unless the contrary is clearly indicated in statute, forfeiture by innocents ought perhaps to be presumed not to have been intended by the legislature, notwithstanding the principles advanced supra in justification of the power.

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(8) Vide Nichols op cit S 1 42(14) p 1 - 454, and precedents cited thereat.

(9) 401 US 715, 91 SCt 1041, 28 LEd 2d 434 (1971).

It is relevant to note that several American judgments[10] subsume the power of forfeiture within the category of the police power.[11] With respect, it is submitted that such a classification is incorrect, and blurs the distinction[12] between these powers in a material respect - whereas the police power is confined to regulating or controlling the use of property without a transfer of title to the State, the power of forfeiture contemplates a deprivation of the Citizen's ownership right and a full 'taking' by the State. This is not to say however that the power of forfeiture corresponds to dominium eminens - here too differentiation is possible on the basis of the rationale of each power, and in respect of whether a compensation entitlement arises under naturalism.

The parameters of the power of forfeiture are broad in South African law, extending to encompass fines, penalties, forfeitures and confiscations. Characteristic of the exercise of this power however, is that an empowering statutory foundation is required to authorise its invocation by the executive branch of government. Illustrations in South African law of the power of forfeiture are found inter alia in customs and excise matters,[13] in liquor

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(10) Inter alia: United States v One 1962 Ford Thunderbird 232 F Supp 1019 (referred to in West's Federal Practice Digest 2 ed Vol 31 p 122; and other authorities cited thereat):

> *"Where Congress ... provides for penalties such as forfeitures, such action ... represents a federal exercise of police power to which the constitutional requirement of just compensation is inapplicable".*

(11) Vide Section 1.3.3 supra.

(12) In several American judgments, it has been held that the seizure-and-forfeiture of vehicles used to transport dagga (marijuana) or for other unlawful purposes, is clearly not an expropriation under dominium eminens: United States v One 1971 Buick Riviera 463 F2d 1168; United States v One 1972 Wood 19 Foot Custom Boat 501 F2d 1327; United States v One 1969 Plymouth Fury 476 F2d 960; McKeehan v United States 438 F 2d 739.

(13) Customs and Excise Act 91 of 1964 as amended: Sections 88 and 89. Vide Appendix to Section 1.3.6.

legislation,[14] in criminal law,[15] and in contraventions of Group Areas legislation,[16] to name but a few.[17].

Procedurally in South African law (unless ownership passes derivatively in circumstances in which the owner consents to the forfeiture), it was held in S v Frost[18] that a rule *nisi* should first be issued prior to the final order by a court of competent jurisdiction, in order that the *audi alteram partem* principle might have application.[19] This general approach would however necessarily seem subject to any statutory procedures laid down in the empowering statute, as was held in S v Khan.[20]

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[14] Liquor Act, 87 of 1977, Section 190, as amended. Vide also: S v Ntsimenyane 1980 (4) SA 53 (O); S v Tshabalala 1980 (4) SA 179 (T).

[15] Criminal Procedure Act, 51 of 1977.

[16] Group Areas Act 36 of 1966, as amended, Section 41(5). Vide also discussion under Section 1.3.8 infra.

[17] Vide also:

R v Leatherman 1937 TPD 242; R v Christos 1944 TPD 50; R v Claasen 1945 OPD 11;
Fil Investments v Levinson 1949 (4) SA 485 (W);
Master's Compressed Yeast Company Ltd v Commissioner of Customs and Excise 1949 (4) 819 (A);
R v Molibele 1952 (4) SA 7 (T); R v Husband 1959 (4) SA 132 (N);
R v Moloto 1961 (3) SA 496 (T); S v Moodley 1962 (1) SA 842 (N):
Ex parte Minister van Justisie 1968 (1) SA 380 (A); S v Heller 1970 (4) SA 679 (A); S v Ntombela 1973 (3) SA 89 (T).

[18] 1974 (3) SA 466 (C).

[19] Vide also inter alia: S v Brandt 1968 (1) SA 644 (SWA) at 652; Scottish Rhodesian Finance Limited v Provincial Magistrate, Umtali 1971 (3) SA 234 (R) at 235; and S v Chandiwana 1971 (3) SA 262 (R), discussed in Silberberg and Schoeman, The Law of Property, 1983 ed, p 344.

[20] 1965 (3) SA 783 (A) at 789.

In final analysis, the power of forfeiture vesting in the State, although frequently appearing harsh in its noncompensable operation, is based on sovereignty under the tenets of Social Contract theory.[21] Its frequently asserted subsumption under the police power emerges as being insubstantial, and the power remains best viewed separately, where its distinction too from dominium eminens (and the other public law proprietary powers of the State) is apparent.

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[21] Cf: Section 1.2.5 supra and Chapter 2 infra.

1.3.7 THE POWER OF DOMINIUM OVER BONA VACANTIA (OR THE POWER OF ESCHEAT)

The State's power of dominium over *bona vacantia*[1] in South African law corresponds closely in its practical operation to what is in American jurisprudence termed the power of escheat.[2] Black's Law Dictionary[3] defines escheat as a "reversion of property to the State in consequence of the want of any individual competent to inherit; ... (it) indicates the preferable right of the State to an estate left vacant, and without there being anyone in existence able to make claim thereto". In South African law, Corbett in The Law of Succession,[4] sets out the principles applicable

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(1) Sodhi and Vasan, in Latin Words and Phrases for Lawyers, (Canada), define '*bona vacantia*' as "unclaimed goods ... which belong to the Crown by virtue of its prerogative". The concept of *bona vacantia* has been discussed in South African case law in the following judgments: Ex parte Sprawson (in re Hebron Diamond Mining Syndicate Limited) 1914 TPD 458 at 460 - 1; Ex parte the Government 1914 TPD 596 at 597; Ex parte Minister of Irrigation 1948 (2) SA 779 (C) at 784 - 5; Ex parte Marchini 1964 (1) SA 147(T) at 150. Vide also 1946 T H R H R 3 at 5 - 6.

(2) It is noted that the analysis of the public law powers of the State in American jurisprudence is traditionally conducted on a fourfold basis. The powers conventionally distinguished there are eminent domain, the taxation power, the police power and the power of escheat. It appears however that this breakdown is incomplete in material respects, as set out in Section 1.3.1 supra at footnote 13. The American analysis may be consulted in Rams on Eminent Domain at pp 62, 66, 160, 185, 200, 311, 349; in The American Institute of Real Estate Appraisers' Handbook at p 13; in Condemnation Appraisal Practice Vol 1 at p 3 and Vol II at pp 263 and 277; in 31 West's Federal Practice Digest at K2; in 26 American Jurisprudence at Sections 4 and 277; in Gildenhuys op cit at p 1; in Ring, Valuation of Real Estate at p 13; and in Todd, The Law of Expropriation and Compensation in Canada at pp 21 - 24.

(3) 5 ed p 488.

(4) Corbett, Hahlo, Hofmeyr and Kahn, The Law of Succession in South Africa p 588; Vide also Walker, Oxford Companion to Law, p 430 and Thompson, Dictionary of Banking p 251.

to *bona vacantia*,[5] the effect of which is largely equivalent to that of escheat - in short, where a person dies intestate without heirs, the State acquires dominium in the *bona vacantia* in his deceased estate.

The words 'dominium over *bona vacantia*' have been conceived by this writer in preference to the adoption of the American 'escheat' nomenclature by reason of the fact that the jurisprudential orientation and emphasis of these respective terms differs. A survey of dictionary definitions of 'escheat' reveals that its meaning is characterised by a subscription

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(5) Sir Edward Coke in The First Part of the Institutes of the Laws of England, or a Commentary on Littleton (as translated in Black's Law Dictionary 4 ed p 640) notes also two classical sources in the law, of relevance to the power of escheat or dominium over *bona vacantia*:

(1) *"Escheata derivatur a verbo Gallico 'eschoir', quod est accidere, quia accidit domino ex eventu et ex insperato: (Co Litt 93)*

Escheat is derived from the French word 'eschoir', which signifies to happen, because it falls to the lord from an event and an unseen circumstance"

(2) *"Escheatae vulgo dicuntur quae decidentibus iis quae de rege tenent, cum non existit ratione sanguinis haeres, ad fiscum relabuntur: (Co Litt 13).*

Those things are commonly called escheats which revert to the exchequer from a failure of issue in those who held of the king, when there does not exist any heir by consanguinity."

Stroud's Judicial Dictionary 4 ed p 934 notes that these sources have been recognised judically in Attorney-General of Ontario v Mercer 8 App Cas 767; St Catherine's Company v The Queen 14 App Cas 46; Attorney-General for Quebec v Attorney-General for Canada (1921) 1 AC 401.

to the original proprietary theory of ownership,[6][7] whereas the inflexion under South African law is in favour of a sovereignty emphasis (as modified, it is submitted, by a Social Contract foundation)[8] - 'dominium over *bona vacantia*' is accordingly more consistent with, and more accurately descriptive of, the jurisprudential nature of this power in South African law.

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(6) Vide Section 1.2.2 supra.

(7) The original proprietary emphasis of the definition of escheat is illustrated by the underlined extracts from the following dictionaries and texts:

(a) Black's Law Dictionary (supra): "a reversion of property to the State...."

(b) Claasen, Dictionary of Legal Words and Phrases, Vol 2 p 26: "The reversion of lands or moneys to the State; a reversion of lands to the lord of the fee or original grantor."

(c) Canadian Law Dictionary p 136: "The reversion of property to the State as the ultimate proprietor of land, by reason of the lack of anyone to inherit ... (it) escheats to the lord as reverting to the original grantor...."

(d) Wharton's Law Lexicon Dictionary of Jurisprudence, p 349: "a species of reversion: it is a sort of caducary inheritance ... the lord of the fee, from whom or from whose ancestor the estate was originally derived, taking it as ultimus haeres upon the failure, natural or legal, of the intestate tenant's family."

(e) The Shorter Oxford English Dictionary Vol I p 680:

"(1) (Law) An incident of feudal law, whereby a fief reverted to the lord when the tenant died siesed without heir.... Hence the lapsing of land to the Crown (in US to the State), or to the lord of the manor, on the death of the owner intestate without heirs.

(f) 16 Halsbury's Laws of England (3ed) p 427: "Escheat was the right whereby land of which there was no longer any tenant, returned to the lord by whom, or by whose predecessors in title, the tenure was created".

(g) Attorney General of Ontario v Mercer (1883) 8. App Cas 767 at 772: "From the use of the word 'revert' in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat as a species of reversion".

(8) Vide Sections 1.2.3 and 1.2.5 supra.

Escheat (or dominium over *bona vacantia*) appears to have been a tacit condition in feudal law attaching to the investiture of rights of tenure in feudal tenants [9] under the process of enfeoffment,[10] as was acknowledged judicially in Burgess v Wheate; Attorney General v Wheate (1759).[11] In his analysis of feudal tenure, Blackstone, in Commentaries on the Laws of England,[12] notwithstanding his customary opposition to contractarianism, alluded indirectly further to the Social Contract foundation of the power of escheat. It is submitted accordingly that dominium over *bona vacantia*, like dominium eminens, is based on a contractarian origin.

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(9) Cf: Gough, Fundamental Law in English Constitutional History, Chapters 2 and 4.

(10) The Shorter Oxford English Dictionary: Vol I, pp 657, 735 and 746:

"Enfeoffment : the action of enfeoffing"

"Enfeoff: To invest with a fief"

"Fief: See FEE"

"Fee: (Feudal Law) An estate in land (in England always a heritable estate) held on condition of homage and service to a superior lord; a fief." (my underlining).

(11) (1759) 1 Eden, 177, in the judgment of Lord Henley and Lord Keeper at 241 - 243:

> *"The legal right of escheat arises under the law of enfeoffment, by which ... the lord gave the land to the tenant and his heirs, under a tacit condition to revert, if the tenant died siesed without heirs...."* (my underlining).

(12) 2 Blackstone Commentaries, 72 and 73, where it is stated inter alia:

> *"... the tenure was determined by breach of the original condition, expressed or implied in the feodal donation...."*

The statutory treatment of the power of escheat provides perspective regarding its evolution since feudal times. In English law, as is noted by Walker in Oxford Companion to Law,[13] certain forms of escheat were abolished by the legislature in 1870, and further in 1925;[14] and the present position, in the words of Thompson, Dictionary of Banking,[15] is that "if an estate owner dies intestate ... (and) ... without heirs, his property goes to the Crown as *bona vacantia*". By contrast, in the United States,[16] legislative recognition accorded to the doctrine of escheat has increased, it being provided generally that "this right of the State (exists) to succeed to property, either real or personal, where no heir can be found."[17] The trend in Canada approximates to that in the United States: Todd in The Law of Expropriation and Compensation in Canada,[18] lists eleven escheat statutes enacted after 1960. In South Africa, a statutory recognition of escheat came in early law inter alia in

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[13] P 430.

[14] Vide Administration of Estates Act 23 of 1925 (England), Sections 45 and 46; discussed in Stroud's Judicial Dictionary 4 ed at p 934.

[15] P 251.

[16] As is noted supra in footnote 2.

[17] Radin, Law Dictionary, 2 ed p 113.

[18] P 21.

the Natal Escheat Laws[19] (No. 11 of 1868 and No. 6 of 1869), but in more recent times, the approach would appear to correspond to that in modern English law in the *bona vacantia* orientation.[20]

The power of dominium over *bona vacantia* is closely allied to, but distinct from,[21] the State's power of forfeiture.[22] Although both permit the acquisition under an original mode by the State of the property of its Citizens, it would seem to adopt the feudal dictum, that the former arises *propter defectum sanguinis tenentis* whereas the latter comes about *propter crimen tenentis*.[23]

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(19) Claassen, Dictionary of Legal Words and Phrases Vol 2 p 26 states in this regard that "it may be noted that these laws were passed while Natal was still a Crown Colony. Law No 6 of 1869 (N) declares the law and practice in cases of escheats, and provides for the holding of an inquest in all cases of escheat to the Crown."

(20) Vide Corbett, op cit, supra.

(21) It is noted that powers of escheat and forfeiture are frequently grouped together for purposes of analysis and their distinction is accordingly blurred by some writers: vide eg Walker Oxford Companion to Law, p 430.

(22) Vide Section 1.3.6 supra.

(23) Classical authorities are at some variance in their reference to this terminology. Walker, ibid, uses the words *propter delictum tenentis*, as does 32 Halsbury's Laws of England 3ed, 367 - 8. Black's Law Dictionary, 5ed p 488 and 4ed p 640, refers to *per defectum sanguinis* and *per delictum tenentis*.

Wharton, op cit, p 349, employs the phrases *ob defectum sanguinis* and *pro delicto tenentis*, but correctly observes that "the following interests do not escheat, viz ... (inter alia) ... *propter delictum tenentis* ...." It would appear that although the choice of preposition is not important, and although the substitution of *crimen* for *delictum* is justified on the basis of modern usage, what is significant is to differentiate between the powers on this basis.

Wharton's Law Lexicon Dictionary of Jurisprudence [24] attempts to distinguish escheat and forfeiture on two bases, one of which is here approved, the other of which is respectfully rejected. In the first place, it is stated:

> *"It (escheat) differs from forfeiture ... in that the latter is a penalty for a crime personal to the offender, of which the Crown is entitled to take advantage by virtue of its prerogative, while an escheat results from tenure only, and arises from an obstruction in the course of descent ..."*

In the second place respectively, it cannot be accepted here that :

> *"An escheat is partly in the nature of a purchase ... (in) ... so far as it is necessary for the lord to enter on the reverted property, in order to complete his full ownership of it ..."*

Although Wharton thereafter dilutes this submission by stating that "a mixed title" is created under escheat, "being neither a pure purchase nor a pure descent, but in some measure compounded of both", the analogy with purchase is particularly weak.[25] The mere fact that a subsequent taking of possession (cf: delivery) of the *bona vacantia* over which dominium is acquired, is (in the view of Wharton) necessary to perfect the acquisition of title by escheat, does not justify this comparison with sale, since inter alia the consensual nature of the latter is conspicuously absent from the former. It would seem furthermore, by extension from the principles applicable under dominium eminens,[26] that the effect of the power of

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[24] Ibid, p 349.

[25] Cf: the criticisms of the analogy of dominium eminens with a 'compulsory sale', as discussed under Section 1.2.4 supra.

[26] Vide Section 1.3.9 infra at footnote 6, (in particular the judgment of Juta AJA in Mathiba and Others v Mosche 1920 AD 354 at 364-5, quoted thereat), and vide Section 1.2.4 supra at footnote 14.

dominium over *bona vacantia*, is that ownership of the subject property passes to the State directly, by operation of law and by the very nature of this power, notwithstanding that the general common law requirements of delivery or registration may not have been fulfilled.

Although, as is apparent supra, the rationale of dominium eminens[27] may have relevance in the clarification of the nature of the power of dominium over *bona vacantia* when displaced to the context of the latter, it is necessary to retain a cognisance of the differences that exist between these two powers. The forum of and motivation for their operation, the manner and procedure of their exercise, the fact that the latter arises only in relation to dead Citizens, and the question as to whether compensability is appropriate for consideration, constitute inter alia a significant basis for their separation.

In overview, although the power of dominium over *bona vacantia* shares common features with both forfeiture and dominium eminens, it remains a sui generis public law proprietary power of the State and is best analysed as such.

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[27] As discussed in greater detail in Section 1.4 infra.

1.3.8 THE GROUP AREAS POWER IN SOUTH AFRICAN LAW

South African legal development has since 1948[1] been characterised by a subscription to apartheid, the manifestations of which have permeated almost every fibre in the fabric of the law,[2] to the extent that the very foundations themselves of human rights and the Rule of Law have been eroded. Contrary to the background of a common law heritage[3] that knew no distinction on the basis of colour, and in the face of an overwhelming international

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(1) The year in which the National Party came to power in South Africa.

(2) Dugard, in Human Rights and the South African Legal Order Chapter 4 p 53 - 106 traces the parameters of racial discrimination in South African law, and notes that it operates on both a political and a personal level. Apartheid extends through the legislative spectrum from race classification and labour legislation to the Homelands policy, and from prohibitions on mixed marriages and freedom of movement and association, to an institutionalised separation of facilities, of amenities, of education, and of territorial residential and trading areas. Vide (or on jurisprudential grounds, perhaps contra) Joubert The Law of South Africa Vol 10 p 329 et seq. Vide also inter alia Van Reenen, Land - Its Ownership and Occupation in South Africa. A Treatise on the Group Areas Act and the Community Development Act; and Robertson, in lecture handouts at the University of Natal, September 1983, who makes the crisp observation that "a prevailing theme throughout the history of developments in land tenure in South Africa (from 1650 onwards) is that of race".

(3) Roman-Dutch authorities display a significant absence of racial orientation, and in its place, a commitment to natural justice and fundamental liberties. Voet states:

> *"A law has various requisites. In the first place indeed, it ought to be just and reasonable - both in its matter, for it prescribes what is honourable and forbids what is base; and in its form, for it preserves equality and binds the citizens equally".*

Commentarius ad Pandectas 1.3.5. Gane translation, The Selective Voet, being the Commentary on the Pandects Durban Butterworths 1955, Vol 1, p 34.

It is noted that although the above extract is perhaps too general to prove the absence of a racial colouring in the Roman Dutch law, it does indicate (indirectly) that the conception of justice that prevailed, was premised upon something other than a legal recognition of the separate identity of races.

authority against,[4] and rejection of, 'separate development', the governmental regime has chosen to institutionalise in its laws and now to enshrine in its new constitution,[5] a policy and grand design which are anathema to fundamental natural human rights and freedoms.

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(4) Inter alia: The 1971 Namibia opinion of the majority in the International Court of Justice (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I C J Reports 16 at 57); the dissenting judgment of Tanaka J in the 1966 South West Africa cases (1966 I C J Reports 248 at 313 - 315); Schreiner, The Contribution of English Law to South African Law in South Africa p 92; Schwelb, 1972 66 American Journal of International Law, 337 at 349, in an article entitled "The International Court of Justice and the Human Rights Clauses of the Charter"; Lefcourt, Law against the People Chapters 2 and 3, p 38 - 64.

(5) Pursuant to the affirmative outcome of the referendum held among whites in South Africa on 2 November 1983, it appears that the practical operation of the proposed constitution waits upon merely the formality of executive implementation. With inter alia its division between "own affairs" and "general affairs" under a presidential system in which there is no guarantee of powers of judicial review, and with its 4:2:1 ratio for the tricameral parliamentary representation of Whites, Coloureds and Indians, to the total exclusion of Blacks, the new dispensation represents a gross constitutional embodiment of the tenets of National Party dogma and an indefensible denial of the liberalist and egalitarian tenets, not only of Social Contract theory and the natural law, but also of the very Christianity that the Constitution purports to espouse. In this regard it is not insignificant that the Churches in South Africa have taken a stand against the proposed constitution (vide inter alia The Natal Mercury of 27 October 1983 at page 18), on grounds inter alia of its entrenched division of men and its institutionalised departure from the principle that all men are equal before God.

The Republic of South Africa Constitution Act 110 of 1983 in Schedule 2 thereto, details the nature and extent of the repeal and amendment of certain provisions of the Republic of South Africa Constitution Act 32 of 1961. Although the bulk of the earlier statute is repealed, Part VI thereof is retained (subject to the amendments listed in paragraph I.A.2 of Schedule 2 of the 1983 Act). The effect of the 1961 Act is accordingly now confined to matters of provincial government, as reflected in its new title (S 121: "... the Provincial Government Act, 1961"), and in its substituted long title ("To provide for provincial Councils and their powers and the administration of provincial matters, and for matters connected therewith").

Proponents of the apartheid philosophy contend that it rests on the premise that 'separate but equal, is equal',[6] but as Dugard notes,[7] the reality in South Africa at present is a premise of 'separate but unequal.'[8] Although it can be clearly understood why some have a wish that apartheid be practised, (inter alia, political expediency, self-interest and a desire to maintain the *status quo*, motivate its adoption and retention) and notwithstanding that it is conceded that a political transition to an alternative and jurisprudentially-superior philosophy will have attendant difficulties, the fundamental premise supra upon which apartheid rests cannot be and is not condoned - it is repugnant to the principles of naturalism and the spirit of naturalist legal heritage, and constitutes an extreme violation of the Rule of Law.[9]

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(6) It was described by the Minister of Bantu Administration and Development, Mr M C de Wet Nel (in Hansard Debates, Vol 1, column 7994, of 14 June 1961), as "differentiation without inferiority". Similarly the South African Ambassador at the United Nations, Mr. R F Botha said: "Our policy is not based on any concepts of superiority or inferiority, but on the historical fact that different peoples differ in their loyalties cultures outlooks and modes of life and that they wish to retain them": 1974 11 UN Monthly Chronicle number 10 at p 19 - 23; also Hansard Debates Vol 55 columns 382-3 of 7 February 1975.

(7) Human Rights and the South African Legal Order p 64-5.

(8) The Reservation of Separate Amenities Act, 49 of 1953, for instance permits the reservation of separate but unequal facilities for different races, and precludes the possibility of judicial pronouncements on the validity and lawfulness thereof.

(9) Vide A S Mathews, Law Order and Liberty in South Africa, p 302 ff and references cited thereat.

While the 'separate but unequal'philosophy clearly revolts the sensibilities, it is noted that in early American jurisprudence, the doctrine of 'separate but equal' found acceptance in the infamous decision in Plessy v Ferguson (1896).[10] This was however later convincingly overruled and repudiated in the landmark judgment in Brown v Board of Education of Topeka (1954),[11] where Warren CJ ruled that separate but equal is not equal, since segregation represents a violation of the Fourteenth Amendment to the United States Constitution.[12] The rejection of the 'separate but equal' premise, and the aversion that natural law finds for discrimination based upon race, have been expressed also by inter alia a former Chief Justice of Australia,[13] and in Rhodesia (now Zimbabwe) by Beadle CJ in City of Salisbury v Mehta.[14] In South Africa too, a judicial reluctance to recognise the reasonableness of apartheid can be found in several judgments;[15] but the majority

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(10) 163 US 537 (1896).

(11) 347 US 483 (1954).

(12) Furthermore, Ibid, at 494: "To separate (black children) from others of similar age and qualifications solely because of their race, generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".

(13) Latham CJ in Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth (1947), 74 Commonwealth Law Reports 31 at 60.

(14) 1962 (1) SA 675 (RAD).

(15) eg: Williams and Adendorff v Johannesburg Municipality 1915 TPD 106; R v Plaatjes 1910 EDL 63; the dissenting judgment of Gardiner AJA in Minister of Posts and Telegraphs v Rassool 1934 AD 167 at 191-3. In R v Carelse (1943 CPD 242 at 253) and R v Abdurahman (1950 (3) SA 136 (AD) at 145) however, the Court insisted that the inequality be substantial before it would intervene - a similar approach was adopted on the facts in R v Lusu 1953 (2) SA 484 (AD). In more recent times, a judicial consideration of the equity of Group Areas legislation has taken place in Minister of the Interior v Lockhat 1961 (2) 587 (A) at 602 and in S v Adams 1979 (4) SA 793(T) at 794-5 and 805.

Vide also the dicta of Didcott J in In re Duma 1983 (4) SA 469 (N) at 473 G - H, and his earlier judgment in Nxasana v Minister of Justice and Another 1976 (3) SA 745 (D) at 747H - 748 B.

decision of the Appellate Division in Minister of Posts and Telegraphs v Rasool,[16] in upholding the legality of separate but equal post office counters for whites and non-whites, remains characteristic of the South African standpoint, and has paved the way for the later statutory[17] treatment (particularly post-1948) under the separate but unequal approach.[18]

The primary instrument for the expression of apartheid in the forum of property law in South Africa, is the State's Group Areas power, which in its exercise and operation in practice, contemplates and comprises two essential phases - firstly proclamation (of a designated group area), and secondly displacement (of affected persons, by way of expropriation).

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[16] 1934 AD 167.

[17] The Group Areas power (broadly construed) claimed by the State, is expressed in a statutory framework which is manifold. The Group Areas Act, 36 of 1966, and its 'sister' Act, the Community Development Act, 3 of 1966, regulate the acquisition occupation and use of land in South Africa on a racial basis. Whereas these acts, although contemplating the Black group, have reference primarily to the White, Coloured and Indian Groups, the Black Urban Areas Consolidation Act, 25 of 1945, provides amplification regarding the treatment of urban blacks; the Black Land Act, 27 of 1913, and the Development Trust and Land Act, 18 of 1936, inter alia, have relevance here too. In regard to apartheid legislation broadly, inter alia the Prohibition of Mixed Marriages Act, 55 of 1949, the Population Registration Act, 30 of 1950, the Reservation of Separate Amenities Act, 49 of 1953, and the Immorality Act, 23 of 1957, Section 16, serve to enact racial discrimination in South African law. Although any detailed analysis of the extreme positivist nature and effect of these statutes lies beyond the confines of this study, suffice it here that these references thereto are made in order to record the far reaching scope and range of these enactments.

[18] Vide supra at footnote 2.

In respect of the first phase supra, under the provision of Section 23(1) of the Group Areas Act,[19] the State President is empowered to proclaim a group area for occupation and for ownership by members of a particular race group. In this regard, the Group Areas power may appear prima facie to share a conceptual similarity with the police power, and perhaps even to be subsumed within the category of the latter, in as far as each relates to the regulation or controlling of the use to which the property may be put.[20] In point of distinction however, whereas the latter relates to the use itself, the former is focussed principally upon the racial identity of those persons who may thereafter put the affected property to use, and not upon that use directly, if at all. Moreover, in further distinction, whereas the latter inhibits and prohibits a particular use recognised as being prejudicial to the public

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[19] Act 36 of 1966.

[20] In the United States, in instances where there has been racial discrimination in property usage, the Courts have upheld the constitutionality of statutory prohibitions against such discrimination, and have viewed this regulatory power as falling withir the ambit of the State's police power (vide cases infra). It is suggested however that although this would be a convenient classification in the United States where the Group Areas power is not known or recognised, such is inappropriate in South Africa (for the reasons recorded in the main text hereafter).

United States decisions of interest on this point view this question accordingly from a different perspective (viz: they forbid rather than entrench discrimination based on race) but contain nevertheless relevance in their enunciation of naturalist ideals:

In District of Columbia v John R Thompson Company 346 US 100, 73 S Ct 1007, 97 LEd 1480 (1953), and cases cited therein), it was held that the legislative power delegated to the District of Columbia by Congress was "as broad as the police power of a state" and included the power to enact a "law prohibiting discrimination against Negroes".

In Commonwealth v Alger 7 Cush 53 (Mass), the Court upheld legislation prohibiting racial discrimination in the renting of flats.

In Massachusetts Commission Against Discrimination v Colangelo 344 Mass 387, 182 NE2d 595, the Court held that although the "freedom of the owner to exercise his own judgment in the sale or rental of his property is ... (a) ... most important attribute of ownership", a statutory prohibition on racial discrimination does not constitute a taking of property under the power of dominium eminens.

Vide also: Locatelli v City of Medford 287 Mass 560, 192 NE 57; and Opinion of the Justices to the Senate 333 Mass 773 at 777.

interest, naturalist jurisprudence would contest vehemently that the exercise of the Group Areas power serves this function, and would contend instead that the nonrepresentative (but purportedly "public") interest advocating this power was unjustly prejudiced (and not that the racially prohibited use was justifiably prejudicial in itself).

In respect of the second phase of its operation, the Group Areas power evidences a substantial overlap with dominium eminens in regard to the practical mechanics by which each power achieves final effect: Section 38 (1B) of the Community Development Act [21] provides that "... the provisions of Sections 6 to 23 of the Expropriation Act, 1975, shall *mutatis mutandis* apply in respect of the acquisition of immovable property by expropriation in terms of this section....". However a significant distinction arises in that under dominium eminens, expropriation is empowered "for public purposes"[22] under the provisions of Section 2(1) of the Expropriation Act,[23] whereas in terms of Section 38(1)(a) of the Community Development Act,[24] expropriation

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[21] Act 3 of 1966. Section 38 relates to the "(a)cquisition of immovable property by the (Community Development) Board by agreement or expropriation". Vide also discussion in Section 1.3.9 at footnote 18.

[22] Vide Jacobs The Law of Expropriation in South Africa pp 15-16 and 267.

[23] Act 63 of 1975, Section 2(1): "Subject to the provisions of this Act, the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes".

[24] Act 3 of 1966, Section 38(1)(a) provides:

> *"The board may with the written approval of the Minister, if it is satisfied that it is expedient to do so for the attainment of any of its objects, acquire any immovable property by expropriation...."*

is empowered, subject to the written approval of the Minister, where such is expedient for the attainment of any of the (statutory) objects[25] of the Community Development Board. Expropriation, then, under the Group Areas power, fulfils merely a "governmental purpose", whereas expropriation by dominium eminens under the Expropriation Act serves a "public purpose"of a far broader nature, as contemplated in Fourie v Minister van Lande.[26]

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(25) Act 3 of 1966, Section 15, sets out the objects and general powers of the Community Development Board. Section 15(1) states:

"The objects for which the board is established shall be, subject to the directions of the Minister -

(a) to develop or assist in the development of such areas ... as may from time to time be designated by the Minister, to promote community development in any such area ...

(b) to assist in and control the disposal of affected properties."

(NOTE: 'affected properties'are defined in Section 1 of Act 3 of 1966, as read with Sections 23 and 24 of Act 36 of 1966).

"(c) to assist persons to acquire or hire immovable property in ... the achievement of the objects mentioned in paragraph (a) or (b)."

(26) A considerable body of case authority exists in South African law regarding what constitutes a 'public purpose' as contemplated in Section 2(1) of the Expropriation Act, 63 of 1975, (and as contemplated in the corresponding sections in preceding statutes eg Section 2(1) of the Expropriation Act 55 of 1965). Since this determination depends largely on the facts in the particular expropriation at hand, casuistic analysis is essential. The nature of "public purposes" received detailed judicial consideration by Steyn AJ in Fourie v Minister van Lande en 'n Ander 1970 (4) SA 165 (O) (discussed by Jacobs The Law of Expropriation in South Africa at p 15), in which judgment the following test was laid down at 177E) for the determination of whether an expropriation (under the 1965 Act, or similarly the 1975 Act) is valid in this regard:

"Eerstens moet vasgestel word wat die subjektiewe doel was van die instansie wat die betrokke goed onteien het. Tweedens moet daar objektief geoordeel word of daardie doel binne die betekenis val van 'openbare doeleiendes' soos deur die Onteieningswet beoog".

(26) continued/ ..

Footnote (26) continued

The *ratio decidendi* in this judgment centred on the point that the Legislature clearly intended "public purposes" in a broad sense (which may include the narrower sense of "governmental purposes", but extends beyond the confines thereof) (Vide 175 D). Accordingly (at 176 B):

> *"Die instandhouding en uitbreiding van die Republiek se telekommunikasiestelsel is dus nie slegs 'n 'regerings doeleiende' nie, maar ook 'n 'openbare doeleiende' in die breë sin, omdat dit die hele land raak en tot voordeel van die publiek as 'n geheel strek".*

Although in the earlier South African cases, expropriations for principally governmental purposes were held justified in inter alia Jooste's case (1911) infra, the trend in later cases (vide Slabbert's case (1963) infra), was in favour of the extended meaning of "public purposes". In the African Townships case (1961) infra, the Court (at p 393) went as far as to hold that expropriations were conceivable which would be for "public purposes" but clearly not for "governmental purposes" - similar dicta are found in Rudolph's case (1940) (at p 131) infra. For analysis in depth of the nature of "public purposes", vide the following South African judgments:

Jooste v Government of the Republic of South Africa 1897 (4) OR 147 at 149; Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society 1911 AD 271 at 279 and 283 - 284; SA Turf Club v Claremont Municipality 1912 CPD 54 at 59 - 60; Langlaagte Proprietary Company Ltd (In Liquidation v Union Government 1916 WLD 127; Van Eck NO and Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A); Broadway Mansions (Pty) Ltd v Pretoria City Council 1955 (1) SA 517 (A) at 522; Minister of Defence v Commercial Properties Ltd and Others 1955 (3) SA 324 (D); White River Council v H L Hall and Sons Ltd 1958 (2) SA 524 (A); Davis v Caledon Municipality and Others 1960 (4) SA 885 (C); African Farms and Townships v Cape Town Municipality 1961 (3) SA 392 (C) at 393 and 396-7; Slabbert v Minister van Lande 1963 (3) SA 620 T at 621 D - F; Olifantsvlei Township Ltd v Group Areas Development Board 1964 (3) SA 611 (T); Barclays Bank D C O and Others v Tarajia Estates 1966 (1) SA 420 (T); Minister of Water Affairs v Mostert and Others 1966 (4) SA 690 (A); Pretoria City Council v Modimola 1966 (3) SA 250 (A) at 25 8 - 9; Springs Town Council v McDonald and Badenhorst 1968 (2) SA 114 (T); Cape Town Municipality v L F Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C); Fourie's case supra; Minister van Landboukrediet en Grondbesit v Primrose Estates 1974 (4) SA 209 (W); Hardman NO and Others v Administrator, Natal 1975 (1) SA 340 (N); Tongaat Group v Minister of Agriculture 1977 (2) SA 961 (A); Sorrell v Milnerton Municipality 1980 (4) SA 660 (C).

Relevant foreign precedents regarding "public purposes" include the following:

Mersey Docks and Harbour Board v Cameron and Jones 11 HLC 443 at 481-2, 11 ER 1405 at 1419; Coomber v The Justices of the County of Berkshire (1883) 9 AC 61 (HL) at 72-3; Hamabal Framjee v Secretary of State for India 1914 ILR 39 (BOM) 279; Municipal Council of Sydney v Campbell 1924 AC 338 (PC); Lord McMillan in Barras v Aberdeen Steam Trawling and Fishing Company 1933 AC 402 at 446-7; Minister of Lands v Rudolph 1940 SR 126 at 129 and 131; Minister of Internal Affairs and Banner v Albertson and Others 1941 SR 240 at 259-60; Bank Voor Handel v Slatford 2 AER 956 (CA) at 965.

(26) continued/ ...

On balance it emerges that the Group Areas power is distinct from both the police power and dominium eminens, and is not subsumed by either nor is it a hybrid of both. Notwithstanding the superficial equivalence it may appear to share with the former (in its first phase of operation), and with the latter (in its second phase of operation), the Group Areas power in South African jurisprudence seems best viewed as being *sui generis*.

Contractarian and naturalist jurisprudence is strongly at issue with the proponents of apartheid philosophy on the question of the Group Areas power, being at variance not only with the purported social validity of the purposes the Group Areas power seeks to promote, but also with the congruence of this power to considerations of public interest and wellbeing. It is significant

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Footnote 26 continued

In American law, "public purposes" have been liberally construed to embrace the public interest broadly, apparently without direct regard to the degree or frequency of the use. There has been an interesting enunciation of the nature of this concept in United States ex rel T W A v Welch 327 US 546 (1946). In commenting on this case, Encyclopaedia Britannica Vol 8 p 336 states:

> *"Although the determination (in the United States) of whether a use is public or not, is said to be a judicial question, the courts have moved so far from the idea that actual use by an appreciable part of the public is a requisite to public purpose, toward a conclusion that if any public purpose is served public use is unnecessary, that is almost correct to say that the question of whether a taking of land is for a public use is a legislative one and not a judicial one .... Thus use of the condemnation power has been upheld where the purpose was to clear slums, beautify an area, construct low-cost housing, provide off-street parking, and promote industrialisation."*

(It is noted that this judgment was given against the background of the judicial review power existing in the United States - reliance out of context on this judgment must therefore be avoided). Vide also United States v Twin City Power Company 350 US 222 (1956).

to note that Section 38 (1B) of the Community Development Act (as supra) does not incorporate an adoption of Section 2(1) of the Expropriation Act - the South African lawmakers accordingly cleverly sidestep the naturalist trap in which they would have been caught, had they attempted to shroud their purely "governmental purposes" with the cloak of respectability that "public purposes" [27] would have provided. The grand apartheid design is quite patently not a "public purpose" under naturalist ideology and the tenets of contractarianism, although this is not to say that positivist excess could not attempt to make it so.

A further enquiry relevant here is the jurisprudential source of this power, as a determinant of its nature. It would appear that South African law attempts to 'rationalise' the Group Areas power as being an attribute of sovereignty, based on legislative authority, and represented or expressed in statutory enactment: if Parliament is considered to have a plenary sovereign power to legislate (as is the view adopted in South African law), then it follows that its enactments are unassailable save by a subsequent sovereign legislature.[28] The Group Areas power would on this basis *prima facie* appear inherent in the sovereign Parliament. Where the defect however lies in this purported rationale of the power, is not in the apodosis, but in the protasis - does a nonrepresentative white parliament in fact have the unlimited sovereignty that it in this regard claims? That the bulk of South African society has not been consulted about Group Areas (and furthermore

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(27) Vide also discussion of public purposes under Section 1.3.9.

(28) Vide discussions under Section 1.2.3 supra.

would not[29] have consented had they been so consulted), suggests that the necessary contractarian foundation for the transmission of plenary power from the original sovereign (the people) to the allegedly *de iure* sovereign (the White Parliament) does not exist (nor did it exist) in this regard. The oppression of a subjugated people differs vastly from ruling them lawfully and *de iure*.

Social Contract theory becomes invaluable here in elucidating these issues and in dismissing as *ultra vires*[30] the supposed legality of the State's Group Areas power. This power is clearly not based on a broad Contract of all the Citizens *inter se*, guided by and under principles of natural law; (it is noted in passing that this too provides a further justification for the *sui generis* treatment supra of the Group Areas power). If it can be accepted that South African society embraces all its Citizens regardless of race (which assumption appears reasonable and would be trite anywhere but in South Africa), then it would seem that the democratically-spirited vision of a dynamic and periodically-renewed or continuously-ratified Social Contract between those Citizens (as enunciated primarily by Rousseau),[31] would militate crucially against the lawfulness of enactments (by a represented

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(29) It is noted that Dworkin, in Taking Rights Seriously (p 152) criticises contractarian reasoning in this hypothetical manner. In defence of this rhetorical style here, it is submitted that such is necessary here to highlight the absurdity and illogicality of imputing a *pactum subjectionis* (vide Section 2.3) by South African Blacks.

(30) Vide, by extension, although in a different context, the judgment of Lord Russell in Kruse v Johnson (1898) 2 Q B 91 at 99.

(31) Vide S 2.4.5 infra.

power-wielding minority) against, and materially prejudicial to, a disenfranchised majority; alternatively expressed, to borrow Rousseau's dictum, true sovereignty rests in the *Volonte Generale,* and the positivist dictates of an oppressive regime cannot deny the immutable rights of the majority nor the lawfulness of the General Will. The Group Areas power of the State, in its very nature and in the manner it is draconianly implemented in South Africa, emerges accordingly as being *ultra vires* the Social Contract and as having been illegitimately assumed by a Parliament that is questionably sovereign in this regard.

The contractarianism of John Rawls[32] contributes significantly also to the clearer understanding of the logical *lacunae* in the conventional South African rationale of the Group Areas power. It is noted however that Rawls' thesis did not envisage the Social Contract as the direct source of powers conferred on the government - rather, in his view, that Contract was focussed on determining the fundamental principles of justice that regulate the structure and operation of democratic society in a spirit of social co-operation, and it is from those principles that those powers in turn would indirectly arise. As is elaborated in greater detail infra in Section 2.6, his concept of 'justice as fairness' can find no concord with the apartheid and Group Areas practices in South African law, since both of the Rawlsian principles are violated in a vital regard: it cannot be said that our society is structured firstly such that each person would have "an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all"[33]

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[32] Vide Section 2.6 infra.

[33] Rawls, A Theory of Justice Section 46 p 302.

and nor can it be said secondly that social and economic inequalities are *ex ante* "arranged so that they are both to the greatest benefit of the least advantaged ... and attached to offices and positions open to all under conditions of fair equality of opportunity."[34] Since men in the original position Rawls postulated, were behind a veil of ignorance (which would include no acknowledgement of race), and since the principles of justice as fairness would accordingly be determined objectively, rationally and antecedently under a process of reflective equilibrium, it would be only authentic judgments, (unbiased by race and not disproportionately beneficial or prejudicial *ex ante* to any particular individual or class), that would find expression in the Social Contract - South African law, in regard to apartheid and Group Areas, accordingly falls far short of the Rawlsian ideal.

The seriousness of this indictment that Social Contract theory raises, and the question that is thereby posed regarding the legality of the Group Areas power, can in a curious way provide a clue to the rationale and motivation of South Africa's Homelands' policy and its new Constitution.[35] If the South African government could render its grand design workable, it would perhaps contend *ex post facto* that it had convincingly dispensed with the contractarian objections supra - firstly, the Blacks would become members of another State, and would accordingly no longer be party to the 'South African Social Contract'; secondly, by virtue of the (nominal) support of the Coloureds and Indians for

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(34) Ibid.

(35) The grand apartheid design extends to creating a constellation or consociation of 'independent''selfgoverning' 'Black' states in the subcontinent. Vide footnote 5 supra.

the new constitutional dispensation, if its subsequent operation was to their detriment, it could be countered that they had consented thereto; thirdly, it would be suggested (although still remaining contrary to Brown v Board of Education of Topeka supra), that there would be compliance with Rawls' first principle in that each 'Citizen' (ie excluding Blacks) would now have an equal (albeit separate) right "to the most extensive system of equal basic liberties compatible with a similar system of liberty for all"; and finally, since the Black are excluded and other nonwhites are consenting participants, it might be suggested (albeit questionably) that there was (deemed) compliance with Rawls' second principl

Persuasive though such arguments might be to those who wish to be swayed, it remains the submission of this writer that even if the grand apartheid design reaches completion, it can never be justified in this (or any other) manner, since it ignores the rights of the Blacks in the State of their true Citizenship and as such critically fails to acknowledge the liberalist and egalitarian spirit of the Social Contract foundation. In the overt denial of fundamental human rights and freedoms, and in the rampant positivism that prevails, South Africa shares much in common with the features of Nazi Germany that Gustav Radbruch criticised so cogently. Radbruch's words in Rechtsphilosophie[36] contain great relevance for South Africa today:

> *"... (the) conception of law and its application (we call ... the doctrine of positivism), rendered the lawyers as well as the people defenceless against the most capricious, the most cruel, the most criminal laws. In the final resort, this concept of positivism equates law (Recht) with might: only where there is might, there is law."*

He continued:[37]

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(36) 1932 ed p 335 as translated; republished in the Rhein-Neckar Zeitung of 12 September 1945

(37) Ibid.

> *"What must however be deeply imprinted upon the consciences of the people and of lawyers particularly, is that there may be laws incorporating such a degree of injustice and social destructiveness that they should be denied application, yes indeed they should be denied even a legal nature. There are thus certain legal principles which are stronger than any legal decree, with the result that any law which contradicts them is devoid of all validity. We call these principles the law of nature ..."*

Guidance is available to South Africa in the warning voice of Radbruch,(38) in the increasingly incensed demands of the international community, in the spiritual dictum of the Churches, and in the call of naturalism in our minds and consciences, but will the unanimity that is there presented be heeded by the White legislature? It seems, however, that to attempt to reform South Africa's traditional devotion to apartheid may prove to be a fruitless task, or to adopt a simile once used in a different context(39) it may be like 'trying to level the Pentagon with a wet noodle'.

In final analysis, the Group Areas power (the proprietary embodiment and instrument of draconian apartheid) emerges, distinct from dominium eminens and the police power, as a *sui generis* power of the State under South African law. In its modern usage, it is assumed unilaterally and without contractarian basis by a legislature that is questionably sovereign in this regard; it is given a practical operation in a manner that is *ultra vires* the natural functions of the State; and it is based upon a jurisprudential rationale that contradicts fundamental tenets of Social Contract theory. The Group Areas power abandons

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(38) Cf: Van Niekerk, (1973) 90 SALJ 234 - 261: The Warning Voice from Heidelberg - the Life and Thought of Gustav Radbruch.

(39) Florynce Kennedy The Whorehouse Theory of Law reprinted in Lefcourt, Law Against the People p 81 at 89.

legal tradition, violates the Rule of Law and ignores overwhelming jurisprudential opposition. It reflects an unreasonable, irrational and unnatural[40] sectional prejudice; it institutionalises racial discrimination as a legal norm; and it elevates private bias to the level of a public duty. Law is denied its function as an instrument of social change, correction and evolution, and reduced to a repressive and oppressive positivist instrument for maintaining the *status quo*. A *tu quoque* [41] argument is thrown at the international community while internally, the law is pitted against the people instead of serving their interests and wellbeing. Apartheid cannot be left unchecked, permitted to remain in discord with the tenets of naturalism, or allowed under a separate and unequal philosophy to continue to deny the contractarian, co-operative and participative foundations of any just society. Ultimately, in the submission of this writer, apartheid and its ramifications are indefensible.

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(40) These submissions would perhaps be disputed by supporters of apartheid. It is submitted however, consistently with the liberalist and egalitarian presumptions (vide Section 3.5 infra), that the onus of proving their falseness rests with the proponents of apartheid, rather than upon this writer to prove their (almost universally accepted) validity.

(41) Vide Dugard op cit p 104. It is noted however that South Africa differs in this regard in a material respect from the rest of the world, in that here, racial discrimination is institutionalised.

1.3.9 THE POWER TO CONSTRUCT PUBLIC IMPROVEMENTS

The State's power to construct public improvements contemplates and encompasses the broad range of public works the State is empowered to execute, in the fulfilment of the public purposes for which it was instituted under the Social Contract, and in the promotion of its Citizens' wellbeing that it holds as its objective. The number of examples in the exercise of this power is accordingly vast, but a significant and representative illustration may be found in the construction of roads by the State or its local authorities. It is noted further that in the proprietary forum, this power operates on various levels - on *res extra commercium*,(1) on *res in commercio*(2) (which have been acquired for public use inter alia by purchase or expropriation), and even upon *res alicuius*(3) (without the disruption of private ownership).

Notwithstanding that the distinction between dominium eminens and the power to construct public improvements may appear fine in that the implementation of the latter frequently requires the exercise of the former, it is noted however that these powers are not the same. A difference emerges in that the power to construct public improvements is confined to that 'construction',

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(1) Vide Gaius Institutes 1.2.1; Justinian Corpus Iuris Civilis 1.2.1; Thomas Textbook on Roman Law p 127; Sohm Institutes of Roman Law 302 and 304; discussed by Silberberg and Schoeman The Law of Property (1983) ed at 17.

(2) Ibid.

(3) Vide: Van der Merwe Sakereg p 27; Silberberg and Schoeman, op cit, p 25.

and does not extend to empowering the acquisition of the property upon which that 'construction' takes place. It is accordingly that Nichols[4] notes that:

> *"... it is well settled that a grant of authority to construct ... (a public improvement) ... does not, in the absence of controlling circumstances, authorise the exercise of the power of eminent domain in order to acquire a site ... (for that purpose) ..."* [5]

Further disparity exists in the fact that under the provisions of Section 8(1) of the Expropriation Act,[6] the invocation of dominium eminens results in the direct and original acquisition of ownership by the expropriator, whereas public works by contrast may be constructed even on property still under private ownership[7] (as in *res alicuius* supra).

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[4] Nichols The Law of Eminent Domain S 1.4(1) and S 3.213.

[5] Cf: Canada: Section 449 of the Municipal Act 1933 (Man.)(Canada), and Section 468 of the 1954 Amending Act; vide Todd, op cit, p 119 et seq and 173 et seq; Paul v Dauphin (1941) 1 W W R 43 at 45-6, affirmed (1941) 2 W W R 224. Vide also Todd, op cit, in this regard.

[6] Act 63 of 1975: Section 8(1) provides: "The ownership of property expropriated in terms of the provisions of this Act shall ... on the date of expropriation, vest in the State...."

It was held similarly (although not under the 1975 Act) by Juta AJA in Mathiba and Others v Mosche 1920 AD 354 at 364-5: "The effect of expropriation is to vest the ownership of the land in the Government, notwithstanding that the land still stands registered in the plaintiff's name, and has not been transferred to the Government. No doubt, dominium in land does not as a rule pass without transfer coram lege loci.... But the principle that such dominium may pass without such ... transfer by mere operation of law, is well known to the Common Law.... And it is quite in the power of the Legislature to effect such a passing over of the dominium by operation of law ... (since such) ... is involved in the very nature of expropriation".

Vide also precedents cited supra under Section 1.2.4 footnote 14, and vide Section 1.3.7 supra, footnote 26.

[7] Vide Chrysler Realty Corporation v North Carolina State Highway Commission 190 SE2d 677. Also Murphy v Wilmington 6 Houst (Del) 345, 22 AM St Rep 345, where it was held that the construction of channels diverting a private stream was empowered under a water and drainage statute, whereas such regulation would not be possible in the exercise of dominium eminens. Cf: Section 134 of Transvaal Local Government Ordinance 17 of 1939.

A cognisance on a procedural level of the points of distinction between these powers is found in The Report of the Select Committee on the Expropriation Bill,[8] where Mr P C van Blommenstein (then Deputy-Secretary, Department of Agricultural Credit and Land Tenure; now Director General of the Department of Community Development) said:[9]

> *"Die onteiening van grond vir paddoeleindes is eintlik 'n eiesoortig funksie...."* (10)

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(8) Record of Proceedings and Original Evidence, S C 6/1974, of 10 October 1974, (ISBN 0 621 01888 0), under the chairmanship of Mr T Langley, paragraphs 21 - 48, pages 10 - 17, at para 37 p 15, and at para 30 p 12.

(9) This was in reply to a question by Dr L A P A Munnik regarding the reasonableness of the exclusion of expropriation for roads purposes, from a consolidated all-embracing Expropriation Act. Ibid, paragraph 37 page 15.

(10) He continued:

> *"... want in party gevalle, soos byvoorbeeld in Natal en in 'n groot mate in die Kaapprovinsie, moet eiendomsreg verkry word. In Transvaal, skied dit bloot by proklamasie. Daar is 'n groot verskil. Die (nudum) dominium berus nog altyd (in die Transvaal) by die geregistreerde eienaar, en die reg wat (deur sulke proklamasie aan die onteienaar) verleen word, is slegs die reg om die grond uitsluitlik vir 'n pad ... (te gebruik) ..."*

It is noted that reference to extraneous parliamentary material such as the Select Committee Report is not taken into account in interpreting the meaning of a statute that is consequent - a long line of decisions provides authority in South African law in this regard: (Vide inter alia: Mathiba and others v Mosche 1920 AD 354 at 362; R v Ristow 1926 EDL 168 at 172-3; Mavromati v Union Exploration Imports (Pty) Ltd 1949 (4) SA 917 AD at 919 and 927; Hopkinson v Bloemfontein District Creamery 1966 (1) SA 159 (0) at 166; S v Shangase 1972 (2) SA 410 at 414). Nevertheless, in the words of Centlivres CJ in Harris and Others v Minister of the Interior and Another (1952 (2) SA 428 AD at 457), "in order to understand the reasons for passing a ... (statute - here the Statute of Westminister) ... it is permissible to refer to the events which led up to such an Act being passed". The reference supra to the Select Committee Report is similarly included here, not to determine the meaning itself of the Act, but to throw a light on its motivation and intended effect.

The 1975 Expropriation Act[11] gives no direct indication in its long title[12] to the fact that an important motivation for and effect of its enactment was the consolidation of the diverse legislation (both as regards procedure, and as regards the entitlement to and statutory basis for compensation) that had existed in South Africa prior to 1975. The 1975 Act was, and (although it has been subject to some subsequent amendment)[13] still is, the "child of compromise"it was described in the Select Committee Report[14] to be, endeavouring as it did to reconcile the provisions of Act 55 of 1965 with the objectives of uniformity and consolidation.[15]

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(11) Act 63 of 1975.

(12) The long title of Act 63 of 1975 states: "To provide for the expropriation of land and other property for public and certain other purposes; and to provide for matters connected therewith." In this regard, its wording is similar to that of Act 55 of 1965: "To provide for the expropriation of land and other property for public purposes, to provide for matters incidental thereto, and to amend ... (fourteen earlier Acts named) ..." A significant difference however is that the 1975 Act provides for expropriation 'for public and certain other purposes."

(13) The Expropriation Act, 63 of 1975, has since its commencement on 1 January 1977 been subject to four amendments under Acts 19 of 1977, 3 of 1978, 8 of 1980 and 21 of 1982. These amendments, although short in their texts, are fairly substantial in their effect. The 1982 Expropriation Amendment Act for instance in Section 4 deletes (prospectively) Sections 12 (5)(i) and 12 (6) of the principal Act, regarding an expropriatee's former goodwill entitlement. This amendment, inter alia, evidences perhaps an even greater movement towards and subscription to positivism; the exclusion of compensation thereby introduced is indefensible on naturalist criteria and is accordingly criticised.

(14) Para 21 p 10. Vide also p 58.

(15) The history of expropriation in South African law reveals that there have been extensive efforts already to consolidate the mass of legislation that formerly existed. Consideration of the legislative evolution of a particular statute has considerable relevance to the proper interpretation of a later Act, one reason being that a deliberate change of the enacted wording connotes a change in

Continued/ ...

Footnote 15 continued

legislative intention. Authority for the importance of statutory history is found in Steyn Die Uitleg van Wette 4 ed p 159; Dadoo Ltd v Krugersdorp Municipality 1920 AD 530 at 554-5; Union Government v Rosenberg (Pty) Ltd 1946 AD 120 at 128-9; Minister of the Interior v Machadodorp Investments and Another 1957 (2) SA 395 (A) at 404 D; Bassa v The Master and Another 1963 (4) SA 510 (N); Youngleson Investments v South Coast Regional Rent Board 1971 (1) SA 405 (A) at 413G; Brink v Alfred McAlpine and Son (Pty) Ltd 1971 (3) SA 741 (A) at 748H.

A full exposition of the statutory history of expropriation is found in the following references - brevitatis causa, this is not reiterated here, and may it suffice that the broad themes are summarised. Vide the submissions of K van Dijkhorst SC in Tongaat Group Ltd v Minister of Agriculture 1977(2) SA 961 (A) at 963H - 969A (where the position up to and including the Expropriation Act 55 of 1965, as amended, is considered, with reference to the English law, Canadian and Australian law, the various provincial proclamations and ordinances prior to 1965, and the general legislation that had application to expropriation matters). Vide also van Schalkwyk, Onteiening in die Suid-Afrikaanse Reg : 'n Privaatregtelike Ondersoek (unpublished doctoral thesis at U O F S, 1977), at pp 60 - 65 (where schedules are given of twenty four Acts incorporated into the 1965 Act, and thirty one Acts and Ordinances not included therein, which had operation co-existently with the 1965 Act) and at pp 77 - 79 and pp 283 - 287 (where that legislation not consolidated under the Expropriation Act 63 of 1975 is discussed). Cf also Jacobs The Law of Expropriation in South Africa pp 3 - 4 and Gildenhuys Onteieningsreg Chapter 2 at pp 22 - 32 (where the development in foreign systems is considered), and at pp 32 - 36 and 36 - 40 respectively (where the position in South African law prior to 1910, and subsequently, is outlined).

In short, whereas the continental systems in general have experienced the benefits of consolidated legislation (cf Van Schalkwyk, op cit p 283-4). and whereas English law is to some extent still diverse, South African law, although it has evidenced a trend towards consolidation and has taken substantial steps forward in this regard in both the 1965 and 1975 Acts, still requires further consolidation to promote uniformity and conformity. The words of Meyer in an address Die Noodsaaklikheid van Konsolidasie delivered at a symposium Onteiening en die Reg in Pretoria in 1971 (prior to the 1975 Act) remain appropriate:

> *"(H)ierdie wette (is) uiteenlopend van aard en wissel van padordonnansies na waterwette na die Wet op Gemeenskapsbou tot onteiening van mineraalregte. Hierdie chaos van onteienings-wetgewing skep verwarring en verwardheid en veroorsaak geweldige onbillikhede en dit moet ons doelstelling wees om die on onbillikhede to voorkom."*

Vide also Appendix to Section 3.4 infra regarding the administrative procedure under Act 63 of 1975, and Appendix to Section 3.7.

A indirect clue to this motivation is provided however in the long title in the words "expropriation ... for public and certain other purposes": whereas Section 2(1)[16] provides for expropriation for "public purposes", the "certain other purposes" appear in Sections 2(2) and 2(3) (expropriation of a remaining portion), Section 3 (juristic persons and bodies), Section 4 (the Railways administration), and Section 5 (local authorities). It appears unfortunate firstly that the long title does not reflect more specifically the legislature's intention[17] to consolidate prior enactments, and secondly that the consolidation that has taken place in the 1975 Act, is not as extensive as it could have been.

In the latter regard supra, since the commencement of construction of a public improvement by the State, requires in general as a separate and antecedent event, the expropriation of property for that purpose under the power of dominium eminens, it is submitted that expropriations for roads purposes would be better embodied in the Expropriation Act, either directly (as for example under Section 4, in the case of railways expropriations) or indirectly (as under the provisions of Section 38 (1B)

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[16] Act 63 of 1975.

[17] Vide Stratford JA in Bhyat v Commissioner for Immigration 1932 AD 125 at 129 - 30; and Feetham JA in Perishable Products Export Control Board v Molteno Brothers 1943 AD 265 at 273-4; S v Bhengu 1968 (3) SA 606 (N) at 610 (in the judgment of Milne JP). Cockram Interpretation of Statutes p 35-6 states: "The Courts will examine the long title to discover the intention of the legislature and the scope of the Act.... However, the Court will not look at the title so as to modify the meaning of plain language of the statute.... on the other hand, where there is an ambiguity in the text of a statute, then the courts will refer to the title for assistance...."

of the Community Development Act),[18][19] rather than being left as they are at present, to the inconsistent mercy of the various provincial ordinances.

A comparison,[20] firstly of the compensation provisions and stipulated

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[18] As discussed supra (vide Section 1.3.8), Section 38(1B) of the Community Development Act 3 of 1966 adopts Sections 6 to 23 (inclusive) of the Expropriation Act, 63 to 1975, to regulate the procedure and compensation in Group Areas expropriations.

[19] It is noted in passing that it is not recommended that Group Areas expropriations ought directly to have been included in a consolidated Expropriation Act. The white South African legislature has in placing the Group Areas power on a separate statutory basis, perhaps ironically and unwittingly anticipated the day that this gross power, anathema to naturalism, will be axed from our lawbooks. The repeal of the Group Areas Act and its statutory partners in the apartheid stable, will be facilitated by the retention of the separatist footing. It is submitted that contractarian-based reform is necessary if the "extra-constitutional attempts of the disenfranchised majority to participate in the government of the country" as contemplated by Dugard in Human Rights and the South African Legal Order (at p 101 - 102) are to be avoided.

[20] (a) Section 12 of the Expropriation Act 63 of 1975 lays down an open market valuation basis (as discussed in depth in an earlier thesis by the writer The Expropriation of Leased Business Properties Chapters II and III.) The test is stated in Section 12(1)(a)(i) "the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer". The applicable procedure is set out inter alia in Sections 6 to 10 of the Act.

(b) In the Cape Province, Section 123(4) of the Municipal Ordinance 20 of 1974 requires the service of a preliminary notice (consistently with the audi alteram partem principle) but no similar procedure finds expression in Section 7 of the Expropriation Act (re notice). In addition, the Townships Ordinance 33 of 1934, sets down a differently phrased test for compensation in Section 51 (2). It furthermore makes reference to enhancement levies (S35 *ter*), injurious affection (S48), and betterment (S50) - these concepts originate in English law (vide Davies Law of Compulsory Purchase and Compensation; Cripps, Compulsory Acquisition of Land)

Continued/ ...

procedure in the Expropriation Act[21] on the one hand, and on the other hand, the corresponding provisions of the various Provincial Ordinances, and secondly of those ordinances inter se, yields the realisation that consistency within the law is here a myth, and that a consolidation promoting uniformity

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Footnote (20) continued

and do not appear in South Africa's Expropriation Act. Section 49 stipulates also certain noncompensable regulatory exercises of the police power).

(c) In the Transvaal, the Local Government Ordinance 17 of 1939, in Section 79 (24A) permits expropriation "for any purpose within the powers of the Council", and imparts accordingly a 'governmental' emphasis in the place of the spirit manifested in Section 2(1) of the Expropriation Act. The Town Planning and Townships Ordinance 25 of 1965 makes reference also to injurious affection (S 45), to "steps which may be taken to avoid or reduce payment of compensation"(S 48) and to a development contribution (S 51).

(d) The Orange Free State's Local Government Ordinance 8 of 1962 in Section 76, contains a similar characteristically governmental view of the purposes for which expropriation may take place. "Steps to avoid or reduce the payment of compensation" are set out in Section 36 of the Townships Ordinance 9 of 1969.

(e) In Natal, a crucial difference exists between the provisions of Section 13 of the Provincial and Local Authorities Expropriation Ordinance, 19 of 1945, and the provisions of Section 12 of the Expropriation Act, regarding the basis upon which compensation is to be assessed. Under Section 13, land and buildings are separately valued at their "fair value"- this defeats the possible synergistic increment to value that can arise from their joint valuation "as a unit": Vide Univ. Pitts. Law Review (USA), Vol 29: 322 (1967)). It is noted furthermore that the relevant date for purposes of valuation under the Ordinance is "the date of service of the notice ... or its first publication"(S 13(a)), and not the (later) "date of expropriation" under the Act (S 12(1)) - since property values characteristically rise with time and since inflation would in the interim operate, the Ordinance here too prejudices the expropriatee. The Roads Ordinance 10 of 1968 provides further variation - read with proviso to Section 9(2) of Ordinance 19 of 1945. Vide also: discussions of Roads Ordinances, Joubert, op cit, pp 48 - 65).

[21] Act 63 of 1975 as amended.

is essential.[22] Although this comparison falls perhaps beyond the scope of an assessment of the nature of the State's power to construct public improvements, it is included here in the interests of perspective, and also by reason of the fact that the construction of public improvements is frequently undertaken by provincial and local authorities. Since dominiun eminens and the public improvements power may appear *prima facie* to overlap, an understanding of the Ordinance framework is accordingly necessary.

A particularly cogent further argument supporting consolidatory reform is the fact that in Natal for example, expropriation as an antecedent to the instituting of public improvements, is possible in certain instances under either the Expropriation Act[23] or under the Provincial and Local Authorities Expropriation Ordinance.[24] Since (as is discussed in footnote 20 supra) an expropriation under this Ordinance may prejudice the expropriatee substantially (either procedurally but particularly so in relation to his compensation entitlement), it would not be inconceivable that an authority might elect a procedure to its advantage.[25] It is the opinion of this writer that although

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(22) It is noted that this was recommended in the Select Committee Report (para 30 p 12 - 13 supra), and that investigations were at that time under way, but the necessary amendments have not yet been instituted.

(23) Act 63 of 1975.

(24) (Natal): 19 of 1945.

(25) Although it is noted that governmental and municipal authorities are customarily most fair and co-operative in dealing with the claims of expropriatees, the writer has personally been advised by a senior member of a municipal authority in Natal, that where an election as supra is possible, expropriation is frequently undertaken in Natal under the Ordinance, by reason of the lesser compensation liability it creates. Contra: Oosthuizen v SAR&H 1928 WLD 52 at 56.

the conflict between the superior and subordinate legislation is here not of a nature that would render the latter *ultra vires* (by reason of the fact that there is a difference in the "purpose" for which each conferred power may be exercised),[26] this positivist realisation does not detract from the weight of the naturalist contention that an expropriator ought not to be able on a purely procedural basis, *ceteris paribus* to give rise to a significantly lesser compensation entitlement for an expropriatee.[27]

In overview, the assessment of the State's power to construct public improvements, establishes that this power is distinct within the public law proprietary forum, from the power of dominium eminens; but the assessment gives rise also to the further and perhaps more vital realisation that the framework of provincial ordinances under which the former power frequently finds expression, requires some substiantial legislative revision (guided ideally by naturalist considerations) in order to promote conformity, to consolidate the diversity and to eliminate the inequity, apparent in the structure of South African law in this regard.

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(26) In general the subordinate legislation promotes "governmental purposes" whereas the Expropriation Act refers largely (in Section 2(1)) to "public purposes", as discussed supra.

(27) A further illustration of inequity of this nature, arises in relation to the provisions of Section 12(2) of the Expropriation Act on the question of solatium under a combined notice of expropriation, where the aggregate of the market values of the expropriated properties exceeds R100 000,00. The resolution of what represents the correct (positivist) interpretation of Section 12(2) remains open - the writer has had occasion to discuss this issue with Dr A Gildenhuys (author of Onteieningsreg), who (consistently with his view in an article in Joubert Law of South Africa Vol X p 114, para 115), regards solatium in such circumstances as being limited to R10 000,00; and to the contrary, the writer has had the benefit of an outstanding opinion from Advocate K McCall SC, who reasons in favour of a higher solatium claim based on the separate treatment of each property under the combined notice. The practical dilemma is set out by the writer in an earlier thesis The Expropriation of Leased Business Properties in Appendix D - vide also pp 37 - 39. In final analysis, however, the presumption of no expropriation without compensation unless the contrary is manifestly clear in the statute (as is argued, with authorities in Section 1.5 infra), as read (by extension) with the dicta in Dormehl v Gemeenskapsontwikkelingsraad 1979 (1) SA 900 (T) at 911 C et seq, the writer records his support in this regard for the view of Adv. McCall SC. It appears however that this issue remains appropriate for judicial

1.3.10 DOMINIUM EMINENS IN RELATION TO THE OTHER PUBLIC LAW PROPRIETARY POWERS OF THE STATE - A CONCLUDING PERSPECTIVE

Since the relation between Citizens and their Property is regulated and even determined by the powers the State exercises over property within its jurisdiction, the inquiry conducted supra is justified. The analytical assessment of the public law proprietary powers of the State enables an amplified awareness of the nature of this relation in South African law - the comparison of such powers with dominium eminens accords also a heightened insight into the latter.

It is revealed further that private ownership[1] is not inviolable or indefeasible in an absolute sense, since not only does this institution derive its vitality from the prior existence of the State, but also its operation is qualified by and subject to the State's overriding proprietary powers as contemplated. When considered from one perspective, dominium eminens and the other powers appear as inroads into the private proprietary title of subjects, but alternatively viewed, they represent reservations to private dominium, that are necessary for the fulfilment of collective purposes, that are implicit accordingly in the Social Contract foundation, and without which the existence as intended of the institution of property and of society itself, would be impaired, frustrated and even defeated.

Notwithstanding the *prima facie* similarity between certain of the powers and dominium eminens (a correspondence that appears substantial in some cases), the points of distinction that exist militate against the naïve and unconsidered

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(1) As is elaborated in greater detail in Chapter 3 infra.

transferance of principles applicable to one, into the forum of the other - this is not to deny the value that can rest in such analogy, but to stress the caution that must attend such an approach.

A consideration of comparative law (a study of the American experience in particular) provides further valuable guidance and orientation, but emphasises that South African law tends to be guided by the sovereignty interpretation to a greater positivist extent than is evident in the naturalist commitment in general in United States' jurisprudence. Where South African law expresses or implies a denial of the fundamental 'oughts' of naturalism, the opposition and criticism of this writer are recorded; and it is here that naturalistically-spirited and contractarian-based reform is recommended as being appropriate or essential. In this regard, it is in respect of the Group Areas power[2] the South African legislature has taken upon itself, that the censure of this writer is substantively the most vehement, and in respect of the consolidation of the host of statutes and ordinances,[3] that reform, structurally and procedurally, is the most pressing.[4]

It remains now for the nature of dominium eminens itself to be considered directly in depth. In explanation of the fact that this core concept has been left for examination to this relatively late stage in this exposition, it is submitted that this is justified since an evolved definition in light of the prior jurisprudential debate and the antecedent comparison with the other public law powers of the State, is thereby permitted.

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(2) Cf: Section 1.3.8 supra.

(3) Cf: Section 1.3.9 supra.

(4) Vide Appendix to Section 3.7.

1.4 DOMINIUM EMINENS - A DEFINITION AND AN ASSESSMENT OF ITS CHARACTERISTICS

Grotius'encapsulation of the dominium eminens power in the extracts from his works supra under Section 1.1, although embodying a deficiency in jurisprudential orientation in its advocacy of the original proprietary theory of State-based ownership, nevertheless presents a clear indication of the nature (in it operation) of the eminent domain power that is conferred upon or vested in the State, and thereby provides a guideline as to the definition of this power and to the assessment of its definable characteristics. It is from Grotius' writings, from the jurisprudential debate regarding the origins of dominium eminens, and from the assessment of this power in relation to the other State - based proprietary powers, that we are led to an elucidated understanding of the nature of dominium eminens.

In the first place, Grotius' interpretation of the State's dominium eminens, postulates and gives expression to a supreme power held by the State or its representatives, which power transcends all private rights to property[1] and which power is exclusively a public law power. Secondly, the exercise of the power of eminent domain by the State knows little restriction in the scope and extent of its potential application, extending in Grotius' view not only to include the exigencies of extreme necessity,[2] (in which circumstances the sanctity both of the person and of property yields to the public interest),[3]

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(1) Cf: Corpus Iuris Secundum (1965) Vol 29A, para 2 at 162.

(2) It is noted that this submission by Grotius can be criticised in important respects. Vide Section 1.3.5 supra.

(3) Cf: Attorney General v De Keyser's Royal Hotel 1920 AC 508 (HL). Vide also Section 1.3.4 supra, footnotes 13 and 15, and cases cited thereat. Cf: Dias, Jurisprudence pp 169 - 170.

but including also the less extreme equilibrium of conditions within the municipal activities of the State in its promotion and advancement of the public wellbeing - the only *caveat* being that the broad ends of public utility must be served,(4) (and possibly also that compensation must be awarded to the expropriatee).(5) Thirdly, to Grotius, the exercise of dominium eminens appears to constitute a vast inroad into the otherwise apparent sanctity and inviolability of private ownership.(6) Fourthly, it emerges that private interests are of necessity subject to those of the State.(7) And finally, it is in the institution of the State itself that the justification and rationale for this vast power lies - the power of eminent domain, being an offspring of political necessity,(8) and being

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(4) Cf: Colonial Government v Stephan Brothers 17 SC 515; Rondebosch Municipality v Western Province Agricultural Society 1911 AD 271; SA Turf Club v Claremont Municipality 1912 CPD 59; Bell's South African Legal Dictionary 3 ed (1951) p 652; Rams Eminent Domain p 361; Langlaagte Proprietary Limited v Union Government (Minister of Railways) 1916 WLD 127; White River Council v H L Hall and Sons Ltd 1958 (2) SA 524 (A); Modimola case 1966 (3) SA 250 (A); Barclays Bank DCO and others v Tarajia Estates 1966 (1) SA 420 (T).

(5) Cf: last sentence in extract from Grotius, op cit, III 20 7, quoted at footnote 2 in Section 1.1 supra.

(6) Cf: Talu Ranching Company v Circle A Ranching Company 1975 (3) SA 905 (D); Motsuenyane's case; 1968 (2) SA 484 (T); Nel v Bornman 1968 (1) SA 498 (T).

(7) Cf: Evans v Schoeman 1949 (1) SA 571 (A); applied in Stellenbosch Divisional Council v Shapiro 1953 (3) SA 418 (C); Sachs v Donges 1950 (2) SA 265 (A); Jeena v Minister of Lands 1955 (2) 380 (A); De Bruin case 1975 (3) SA 56 (T).

(8) That the power of eminent domain is an offspring of political necessity has clearly been established in the United States. Joiner v City of Dallas 380 F Supp 754, affirmed 95 S Ct 614, 419 US 1042, 42 L ed 2d 637, rehearing denied 95 S Ct 818, 419 US 1132, 42 L ed 2d 831. Seneca Constitution Rights Organisation v George 348 F Supp 51 Vatt Ch 20, 34; Bynk, lib 2 ch 15; Kent, Comm, 338 - 340; Cooley, Constitutional Limitations 584 et seq.

inherent in the State unless denied by fundamental law,[9] in its operation justifiably subverts or subordinates the interests of an individual constituent of the broad social collective,[10] in order that the wellbeing of the State at large may be advanced.[11]

Grotius' assessment of dominium eminens contains however a significant weakness in that it blurs the distinction between dominium eminens and the State's power of destruction by necessity.[12] In the accurate analysis of the nature of dominium eminens, it is essential, as pointed out supra,[13] to differentiate it from the other powers of the State to which it may bear a resemblance. In failing to contrast the power of dominium eminens and the State's police power (or power to regulate the use of property), Bouvier and Black's Law Dictionary [14] display a similar weakness[15] in defining

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(9) Cf: Kohl v United States 1876 (91) US 449 at 452.

(10) In the words of Huber, Heedendaegse Rechtsgeleertheyt 2.8.27 Gane translation: "The property of private persons is subject to the common good: so that the Sovereign has power, for reasons of general necessity or for the benefit of the citizens, to take away from persons the free control of their property."

(11) Cf: Blanton v Fagerstrom 249 Ala 485, 31 So 2d 330, 172 ALR 128; Northeastern Gas Transmission Company v Collins 138 Conn 582, 87 A 2d 139.

(12) Vide Section 1.3.5 supra.

(13) Vide 1.3.

(14) 4 ed 1951 Eminent domain (emphasis added).

(15) The same weakness is apparent in Cooley's definition in Constitutional Limitations, where he defines eminent domain as:

> *"the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its Citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand."*(emphasis added).

eminent domain as:

> *"The superior right of property subsisting in a sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit without regard to the wishes of the owner."* (16)

Although South African common law heritage embraces Grotius' analysis of dominium eminens, contemporary South African jurisprudence remains relatively in a stage of fledgling infancy in its development and enunciation of this concept.(17) By contrast, vast authority and synthesis in this regard has found expression in the United States.(18)(19) In obiter in Kohl v United States,(20) a rationale for the State's dominium eminens is found:

> *"The power of eminent domain is ... distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of lands being held, not out of the tenure by which lands are held ..... eminent domain - using this term not as being synonymous with the ultimate dominion or title to property, but as indicating the right to take private property for public*

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(16) Cf: cases cited at 31 West's Federal Practice Digest at 111 - 112 inter alia : Lamm v Volpe 449 F 2d 1202 (1971): "The police power should not be confused with eminent domain...."

(17) Sparse reference is made to dominium eminens in South African case law. Vide inter alia Corporation of Pietermaritzburg v Dickinson and McCormick 1897 NLR 233 at 245; Jooste v Government of the South African Republic 4 Off. Rep 147 at 149; Pretoria City Council v Modimola 1966 (3) SA 250 (A) at 258 G; Fourie v Minister van Lande en 'n Ander 1970 (4) SA 165 (O) at 169G.

(18) A vast body of legal writing, under the head of Eminent Domain, exists in the United States, by writers such as Nichols, Orgel and Rams. In respect of American case law, vide inter alia 31 West's Federal Practice Digest, sections 1 and 2 et al; 26 American Jurisprudence 2d, sections 1 and 2 et al; Corpus Iuris Secundum Volume 29 para 2 et al.

(19) It is noted for purposes of South African law that care must be exercised in relying on United States precedents where the ratio for the decision rests upon a constitutional provision. Where however the ratio relates to the common law, the United States jurisprudence provides valuable guidance for the South African system.

(20) 1876 (91) US 449 at 451 (majority judgment).

> *uses - belong to state government ... and any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals.... It is essential that the State should hold the power ... to appropriate lands or other property for its own uses and enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed."* (21)

A host of definitions of dominium eminens has been suggested but each of the definitions consulted appears to labour under certain defects.(22) Nichols in his twenty volume *magnum opus* on Eminent Domain(23) submits that "eminent domain is the power of the sovereign to take property for public use without the owner's consent", but he later(24) appends an additional requirement that such exercise must be "upon making just compensation." The irreducible definitional characteristics in Nichols are accordingly the following - that dominium eminens:

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(21) Vide extracts from West River Bridge Company v Dix, 6 How US 507, quoted under Section 1.2.3 supra at footnote 2, for an alternative rationale for dominium eminens.

(22) One of the sound definitions consulted is that in Corpus Iuris Secundum (1965) Vol 29 A para 1 at 161:

> *"Eminent Domain is the right or power to take private property for public use; the right of the sovereign, or of those to whom the power has been delegated, to condemn private property for public use, and to appropriate the ownership and possession thereof for such use upon paying the owner a due compensation."*

This encapsulation labours however under the deficiency, elaborated in the main text infra, that appears in the last seven words thereof.

(23) Vol 1, S 1.11, page 1 - 7.

(24) Ibid, Vol 1, S 1.11, p 1 - 10.

(a) is a power or attribute of sovereignty; and

(b) empowers the 'taking' of (private) property:

(i) for the public use

(ii) without the owner's consent

(iii) upon making just compensation.[25]

Nichols' definition can be criticised in two principal respects. Firstly, since not all expropriations take place without the owner's consent, this aspect cannot be conceded as a definitional element. Expropriation of a remainder after a portion of a property has been expropriated, (or 'excess condemnation' as it is termed in the United States), is frequently at the request of the owner and thereby with his consent. If Nichols' proposition were to be accepted, then the 'expropriation' of the remainder would in fact not be an exercise of dominium eminens at all but rather a sale by *traditio*, or perhaps a "compulsory purchase" as it would be interpreted in the English law. It would seem that Bouvier's words supra "without regard to the wishes of the owner" are accordingly preferable to Nichols' phrase "without the owner's consent", since the former highlight the important aspect that dominium eminens is an original mode of acquisition of ownership. The consent or otherwise of the owner would assume significance only in a derivative acquisition. In the words of Joubert in Law of South Africa:[26]

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[25] Cf: Mid-American Pipeline Company v Missouri Pacific Railroad Company 298 F Supp 1112 : "For the valid exercise of the power of eminent domain, three things are required: (1) provision must be made for the payment of just compensation; (2) the property must be devoted to a public use; and (3) there must be a public need for such use." discussed in 31 West's Federal Practice Digest at p 139 - 140.

[26] Page 3 footnote 1.

> *"It is clear from Section 8 of the Expropriation Act 63 of 1975 that expropriation under this Act embraces the element of acquisition.... Expropriation is an original mode of acquiring ownership and the title acquired by the expropriator is independent of the title of the expropriatee."* (27)

A second criticism (in the context of South African law) relates to Nichols' final element, which finds its origin in American jurisprudence in the Fifth and Fourteenth Amendments(28) to the United States Constitution, and which would (even in United States law) appear accordingly to have been inaccurately (or redundantly) included in his amplified definition. The making of just compensation upon expropriation is not an essential feature of the definition of the dominium eminens power, but is rather a corollary to or consequence of the definition itself; and, in naturalist thought (as embodied in the constitutional provisions supra), is an unavoidable *sequitur* in necessary limitation of dominium eminens when this power finds a practical exercise. In addition, Thayer, in his Cases on Constitutional Law(29) although

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(27) Cf: Van der Merwe Sakereg p 159 and 194;
Silberberg and Schoeman: The Law of Property 1983 ed, p 299.
Sackman, Condemnation Appraisal Practice Volume II, p 592
Camillo, Restrictive Covenants, Pittsburgh Law Review 31 : 128, 1969, relying on Board of County Commissioners v Thormyer 169 Ohio St 291, 199 NE 2d 612 (1959);
Cf: Section 1.2.2 supra at footnote 16. Vide also Beckenstrater v Sand River Irrigation Board 1964 (4) SA 510 (T) at 515A.

(28) Vide: American Jurisprudence 2d Desk Book: Document 1 and vide Section 1.6 infra at footnotes 7 and 9 :

Fifth Amendment: ...."nor shall private property be taken for public use, without just compensation".

Fourteenth Amendment: Section 1: "... nor shall any state deprive any person of life, liberty or property without due process of law...."

(29) Vol I, p 593. Cf: Encyclopaedia Britannica Vol 8 p 335, defines eminent domain as "the power of the government to take private property for public use without the owner's consent", stressing thereafter that the duty to pay compensation to the property owner is a consequence in the United States of constitutional provisions (and not of the nature of the power itself).

not supporting the Social Contract postulate, makes the important point that the State's right to take private property and the individual's right to receive compensation upon expropriation, are of a different jurisprudential nature - the former flows from "a necessity of government" whereas the latter stands upon "the natural rights of the individual." It is accordingly that it has been held in American law in Griffith v Southern Railway Company[30] that whereas "the payment of compensation is not an essential element of the meaning of eminent domain, it is an essential element of the valid exercise of such power".

If the thesis of dominium eminens as a sovereign attribute is accepted (as under Nichols' first element), then it emerges that dominium eminens in its primary appearance was an unlimited public law power of the politically sovereign State. The function of constitutional or legislative enactments has been to place limitations upon that power in its operation, in order that the motivation that prompted the aggregation of individuals into communities might not be defeated - in order that, in other words, the State's interruption of the relation between Citizens and their Property might not assume draconian proportions not intended under the Social Contract. The provisions of Section 2(1) of the Expropriation Act[31] - that expropriations for public purposes are lawful - represent a legislative affirmation in South Africa of the necessary limitation that Nichols voices in his point that dominium eminens permits a 'taking' "for the public use" only. It is submitted that the limitation thereby imposed upon the otherwise

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(30) 191 NC 84, 131 SE 413 (North Carolina, USA); affirmed in Wissler v Yadkin River Power Company 158 NC 465; 74 SE 460;

(31) Act 63 of 1975; South Africa.

(and generally) unfettered nature of sovereignty, indicates also support for the Social Contract postulate. That private property cannot lawfully (under naturalism) be disturbed unless a recognised public purpose justifies any such action by the State, suggests that it must have been impliedly in terms of a prior Social Contract that this naturalist limitation upon Sovereignty was introduced; and contemporaneously with the creation of dominium eminens that this limitation found social acceptance.

In final analysis it emerges that dominium eminens is a public law power[32] vested in the State and, as an offspring of political necessity, is an inherent attribute of sovereignty created and conferred by the Social Contract. To the extent that the public interest and wellbeing so require,[33] dominium eminens permits the State to expropriate private property for public purposes without regard to the wishes of the owner, and through the exercise of such power through proceedings *in rem*, to acquire in an original mode an ownership and title therein that is independent of the title (or sum of diversified titles) of the expropriatees.

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(32) Pretoria City Council v Modimola 1966 3 SA 250 A at 258 - 259: "Die reg van onteiening is 'n publieke reg want dit kom die Staat alleen toe."

(33) Cf: Footnote 22 supra, and Section 1.2.3 at footnote 8.

1.5 THE QUESTION OF NOMENCLATURE - ' DOMINIUM EMINENS' AND 'EMINENT DOMAIN'

1.5.1 INTRODUCTION

Allied to the definition[1] of dominium eminens, is the question of the appropriate English nomenclature. By reason of the criticisms that have been raised in this regard, it is necessary, although this remains perhaps merely an exercise in semantics, to consider the appropriateness of the words 'dominium eminens' as used by Grotius, and their English translation as 'eminent domain', in order that the accuracy of the description of the power contemplated, may be assessed.

1.5.2 CRITICISM OF THE 'DOMINIUM EMINENS' NOMENCLATURE BY THE ROMAN DUTCH JURISTS - THE ALTERNATIVES OF 'IMPERIUM EMINENS' AND 'POTESTAS'

The 'dominium eminens' terminology conveived by Grotius became the subject of some criticism in Holland, by reason of the fact that certain of the Roman Dutch jurists considered its reference to 'dominium' to be suggestive of something other than the power of the State it was intended to encapsulate.

Puffendorf, in De Jure Naturae et Gentium[2] drew a distinction between the control over property exercised in the private law by a proprietor owner or rightholder, and the control over property vested in the sovereign or state under the public law. To the former, he ascribed the term 'dominium', whereas in his view the latter was best incorporated in the word 'imperium'.

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(1) Vide Section 1.4 supra.

(2) Liber 1, Caput 1, 519. Cf also: Puffendorf De Officio Hominis et Civis II 15 4.

He contended accordingly (as supported by Van Bijnkershoek in Quaestiones Juris Publici)[3] that 'imperium eminens' was more accurately descriptive of the nature of the power that existed.

In Elementia Juris Naturae et Gentium[4] Heineccius argued:

> *"We confess that this use of the word (eminent domain) is not quite apt, for the conception of dominium and that of imperium are different things : it is the latter and not the former which belongs to rulers."*

He continues:

> *"... (the right) of applying to the use of the state the property (of its Citizens) when necessity requires it - a right which is usually called the right of eminent domain ... (is) what Grotius first styled dominium eminens, (but what) Seneca more accurately called potestas. To kings, he said, belong the control of things, to individuals the ownership of them."*

Criticism of Grotius was not however unanimous. Huber in Heedendaegse Rechtsgeleertheyt[5] supported the Grotian dicta and expressed the view that:

> *"... the property of private persons is subject to the common good : so that the Sovereign has the power, for reasons of general necessity or for the benefit of the Citizens, to take away from persons the free control of their property."*

It emerges that although there may have been some substance in the criticism of Puffendorf et al, the phrase 'imperium eminens' was not necessarily preferable, in the implied presumption therein that the jurisprudential origin of the power lay directly in the sovereignty of the state. Furthermore, if 'imperium eminens' were to be advocated as a more correct nomenclature, this would narrow the opportunity to develop the submission that

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(3) Liber II Caput 15.

(4) Liber I Caput 8 Section 168.

(5) 2.8.27. Gane translation.

the power finds its origin in the Social Contract. Finally, as Heineccius himself conceded,[6] (and in view of the vast recognition accorded to 'eminent domain' especially in American jurisprudence) wide modern usage and acceptance of this terminology would render fruitless any proposal for its abandonment.[7]

1.5.3 THE EQUIVALENT IN ENGLISH OF 'DOMINIUM EMINENS' - EMINENT DOMAIN VS EMINENT DOMINION

The preciseness and accuracy of the major translations of Grotius' writings has also been called into question, in view of the substitution by Campbell (1901) (and Kelsey (1925)) of the words "eminent domain" for Grotius' "dominium eminens", in place of the more literal and direct translation thereof by Whewell (1853) as "eminent dominion".[8]

Randolph in The Eminent Domain[9] points out that the Latin word "dominium" is capable of two interpretations - in the broadest sense, it suggests a general attribute of sovereignty, and in its more limited sense, a transcending public power over private property.

> *"(T)hough it has been suggested that 'dominium' be taken in its broadest meaning, with intent to identify the doctrine with general sovereignty, the preponderance of authority and common practice are in favour of its interpretation in its sense of power over property."*

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(6) Liber 1 Caput 8, Section 168.

(7) This view is supported inter alia by Nichols, op cit Vol I.

(8) Discussed supra under Section 1.1 at footnote 1.

(9) 1887 LQR 314.

Although Randolph contributes to the understanding of dominium eminens by highlighting its two *indicia*, and although he may be correct in impliedly according to sovereignty a slightly lesser recognition than is almost universally accepted at present, it is submitted that he errs in his assessment of the jurisprudential authorities, which, even at the time he wrote, tended to accept both aspects (or perhaps even to favour the former), and saw dominium eminens as a general attribute of sovereignty which gave rise to the State's transcending public power over private property. It remains necessary inter alia to resolve which of the English translations of dominium eminens reflects this understanding and captures the idea that Grotius postulated.

It is submitted that it is preferable to adopt the words "eminent domain" (as used by Campbell and Kelsey) rather than the words "eminent dominion" (as used by Whewell) in the English translation of Grotius. This is appropriate in the first place in order that the incumbent jurisprudential debate (regarding whether dominium eminens is an inherent attribute of sovereignty), is not defused and precluded (wrongly so) by semantics - the word "dominion", with its implicit connotations of sovereignty, would lessen the cogency of any alternative submission. Secondly, "eminent domain" appears more accurately to reflect Grotius' intention - in view of the inflexion he adopts of the State as original proprietor of all property, "domain" is more consistent with his standpoint. Thirdly,

etymological analysis[10] reinforces the adoption of the word "domain", since although both the English words "domain" and "dominion"share a similar origin in Latin, a material distintion emerges in their precise meaning - whereas "domain" emphasises the property itself which is subject to "dominion",

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(10) In The Shorter Oxford English Dictionary on Historical Principles, 3 ed (1978) it is stated (at Vol 1, pp 515, 593, 594 and 647):

"Dominion : ... the power or right of governing and controlling; sovereign authority; sovereignty; ..."

"Domain : ... 1. = Demesne
2. A heritable property; estate or territory held in possession; lands ...

: Phrase: Eminent Domain: ultimate or supreme lordship; the superiority of the sovereign power over all property in the state, whereby it is entitled to appropriate any part required for the public advantage, compensation being made to the owner."

"Demense : ... 1. Possession (Law) : possession of real estate as one's own ...
2. An estate possessed; an estate held in demense; land possessed and held ...
3. The territory or dominion of a sovereign or state..."

"Eminent : ... 1. High; towering above other things..."

In addition, the linguistic sources are stated as:

"Dominion : M.E. (-OFr dominion - med L dominio, f dominion property, f dominus, lord, master.)"

"Domain : M.E. (-OFr domaine, alt., by association with L dominus (See DOMINION), of OFr. demaine. demeine, DEMESNE.)

"Demesne : M.E. (-A.Fr, O.Fr. demeine, later A.Fr. demense, ... L dominicus.).

the word "dominion"refers to the power or right that exists over the subject thing. Since the expropriation of private property by the State under the power of dominium eminens is a proceeding *in rem*[11] in that the power acts upon the property itself and not upon the title or rights to that property (nor upon the sum of such titles if there are diversified interests), the nature of the power is most accurately expressed in English in the word "domain". Finally, as voiced supra,[12] and although such in isolation would not constitute a valid basis for its perpetuation, the contemporary jurisprudential tradition, particularly in the United States , favours the continued usage of the "eminent domain" nomenclature.

1.5.4 CONCLUSION

In the final analysis, it appears that Campbell's and Kelsey's translation of 'dominion eminens' as 'eminent domain' is preferable to Whewell's translation as 'eminent dominion'. It emerges also however that a cautious circumspection must necessarily attend the use of the English translations of Grotius' texts, in that reliance on the primary Latin source is preferable in instances of controversy. That Latin source too has been the subject of criticism, but the words 'dominium eminens' appear to remain a sufficiently accurate description of the power of the State that is contemplated, to justify their continued use.

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(11) Cf: Section 1.4 supra at footnotes 26 and 27, and at concluding paragraph thereof. Vide also Chapter 3 infra.

(12) Vide Section 1.5.2 supra at footnotes 6 and 7.

1.6 GROTIUS' NATURALIST VIEW OF PRIVATE PROPERTY AND THE QUESTIONS OF COMPENSATION UPON EXPROPRIATION AND EXPROPRIATION WITHOUT COMPENSATION

Grotius clothed his conceptions of private property and dominium eminens with the protection of the cloak of a natural law that was based upon the reason of man, and not, as was formerly the view, upon the inspiration of Divinity:

> *"The law of nature is a dictate of right reason, indicating that moral guilt or rectitude is inherent in any action according to its agreement or disagreement with our rational-and-social nature.... This natural law does not only respect such things as depend not upon human will, but also many things which are consequent to some act of that will. Thus, property, as now in use, was introduced by man's will, and being once admitted, this law of nature informs us that it is a wicked thing to take away from any man what is properly his own."* (1)

Grotius' displacement and transfer of the naturalist emphasis from the spiritual to the temporal did not constitute a rejection of or an alienation from a subscription to and belief in the tenets of a Divine Providence - it was instead a reconciliation of facts and relationships "consequent to some act of (human) will", (perhaps, inter alia, the Social Contract), with the "dictates of right reason" that had in the temporal forum(2) motivated their expression; and it was an attempt upon the basis of reason (rather than Providence), firstly to rationalise "the law of nature"and "the moral guilt or rectitude ... inherent in any action," and secondly to resolve certain

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(1) Grotius, De Iure Belli ac Pacis, I.1.10 (Gane translation).

(2) An interesting Biblical correlative to Grotius' interpretation is contained in a footnote in The Shorter Oxford English Dictionary, Volume 2, at page 2259 : 2 Corinthians 4 : 18:

> *"For the things which are seene, are temporall, but the things which are not seene, are eternall".*

issues relating to "our rational-and-social nature" without having recourse to an abstract Divinity, which Grotius saw as being separate and distinct from the secular affairs of men.(3) Property, as he stresses, was "introduced by man's will", and in so stating, Grotius presages and hints at the Social Contract theme that was to dominate jurisprudence for more than a century to follow.(4)

Central to Grotius' naturalist vision of eminent domain, are his words supra that "it is a wicked thing to take away from any man (without compensation) what is properly his own". His subscription to naturalism is not however an extreme idealism, but is tempered by a deep awareness of the need for a certain degree of expediency in the State's activities. It is for this reason that he qualifies his words with his proviso that "when this is done, the State is bound to make good the loss" from its public revenues. Under the Social Contract he impliedly envisages (as is discussed in greater detail infra),(5) the civil rights of Citizens acquired in terms of that Contract are not entirely inviolable or absolute:(6)

> *"This is also to be noted, that a right, even when it has been acquired by subjects, may be taken away by the king in two modes: either as a Penalty or by the force of dominium eminens. But to do this by the force of dominium eminens, there is required in the first place, public utility; and next, that, if possible, compensation be made, to him who has lost what was his, at the common expense. And as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract."*

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(3) Cf: 12 Encyclopaedia of the Social Sciences, p 534.

(4) Vide Section 2.4 infra.

(5) Vide Section 2.4.2 infra.

(6) Grotius, op cit, II.14.7, Whewell translation, p 179. (Emphasis added). It is noted that the two elements Grotius here stipulated (public utility, and if possible, compensation), were reiterated in the French Declaration of Rights : vide 5 Encyc.Soc.Sci. 493.

Accordingly, although Grotius' naturalist jurisprudence predicates broadly and "if possible" the desirability of compensating an expropriatee, his dicta do not elevate that compensability to the level of an absolute right,(7) and relegate rather the issues of the sufficiency of that compensation and of the possibility of expropriation without compensation to a level of lesser significance in his broad scheme. Clearly he envisaged a strong presumption against expropriation without compensation, but he omitted to pronounce the features of the circumstances in which compensation would be so denied. What emerge in the context of eminent domain as significant *lacunae* in Grotius' writings, are the definition of these circumstances, and the resolution of the questions as to what in his view would constitute the expropriatee's justifiable quantum of compensation where the State has exercised its powers of dominium eminens, and as to when the Citizen must "if needs be contribute" to the promotion of State wellbeing in a manner disproportionate to his station, instead of compensation being paid from the public revenues "at the common expense". Whereas in the Unites States, the Fifth and Fourteenth Amendments to the Constitution, afford a guarantee of just compensation, no such protection exists in South African law. Grotius appears to have held the view that the practical mechanics and determination of the appropriate quantum entitlement, lay largely beyond the confines of his jurisprudential enquiry, and accordingly by implication deferred and referred that assessment to the practitioners and theorists within a given society and era, to determine in relation to the prevailing social circumstances and structures of their age.

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(7) Cf: Puffendorf, De Officio Hominis et Civis II 15 4 (emphasis added)

> "... *Eminent Domain ... consists in this, that when public necessity demands it, the goods of any subject which are very urgently needed at that time, may be seized and used for public purposes, although they may be more valuable than the allotted share which he is supposed to give for the welfare of the republic. On this account, the excess value should insofar as possible, be refunded to the Citizen in question either from the public funds, or from a contribution of the other Citizens".*

The foundations of the natural law accordingly stand in favour of the interpretation that compensation ought to be the necessary consequence to disentitlement, dispossession or deprivation through expropriation, notwithstanding the fact that the jurisprudential origin of the compensation entitlement differs from that of dominium eminens. In the words of Thayer[8]

> *"There is a right to take and attached to it as an incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed like a shadow, but it is yet distinct from it, and flows from another source."*[9]

The viewpoint of equity is enunciated in early South African law in In re John Freeman v Colonial Secretary of Natal,[10] where Connor LJ held:

> *"On ordinary principles of justice, if an owner of land has, under compulsion of law, to allow of an interest of his in the land being taken from him or injuriously affected, he should be compensated fully, unless legislation clearly provides otherwise. And there cannot, I think, be any doubt, that unless legislation has so otherwise provided, the tendency should be rather in favour of compensation than otherwise, in consequence of there being such compulsion."*

In modern South African law (although there is a measure of conflict resulting from the contrary proposition that compensation must have

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[8] Cases on Constitutional Law Vol 1 p 953.

[9] This spirit is embodied in the Fifth Amendment to the United States' Constitution in the words: "No person shall be ... deprived of life liberty or property without due process of law; nor shall private property be taken for public use without just compensation". (Cf: Section 1.4 supra at footnote 28). In regard to the basis for the differentiation between these sources, vide Section 1.4 supra at footnotes 29 and 30, and discussion in main text thereat.

[10] (1889) 10 NLR 71 at 73; Cf Lochner v Afdelingsraad, Stellenbosch 1976 (4) SA 737 (C) at 746, and Lenhoff, Development of the Concept of Eminent Domain (1942) 42 Columbia Law Review 596 at 615.

statutory authorisation if the Sovereign is to be bound),[11] it would appear nevertheless that there is a presumption generally against expropriation without compensation.[12] Numerous authorities are cited in this regard in Minister van Waterwese v Mostert.[13] Statutory law has not however in all cases given direct expression to this naturalist and common law ideal, since sovereignty is not subordinate to property rights.[14] As discussed supra,[15] it was held in Joyce and McGregor Ltd v Cape Provincial Administration[16](contra Cape Town Municipality v Abdulla)[17]that the expropriated party has no right to compensation in South African law unless he can show that such is specifically permitted in terms of the empowering statute, and even where compensation is payable, the expropriated party is not necessarily entitled to the full extent of his loss.[18] In regard to unregistered rights, for instance, S 22 (read with S 13(1)) of the Expropriation Act[19]provides that unregistered rights are terminated on expropriation,

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(11) Vide inter alia Section 1.2.3 supra at footnotes 7 and 8. Cf: Pretoria City Council v Blom 1966 (2) SA 139 (T)

(12) A similar view is expressed in an earlier work of this writer, The Expropriation of Leased Business Properties (1981), in Chapter 1 thereof.

(13) 1964 (2) SA 656 at 660E.

(14) Vide Sections 1.2.2. and 1.2.3 infra.

(15) Vide Section 1 2.3 supra.

(16) 1946 AD 658 at 671.

(17) Contra 1974(4) SA 428(C) and 1975(5) SA 375(C); but cf 1976(2) SA 370 (C) at 375 A - F and 376 A - C

(18) Cf: Johannesburg Market Concession and Building Company v The Rand Plague Committee 1905 TS 406 at 412. Contra : Puffendorf, De Iure Naturae et Gentium 8.5.7; Van Bijnkershoek Verhandelingen van Staatzaken 2.15; and Kersteman, Aanhangzel tot het Rechtsgeleert Woorden-Boek p 285. Vide also: Jones v Stanstead Railroad Company 1872 LR 4 PC 98 at 115; East Freemantle v Annois 1902 AC 213 at 217; Reddy v Durban Corporation 1939 AD 293 at 299; Pretoria City Council v Blom 1966 (2) SA 139 (T) at 143 (H); Moller v SAR&H 1969 (3) SA 374 (N) at 376.

(19) Act 63 of 1975.

and further that such do not qualify for compensation, unless they are protected in terms of S 9(1)(d)(i)-(iv).[20]

Under the doctrine of positivism, the plenary power of the legislator to legislate is unassailable;[21] and where statutory instances occur of the authorisation of expropriation without compensation, the South African judiciary does not have the power to alter the harsh effects of such enactments.[22] Furthermore, as noted in the Canadian case Queen v Super-test Petroleum Corporation,[23]

> *"(t)here is no element of tort or delict in an expropriation under the Expropriation Act (Canada). It (expropriation) is the lawful exercise by the Crown ... of its right of eminent domain under the authority of an enactment of Parliament."*

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[20] There are several further instances of deprivation without compensation in South African law - eg: as in respect of loss or damage caused by the exercise of powers conferred by the Environment Planning Act 88 of 1967. (Cf: English law: The Town Planning Act (1925), Section II; Town and Country Planning Act, 1959; discussed in Davies, op cit.). As is noted supra however (in S 1.3.3 and at footnotes 14 15 and 16), caution must be exercised to distinguish dominium eminens from plenary police powers (and the other public law powers of the State discussed under Section 1.3 supra). Vide also: Cape Provincial Administration v Honiball 1942 AD 1; Simmer and Jack Proprietary Mines v Union Government 1915 AD 368; O'Leary v Salisbury City Council 1975 (3) SA 859 (R); Tongaat Group Ltd v Minister of Agriculture 1977 (2) SA 961 (A) at 962; Administrator, Transvaal v Kildrummy Holdings (Pty) Ltd 1978 (2) SA 124 (T) at 131-2. Vide inter alia also: Town Planning and Townships Ordinance (Transvaal), No 25 of 1965, Section 45; Section 4 of the Mountain Catchment Areas Act 63 of 1970; Van der Spuy, 1977 T H R H R 52 et seq; Joubert, op cit, p 4. Cf Section 1.3.3 infra at footnote 20 and main text thereat.

[21] Collins v Minister of the Interior 1957 (1) SA 552 (A) at 565.

[22] Vide Joubert Law of South Africa, Vol X, p 8 at footnote 4.

[23] (1954) Ex CR 105 (Canada) at 146; 71 C R T C 169; (1954) 3 D L R 245; per Thorson J; discussed by Todd, The Law of Expropriation and Compensation in Canada, at 244, footnote 148. Vide also Horn v Sunderland Corporation (1941) 2 K B 26 at 46 (C A), (1941) 1 AER 480, per Scott LJ, discussed by Jacobs, The Law of Expropriation in South Africa, at 93 ff.

Notwithstanding the positivist conviction in South African law, the combined pressure of the naturalist, the contractarian and the capitalist commitment to the sanctity of property, has however given rise to a presumption that wherever expropriation subject to compensation is possible in terms of existing legislation, there should be no deprivation without compensation - the standpoint in English law is similar.(24) It is noted further that the proposition in South African law that "a legislative intention to authorise expropriation without compensation, will not be imputed in the absence of express words or plain implication,"(25) is supported by a wealth of precedent and authority.(26)

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(24) It is noted in this regard that the English law of property is a curious hybrid - on the one hand, a socialist norm prevails, and on the other hand, private property rights are reverently respected. In Attorney General v De Keyser's Royal Hotel 1920 A C 508, (discussed supra in Section 1.3.4 at footnote 13 and in the main text thereat), the House of Lords held that the Sovereign's prerogative power to expropriate private property without compensation, gives way to its statutory power of expropriation subject to compensation.

(25) Belinco v Bellville Municipality 1970 (4) SA 539 (A) at 597C.

(26) For example, inter alia:
Van Niekerk v Bethlehem Municipality 1970 (2) SA 269 (O) at 271 E et seq; Cape Town Municipality v Abdulla 1975 (4) SA 375 (C), 1976 (2) 370 (C) (criticised by Gildenhuys op cit, at p 10 footnote 69); Krause v South African Railways and Harbours 1948 (4) SA 554 (O) at 562 - 563 ; Blackmore v Moodies Gold Mining and Exploration Company 1917 AD 402 at 416; Central Control Board v Cannon Brewery 1919 AC 744; Colonial Sugar Company v Melbourne 1927 AC 343 at 359; Attorney-General v De Keyser's Royal Hotel 1920 AC 508 at 542; Inglewood Pulp and Paper Company v New Brunswick Electric Power Commission 1928 AC 492 at 499, where for example it was held: "... the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear"; Rex v Stronach 1928 (3) DLR 216 at 219. Vide also: Town Council of Cape Town v The Commissioner of Crown Lands and Public Works Foord 21 25; Jooste v The Government of the South African Republic 1897 (4) OR 147 at 148; Lenz Township Company v Lorentz and Stapylton - Atkins 1959 (4) SA 159 (T) at 165 - 166; Malherbe v Van Rensburg 1970 (4) SA 78 (C) at 82.

From this, what becomes apparent is that the South African Courts, in their interpretation of expropriation statutes, will construe the enacted provisions restrictively,[27] and will not give effect to measures depriving Citizens of their property without compensation, unless the legislature's intention to do so is made quite clear. In this regard, the words of Holmes JA in Belinco v Bellville Municipality[28] are of value, where (in answering the question left open in Administrator, Cape Province v Ruyteplaats Estates (Pty) Ltd[29]) he held: "I do not consider that an implication can be plain if it has to be astutely winkled from contextual crevices."

It is regrettable that in spite of these interpretative efforts by the judiciary, the constraints imposed by statute have given rise to instances of harsh operation. Not only has the legislature seen fit to ignore largely our naturalist heritage, to overlook the contractarian insight and to reject the Grotian guidelines, but it has also determined the parameters upon which the compensation entitlement is based, to the exclusion of certain parties prejudicially affected by expropriation. If the recognition accorded by

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(27) Broadway Mansions (Pty) Ltd v Pretoria City Council 1955 (1) SA 517 (A) at 522; Slabbert v Minister van Lande 1963 (3) SA 620 (T) at 621 D; Fourie v Minister van Lande en 'n Ander 1970 (4) SA 165 (O) at 170 B; Jacobs, op cit, p 5 "As an expropriation constitutes a drastic interference with the rights of the individual, the Act is to be restrictively construed. Vide also: Rigg v SAR&H 1958 (4) SA 339 (A) at 349; Wellworths Bazaars Limited v Chandlers Limited 1947 (2) SA 37 (A) at 43; Dadoo Limited v Krugersdorp Municipal Council 1920 AD 530 at 552; Krause v SAR&H 1948 (4) SA 554 (O) 562 - 3; Africa v Boothan 1958 (2) SA 459 (A) at 462; Oosthuizen v SAR&H 1928 WLD 52 at 62; Halsbury's Laws of England Vol 36 p 413 para 627; Newcastle Breweries v The King (1920) 1 K B 854 at 866.

(28) 1970 (4) SA 589 (A) at 597 D; cf Brebner v Seaton 1947 (3) SA 629 (E) at 640.

(29) 1952 (1) SA 541 at 551 A - B.

Friedman J in Interland Bemarkings Edms (Bpk) v Suid Afrikaanse Spoorweë en Hawens en Andere 1981 (1),[30] to the extended right of compensation conferred under the 1975 Act on parties formerly excluded, is indicative of the future trend, or if his words represent a judicial recommendation or anticipation of the movement to come, then the possibility remains that equity may find expression in the South African law of expropriation.[31] The bald fact however at present remains that the compensability of expropriated interests is not an unavoidable *sequitur* of expropriation.

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[30] 1981 (1) SA 1199 D at 1200 H: per Friedman J:

> *"Whereas under S 13 of the old Expropriation Act 55 of 1965, no compensation whatever was to be paid to the holders of 'unregistered rights,' the 1975 Act permits of certain exceptions ... as demonstrated by S 13(1)."*

[31] Vide Appendix to Section 3.7.

1.7 DE IURE BELLI AC PACIS IN HISTORY AND IN MODERN LAW: A CONCLUDING PERSPECTIVE REGARDING THE ROLE OF DOMINIUM EMINENS IN SOUTH AFRICAN JURISPRUDENCE AT PRESENT:

De Iure Belli ac Pacis is an epic treatise in international law and the reservations that have been voiced herein, do not constitute an indictment of the vast merit of Grotius' writings, in as much as they voice the realisation that it was not exclusively or even principally towards an enunciation of dominium eminens that Grotius' work was primarily directed. Accordingly, although Grotius does not assess this power encyclopaedically, his contribution remains rooted in his encapsulation of it and his exposure of certain matters of fundamental significance in regard to its understanding. Grotius did not (and nor did he purport to) resolve all the questions that his inquiry generated. It is in elucidation or in answer to certain of the issues he raised that this exposition has been directed, principal among these issues being the origin in jurisprudence of the State's dominium eminens (and in particular the Social Contract (and other) interpretations thereof that have been advanced), and the relationship that Citizens bear to their (immovable) property under South African law.

The conflict that exists between Grotius' rationalist and naturalist "dictates of right reason" and the statutory dictates of the South African legislature, evidences that our present legislation falls substantially short of the Grotian ideal, and as will subsequently emerge in the discussion of Social Contract theory that follows, similarly short of the fundamental contractarian principles. For these reasons, and in order to be true to the foundations of our legal heritage, a critical reassessment of the

statutory provisions is recommended. The themes of our legal and historical tradition and our rightful evolution should not and must not be permitted to be subordinated to the positivist dictum.

Dominium eminens emerges in final analysis as an inherent attribute of sovereignty, created conferred and limited by the Social Contract, and rationalised as an offspring of political necessity. Its effect is that the State, in the promotion and advancement of public wellbeing, is permitted to expropriate private property for public purposes without regard to the wishes of the owner, and to acquire in an original mode, title thereto. The jurisprudential orientation of sovereignty founded on contractarian principles, and the comparative assessment of dominium eminens in relation to the other public law proprietary powers of the State, permits an elucidating clarity regarding the origin, meaning, evolution and effect of this power in South African law. Cognisance must remain however of its distinction from other such State-based powers, and an awareness and realisation of the aberrated nature of certain draconian abuses in South African law under guise of dominium eminens, will afford the opportunity for South African law to move itself towards greater conformity with the naturalist ethic which Grotius then advocated, and which we now ought to espouse cherish and nurture.

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CHAPTER 2

THE THEORY OF SOCIAL CONTRACT AS A FOUNDATION FOR DOMINIUM EMINENS

CHAPTER 2 : THE THEORY OF SOCIAL CONTRACT AS A FOUNDATION FOR DOMINIUM EMINENS

2.1 AN INTRODUCTION TO SOCIAL CONTRACT THEORY AND AN OUTLINE OF OBJECTIONS TO ITS VALIDITY

As the hands of history turned through the last pages of the mediaeval Church-based era, the rays of a rising enlightenment permeated the minds of men and heralded the dawn of a new epoch of culturalism and reason. The Renaissance, the Reformation and the growth of the national state manifested Man's cultural spiritual and political rejuvenation, and as was evidenced by the consequent unfolding of political thought, the mediaeval backdrop and Church-based dogma were no longer able to quench the thirst for knowledge or appease the hunger for political power. No more a mere segment of the mediaeval universal theocratic or cosmological collective, Man's emergence as a central protagonist in the mortal interplay gave rise to a conflict between the State or Sovereign's burning claim to supremacy and the flame that had been kindled for individualistic self-assertion, and, consistently with the increasingly rationalist tradition, to the need to legitimise these competing forces. The Doctrine of the Divine Right of Kings,(1) enunciated inter alia by Sir Robert Filmer in Patriarcha, came in the seventeenth century to have as an opponent the theory of an Original Social Contract,

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(1) The Doctrine of the Divine Right of Kings was both the political precursor and the substantive antithesis to Social Contract theory (Vide Section 2.4.4 infra at footnote 15, and Section 2.4.5 infra at footnote 7.). Based on the scriptural authority of St Paul in the thirteenth chapter of Romans, it was developed in the sixteenth century by Jean Bodin

/ Continued ...

Footnote 1 continued

in Six livres de la republique (1576)[a] to justify the centralising of absolute authority in the monarch Louis XIV). James 1 of England himself in the Trew Law of the Free Monarchies (1598)[b] wrote that:

> *"The state of monarchy is the supremest thing upon earth:for kings are not only God's lieutenants upon earth, and set upon God's throne, but even by God himself they are called Gods."* (c)

He stated further:

> *"And so it follows of necessity, that kings were the authors and makers of the laws, and not the laws of the kings."* (d)

The magnum opus came in 1600 in William Barclay's elaborate De regno et regali potestate, which was followed later by Sir Robert Filmer's Patriarcha: Or the Natural Power of Kings (1680). It is interesting to note that Patriarcha was published posthumously, twenty seven years after Filmer's death,[e] by Royalists anxious to restore monarchial legitimacy in the face of the growing popularist spirit. His argument, in short, extended the traditional ius divinum rationale and submitted that the king's power is "natural" , since he is the heir by primogeniture descended from Adam. He was bitterly attacked by Sidney Discourses Concerning Government,[f] (who was executed in 1683 for his 'seditious'efforts), and by John Locke in The First Treatise of Government (1690) (entitled:"In the (First Treatise), the Falfe Principles of Sir Robert Filmer and His Followers, are detected and overthrown").[g]

Sub-Footnotes:

(a) Later enlarged and republished in Latin in 1586 and in English in 1606.

(b) Reprinted in The Political Works of James I, with an Introduction by C H McIlwain, Cambridge Massachusetts 1918.

(c) Ibid, p 307.

(d) Ibid, p 62.

(e) 1653.

(f) Written between 1680 and 1683, and published posthumously in 1698.

(g) Vide Section 2.4.4 infra.

/Text continued on page

either between Ruler and Ruled, or between the Ruled *inter se*.[2]

The theme common to the writings of the pure Social Contract theorists (the early 'contractarians') is their view that society arose by tacit agreement from an original Contract or Compact, the effect of which was that the individual was removed from the state of nature and placed within the civil society created. Government under laws, impartial justice, the inviolability of the person, and the institution of property, were thereby vitalised and infused with a living existence.

The essence of the challenge the contractarians faced, may be distilled into a fivefold structure : firstly, to present a plausible vision of natural pre-social man; secondly, to show that such a man, rationally committed to his self-preservation, would have chosen to enter into a state of Society in preference to remaining in his natural condition; thirdly, to prove that the instrument of Social Contract would have been adopted to effect this intention; fourthly, to account for the binding nature of the obligations consequent thereupon; and fifthly, to show how those obligations would devolve from the original participants to bind subsequent generations.[3]

Modern scholarship, in line with the nineteenth and twentieth century jurisprudential vogue, has in general regarded the Social Contract proponents

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[2] Vide Section 2.3 infra.

[3] Certain of these objectives are adapted from Wilmoore Kendall, 14 Internat. Encyc.Soc.Sci. (1968) 376 at 377. The structure as framed by Kendall labours however under the crucial omission that it could find consistency with a non-contractarian rationale of the origin of society. For this reason it has been materially modified herein.

as having failed in these tasks, and has tended to relegate the significance of theories of an Original Compact. Dias,[4] for instance, refers to "the mythical Social Contract theory," and Laski notes:

> *"We have no evidence of an original Social Contract such as the theory demands; the state has not been made but has grown. Nor could its operations be conducted on the basis of consent alone. There is not only the fact that, at some point, a dissenting minority must be made to give way; there is also the fact that ... the problem of size makes representative government, in some shape, the only form through which it is practicable for the will of the State to find expression. ... Something more positive (than tacit consent) is required ... (since) ... it is impossible to think of a modern community, the ends of which can be obtained without the exercise of force over some, at least, of its citizens."* (5)

Although several responses are available to each of the objections Laski raises (Rousseau's *'Volonte Generale'* concept for one (as discussed infra) dispenses with much of the criticism, and appears accordingly to have been incorrectly interpreted by Laski), suffice it here to observe that the contractarian doctrine of tacit consent was in part a naturalist statement of the basis upon which a just and legitimate society *ought* to be founded. This realisation became particularly apparent as the theory evolved from an interpretation grounded on historical fact to its view as a postulate of reason.

Sir Henry Maine in Ancient Law[6] directed a further vehement attack against Social Contract theory, disputing the alleged historicity of its foundation:

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(4) Jurisprudence (1970) p 575.

(5) Introduction to Politics (6ed) 1971.

(6) At pp 308 - 10 and 345 - 7. Vide also Section 2.3 infra at footnote 4.

> *"The State of Nature had been talked about till it had ceased to be regarded as paradoxical and hence it seemed easy to give a fallacious reality and definiteness to the contractual origin of Law by insisting on the Social Compact as an historical fact.... But the antiquity to which was referred, was vague, shadowy, and only capable of being understood through the Present."* (7)

Maine accused the contractarians of adopting both "juridical and popular errors", (8) and of being "ignorant or careless of historical jurisprudence", (9) and contended that:

> *"The doctrine of an Original Compact can never be put higher than this ..... though unsound, 'it may be a convenient form for the expression of moral truths'..."* (10)

His final analysis was that Social Contract theory, although based upon "political serviceableness", (11) was a mythical creation "gratifying the speculative tastes of lawyers", (12) centering his conclusion squarely upon his observation that:

> *"The point which before all others has to be apprehended in the constitution of primitive societies, is that the individual creates for himself few or no rights, and few or no duties".* (13)

Since it is postulated in this exposition that the Social Contract is the jurisprudential foundation for dominium eminens, Maine's objections must be considered in some depth; in the interests of perspective too, they must to an extent be viewed against the background of the positivist rejection of the natural law that prevailed during the nineteenth century. His criticism is based upon an inductive and deductive reasoning process under which he drew inferences from a voluminous and weighty compilation of antiquities, but

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(7) Ibid, p 310. (8) Ibid, p 308. (9) Ibid, p 309. (10) Ibid, p 347.
(11) Ibid, p 309. (12) Ibid, p 309. (13) Ibid, p 311.

this empirically anthropological method may in itself cast light upon what may constitute a critical flaw and defect in Maine's hypothesis regarding the Social Contract. That private law rights and duties were in general rare in primitive tribal communities, does not, it is submitted, disprove that the State itself originated in a contractarian manner, nor does it prove that the State's public law power of dominium eminens did not or could not flow from an implied Original Social Contract or Compact - the general does not disprove the specific.(14) What is conceded though is that if it is argued that a private law contractual relationship as historical fact is the one that existed at the inception of primitive societies and that gave rise to dominium eminens, then this evidence adduced by Maine would labour the proponent of such view with the task of overcoming the fact that the existence of such relationship would accordingly appear improbable. Dominium eminens however is not postulated as having a private law source,(15) and nor in the ultimate analysis is the Social Contract postulated as historical actuality - rather, contractarianism is directed principally at explaining the *nature* of society and not purely its *origin*.(16)

Consistently with the Roman law and particularly with the dicta of Grotius, dominium eminens is *ex hypothesi* a public law power vesting in the State, without the realisation of which, the private law indefeasibility and inviolability of the real right of ownership(17) could not exist. In a curious irony, it may well be Maine himself who is guilty of the "juridical and popular errors" he alleges in his opponents. Empiricism, and particularly empiricism grounded upon facts acknowledged even by Maine in this

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(14) Cf: (although not relating to the same context) the logic that underlies the 'generalia specialibus non derogant' principle of interpretation (as set out in Steyn Die Uitleg van Wette p 193-4).

(15) Vide Section 1.4 supra at footnote 32.

(16) Cf: Kendall, op cit, p 376.

regard to be inadequate (albeit drawn from a vast source), and grounded upon logically questionable induction, must not be permitted to ravage the possibility of considering alternative *indicia*. Although Social Contract theories in the context of their time, may in some respects have afforded the "political serviceableness" Maine alleges, it would be illogical to conclude that such effect represents in all cases the primary or exclusive theoretical motivation or justification.

What emerges is that although the onslaught of Maine and his successors has confirmed the existence during the greater part of this century until a decade ago and earlier, of a broad jurisprudential presumption against the validity of Social Contract theory, their attack has by no means pronounced a final valediction - at most, it has shifted the onus in this debate to the advocates of its correctness. Following the publication by John Rawls of his Theory of Justice[18] in 1972,[19] we stand perhaps at the commencement of a new era of contractarianism; and the teachings of the Old Masters - Hobbes, Locke, Rousseau and others - accordingly revive to relevance in the background and insight they provide. As revealed by Rawls, it is submitted by this writer that a far greater importance attaches to the Social Contract theory than is contemporarily recognised, both in general law and in expropriation law in specific, and both in regard to the origins of social institutions broadly and in regard to the institution of property in particular.

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[18] Discussed at Section 2.6 infra.

[19] It is perhaps significant to note that all criticisms of pure Social Contract theory consulted, predate Rawls' publication eg: compare publication dates cited in footnotes supra. On the one hand this confirms the general jurisprudential vogue prior to that time, and on the other hand, signifies the innovative and even revolutionary nature of Rawls' insight.

For dominium eminens then, a crucial light is cast by Social Contract theory upon its jurisprudential origin and nature. In delimitation of scope however, it is noted that whereas this theory is frequently used as a rationale for civil disobedience (and this was largely the forum in which its early expression took place), the principal concern herein is not this issue, but rather the proprietary inflexion and orientation. It is accordingly that the analysis infra of Social Contract theory is undertaken.(20)

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(20) The assessment conducted herein focusses on the principal contractarian works - lesser writers are excluded.

2.2 THE ORIGINS OF SOCIAL CONTRACT THEORY

Although frequently ascribed to Hobbes, Locke and Rousseau, the historical origins of Social Contract theory date back long before the seventeenth century. Contemporary legal historians have however been unable to agree upon the starting point of the Social Contract movement. It is relevant to trace its development to afford historical perspective and to permit a deeper understanding.

Perhaps the first expression[1] of the Social Contract idea is set out by Plato in his Republic (353 BC):

> *"Therefore when men act unjustly towards one another, and thus experience both the doing and the suffering, those amongst them who are unable to compass the one and escape the other, come to this opinion: that it is more profitable that they should mutually agree neither to inflict injustice nor to suffer it. Hence, men began to establish laws and covenants with one another, and they called what the law prescribed lawful and just."* (2)

These words give expression to Plato's belief that the aggregation of individuals into societies was impelled by the wish to avoid the pain suffering and injustice that attended the absence of an ordered community - "that it is more profitable that they should mutually agree neither to inflict injustice nor to suffer it".

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(1) Gough's critical study The Social Contract (1936, Oxford, Clarendon) makes reference to the Old Testament covenants between God and particular individuals (eg Abraham), and between God and the people of Israel. However as 14 Internat.Encyc.Soc.Sci. 376 at 378 notes, the Biblical covenants "may be dismissed out of hand as sources for the modern contractarians. They were, in the nature of the case, agreements between Jehovah and an already existing society; the 'law' to which they subjected the people of that society, pre-existed it and was allegedly not of human origin".

(2) Book 2, 358, Lindsay translation, (emphasis added): Glaucon's statement.

To Plato, Nature was a State of Might, not Right, and Man in the pre-social pre-legal and pre-moral condition was dominated by egoism and the pursuit of self-interest - this was in Plato's view the primary motivation of political behaviour. Hobbes and certain of the philosophers of his era were later to revive much of the Greek abstract, and to transfuse into it the prevalent waves of individualism and rationalism.

In A History of Political Theory,[3] Sabine refers to the contribution of the Epicurean School (circa 300 BC) to the development of the Social Contract approach. Epicurus and his followers reasoned that men are innately selfish and as an exercise in expediency, tacitly contracted mutually to establish the State, in order to obtain protection against the depredations of other men, and to promote and to enable co-existence.

From the time of the Greeks,[4] Social Contract theory proper regained a recognition only in the later mediaeval times, when the emphasis in jurisprudence and theology returned to regarding man as an individual. Manegold of Lautenbach in the eleventh century (as referred to in Carlyle A History of Mediaeval Political Theory in the West)[5] evolved a theory of Social Contract based upon a *pactum* between the King and the People, in order to justify censure of sovereign abuses and excesses. In his words as translated:

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(3) 3ed p 133-4.

(4) Laski in 14 Encyc.Soc.Sciences 127 notes however that in Roman law the theory found "an unprecise form ... in Cicero and in the lex regia". Kunkel, Introduction to Roman Legal and Constitutional History (Kelly translation) 2ed at p 150 amplifies this by reference to the 'Lex Dei quam praecipit Dominus ad Moysen' which attempted to "justify the law of the pagan jurists and emperors by the standards of the Christian state religion".

(5) Vol III, p 164, note 1.

> *"No man can make himself emperor or king; a people sets a man over it to the end that he may rule justly, giving to every man his own, aiding good men and coercing bad, in short, that he may give justice to all men. If then he violates the agreement according to which he was chosen, disturbing or confounding the very things he was meant to put in order, reason dictates that he absolves the people from their obedience".*

In The Mediaeval Idea of Law as represented by Lucas de Penna,[6] Ullman voiced certain essentials of the Social Contract in stating de Penna's view that since the Ruler was seen as *dominus mundi*, he acted at the same time as Trustee Guardian and Protector to all his subjects:

> *"It is by virtue of this trusteeship that he is permitted to expropriate possessions for the common good, but on the other hand is obliged to compensate the owner".*

In these extracts, it emerges that there was in the mediaeval conception, a change in emphasis - whereas the Greeks saw self-interest and egoism as having motivated the Social Contract, Manegold and de Penna idealised this as a quest for justice. Common though to both interpretations and to all the early forms of Social Contract, extending even to Hobbes' time, was an acceptance of Social Contract as an historical fact.

Friedman in Legal Theory,[7] traces the origin of the Social Contract to the Italian jurist, Marsilius of Padua (1270 - 1343) who, in his rebellion against the supremacy of the Church in secular affairs, developed the distinction between the *de iure* and the *de facto* sovereign. In his view the people are the original *de iure* source of political power; where government

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[6] 1947; p 187.

[7] P 67.

is legitimate, by the mandate of the people and with their consent (Social Contract), *de iure* authority is revocably transferred thereby or conferred upon the political sovereign; where however a legitimate sovereign is usurped, or the sovereign imposes its will upon the people without their consent, *de facto* sovereignty exists.(8) The naturalist and Aristotelian standpoint that Marsilius adopts in Defensor Pacis (1324) is that the sovereign accordingly has obligations to the Citizens or subjects, and it would appear that this obligation would extend in his view to the Citizen's entitlement to compensation in the event of the expropriation of his property.

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(8) Edward McChesney Sait, in Political Institutions - A Preface (1938; pp 156-7) considers the nature of the distinction between these sovereigns - it is noted that for purposes of reference thereto in this exposition (in the absence of indication to the contrary), the word 'sovereign' connotes the *de iure* political meaning thereof:

> *"We recognize, first, a legal sovereign, which has* de jure *- that is, from the standpoint of law - the final word of command. There may be no other sovereign. With the establishment of the representative system, however, a second sovereign makes its appearance - the electoral sovereign. It may acquire a share in the legal sovereignty, ratifying constitutional amendments that the legislature has proposed; or even all the legal sovereignty, so that it acts without the legislature by means of the initiative. In most cases, however, constitutional amendments are made, under special rule and procedure, by the legislature. Then the electoral sovereign is both superior and inferior to the legal: superior in the fact that it creates and destroys the legislators; inferior in the fact that the representatives, in their sovereign capacity, may modify or even abolish the electorate. In a period of political transition, some person or group in the community may become the centre of real, effective power - the actual or* de facto *sovereign. This sovereign may either (illegally) destroy the other sovereigns or else, preserving them, bind them to its will. If it demonstrates its stability over a considerable length of time, its* de facto *supremacy will be merged in* de jure *supremacy."*

This distinction was significantly blurred or omitted from consideration by the great analytical positivist, John Austin, who in his lectures The Province of Jurisprudence Determined (p 221) stated:

> *"If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent."*

The individualistic emphasis in the natural law in the writings of St Thomas Aquinas[9] found its parallel in the evolution of Social Contract theory in the De Concordantia Catholica (1433) of Nicholas of Cusa:[10]

> *"Since by nature all men are free, any authority by which subjects are restrained ... comes solely from harmony and consent of the subjects, whether the authority reside in written law or in the living law which is the ruler. For if by nature men are equally strong and equally free, the true and settled power of one over the others, the ruler having equal natural power, could be set up only by the choice and consent of the others, just as a law also is set up by consent."*

The essential propositions Nicholas makes are: that man in his natural state is free; that the power of the sovereign (king) is derivative and by mandate from the people; and that government derives from the consent (Social Contract) of the Citizens and not by delegation from a Divinely-appointed Monarch. Nicholas' writings reflected then the popular spirit of individualism that characterised European political theory and jurisprudence from the Renaissance to the seventeenth century; and to a considerable extent, his themes contribute significantly to the later writings of John Locke.

The Vindiciae contra Tyrannos (1579) was one of the leading post-Renaissance treatises[11] - although primarily focussing upon the relationship between Church and State,[12] its substance linked directly to the unfolding and

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(9) Vide Chapter 3 infra.

(10) II, xiv.

(11) There is debate as to the true author of the Vindiciae - Sabine, op cit, p 377 - 384 regards it as being Languet, while Laski, 14 Encyc.Soc.Sci. 127 at 128 says it was probably Duplessis-Mornay.

(12) The Vindiciae was written shortly after the Massacre of St Bartholomew in 1572, with the object of considering whether it is the duty of a Citizen to obey the monarch if his commands are contrary to divine and natural law. The author's conclusion, based on a contractarian structure, was that obedience to the State (or to a monarch who persecutes religious truth) was justified only to the extent that there was compliance with the Will of God - in this, the Vindiciae presented a doctrinal counterbalance to the Divine Right of Kings (Cf: Laski, ibid).

development of Social Contract theory. The broad Contract involved two *pacta* - the first was a religious covenant between God and the king-and-people jointly (which reflected the Reformist mood), and the second a political covenant between the King and the People, involving mutual and reciprocal obligations. The Vindiciae incorporated however a curious contradiction - in that the king was a "vassal of the King of Kings" under the first covenant,(13) his obligations seemed to be to God alone; and yet, in that he derived his political authority from the people, it seemed that it was to them that he must answer. Although on the surface, the second covenant may have appeared to lend support to the liberal cause and to justify popular resistance to despotic or absolute government, the contradiction in the broad formulation permitted the Vindiciae to find some consistency also with the doctrine of the Divine Right of Kings. It was perhaps an attempt to reconcile in the ecclesiastical forum a conflict that was assuming a growing secular significance - that conflict between the Divinely-ordained hereditary Monarch and the popularly-inflamed spirit of individualism. It was from this point that the proponents of the Divine Right of Kings on the one hand and the Social Contract theorists on the other, were to know significant divergence.(14)

In The Sociology of Law,(15) Berman (in an article entitled The Influence of Christianity on Western Law) points out that the seventeenth century prominence of the Social Contract theory was anticipated a century earlier in the works of Calvin, who reconciled to an extent the contradiction the Vindiciae embodied

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(13) Cf: A Defence of Liberty against Tyrants (Laski translation) London 1924 p 70.

(14) Cf: Section 2.1 supra at footnote 1.

(15) Ed: Evans, Ch 30 p 424 at p 434 footnote 10.

by advocating passive obedience on the part of the Citizen. McNeill's History and Character of Calvinism[16] confirms that Calvin himself on one occasion had asked each person in Geneva to accept the doctrine of justification by faith, to swear their obedience to the Ten Commandments, and to take an oath of loyalty to the city. In Property and Prophets: The Evolution of Economic Institutions and Ideologies,[17] Hunt notes further that:

> *"Protestantism not only freed (the new middle-class capitalists) from the religious condemnation the Catholic Church had heaped upon their motives and activities, but eventually made virtues of the selfish, egoistic and acquisitive motives the mediaeval church had so despised."* (18)

In the political writings in general in the sixteenth and early seventeenth centuries, much of the interpretation of the later Social Contract theorists is foreshadowed. Machiavelli,[19] the Jesuits (inter alia

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(16) New York 1957 p 142.

(17) New York 1981 at p 31.

(18) The relationship between Protestanism and Capitalism is explored in depth in Weber, The Protestant Ethic and the Spirit of Capitalism (New York Scribner 1958) and Tawney Religion and the Rise of Capitalism (New York Mentor Books 1954).

(19) Machiavelli's central works, The Prince and Discourses on the First Ten Books of Titus Livius, both completed in 1513, (Detmold translations in The Historical Political and Diplomatic writings of Niccolo Machiavelli, Boston 1891), are iconoclastic as far as absolute monarchy and papal supremacy are concerned, viewing politics as an end in itself. "The principles (of religion) seem to me to have made men feeble, and caused them to become an easy prey to evil-minded men, who can control them more securely, seeing that the great body of men, for the sake of gaining paradise, are more disposed to endure injuries than to suffer them" (Discourses II 4). In their emphasis on universal egoism, his writings anticipate contractarianism, and in his treatment of the omnipotence of the legislator, find substantial accordance with the sovereignty theory in property law (vide Section 1.2.3) and the writings of Rousseau (et al). Moreover, in his views that man and society are not coeval, that man is not social or political by nature, and that natural or divine law imposes no perfect duties upon men towards one another and towards society itself (of which their rights are derivative), Machiavelli's writings provide a common bond uniting Hobbes Locke and Rousseau. In this latter regard, cf Kendall in 14 Internat.Encyc.Soc.Sci. at 376.

de Mariana[20] and Suarez)[21] and the German Protestant Althusius,[22] contributed significantly to the later contractarian standpoint.

Cole, in his Introduction to the Social Contract of Rousseau[23] records reference to the theory of Social Contract existing in Hooker's Ecclesiastical Polity (1632) and Milton's Tenure of Kings and Magistrates (1649), but submits that the best known instances of its use at the time was by the Pilgrim Fathers in their declaration on the Mayflower in 1620:

> *"We do solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a civil body politic."*

No exhaustive record of the early origins of Social Contract theory is possible within the limits of an exposition of this nature - Bellarmine, Boucher, Buchanan, Knox, Lilburne, Parker, Parsons, Prynne, Selden, Tyndale and a host of others, participated also in the unfolding of contractarianism,

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(20) Juan de Mariana, in De rege et regis institutione (1599), gave the principles of the Vindiciae a non-theological translation. He conceived of a state of nature (similar to that of Hobbes) and of a natural process of transfer by men to a state of civil society grounded upon the institution of property. Cf Savine op cit p 389.

(21) In Tractatus de legibus ac deo legislatore (1612), Francisco Suarez defended the spiritual power of the pope, and regarded the Social Contract as justifying tyrannicide or the resistance of political oppression where the pope called upon the people to act in that way. 14 Encyc.Soc.Sci 127 at 128-9 observes: "... with remarkable ingenuity, contract and popular sovereignty combine (in Suarez's writings) to make the Roman pontiff, as in the Middle Ages, the master of secular power".

(22) Althusius, a law professor in Holland, postulated a form of Social Contract in Politica methodice digesta (1603), which characterised sovereignty with the requirement that certain fundamental conditions or limitations thereby imposed are not to be violated - in this regard, his emphasis corresponds to that of Locke.

(23) P xiii - xiv.

although it is noted that their works were largely of a lesser stature and to a considerable extent subsumed by the writings of the principal theorists. The references that have been made and those which remain, serve however to prove that the Social Contract was not merely an ephemeral innovation of seventeenth century political thought - rather it was against this historical backdrop, spanning two millenia, that the Contract theory proper was to emerge formally, powerfully and in depth in the seventeenth century in the writings of Hobbes, Locke and Rousseau, and the social philosophers that followed. (24)

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(24) An assessment of the writings of the principal contractarian theorists is undertaken infra.

2.3 THE ESSENTIAL FEATURES OF SOCIAL CONTRACT THEORY PROPER: THE PACTUM UNIONIS AND THE PACTUM SUBJECTIONIS :

From the jurisprudential foundations expounded by Grotius, Hobbes, Locke Rousseau et al,[1] and drawing from the cornerstones of the legal heritage,[2] a Social Contract philosophy emerged in the seventeenth and early eighteenth centuries, based upon two principal tenets:[3]

(i) firstly, the *pactum unionis*; and

(ii) secondly, the *pactum subjectionis*;

which either alternatively or in conjunction constituted the Social Contract theory envisioned by jurists at that time. Since the relative emphasis and acknowledgement of these *pacta* varied significantly in the writings of the theorists, a considerable jurisprudential debate arose, not as to whether the Social Contract itself existed (since this was generally accepted at the time), but as to what its constituents were.

The former, the *pactum unionis* , was postulated as an agreement of unification between all men inter se, in terms of which a notional collective or State (the Civitas) was created. It presupposed that at the inception of societies

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(1) Vide Section 2.4 infra.

(2) Vide Section 2.2 supra.

(3) Pollock, Essays on the Law p 80 - 112 (vide also History of the Science of Politics (1911)), (repeated by Friedman Legal Theory p 68)sets out and discusses these two pacta.

in a time of misty antiquity, men chose to aggregate into communities[4] (for reasons of their own self-advancement) in terms of this agreement of union collectivisation or socialisation as contemplated. The *unionis* hypothesis accordingly gave expression to the broad naturalist conception that men yearned for an ordered society, and provided a rationale feasible within the age, regarding the basis of societal formation. Mutual respect and forebearance, the promotion of peace stability and growth, and the securing of private rights to person and property, constituted the primary motivations for union. The effect of union on the one hand was that the State as a body came into existence, and on the other hand that individuals found the opportunity for their protection and advancement in the ordered forum the State presented.

The *pactum subjectionis* was the device which imbued the State with sovereignty (*de iure*), since it was here that the individuals comprising the society, agreed to submit to the State's powers. Whether this *pactum* took place between the Sovereign and the Citizens collectively as a body (in consequence of a 'prior' *pactum unionis*), or between the Sovereign and the Citizens individually and severally (in the thesis of those contractarians who rejected the existence of the *unionis* postulate), or further still, between the Citizens individually *inter se* without the participation of the Sovereign

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(4) Insofar as this proposition is concerned, it is not dissimilar to Maine's celebrated pronouncement:

> *"The movement of progressive societies has hitherto been a movement from Status to Contract"*

(Ancient Law p 182; contra discussion under Section 2.1 supra. Vide also Graveson The Movement from Status to Contract)

in that men are in uniting, moving from what Hobbes described as a "brutish" state of "Warre", into ordered (yet subjected) societies. The primary difference however (and the basis for Maine's objection to Social Contract theory) is that Maine's vision of contract remains rooted in the Romanist conception of contract as confined by the limits of the private law.

(under which last view the Sovereign could (perhaps) not be considered to have incurred any 'contractual' obligation), depends on which particular *genre* of the Social Contract is adopted. Notwithstanding this diversity, where *subjectionis* was conceded, the rationale impelling this subjection of the individual was considered to rest in the fact that a State without plenary sovereign powers, would not be able in all circumstances to enforce observance of, and to sanction transgressions of, the ideals that had motivated men to move into societies. The *pactum subjectionis* in its effect, on the one hand conferred the relative status of Sovereign and Subject, of Ruler and Ruled, of State and Citizen, and gave rise to the broad duty of the members to obey and to be subject to the sovereign they had chosen and to whose existence they had consented; and on the other hand, in the proprietary forum, this *pactum* entrenched the existence of the powers the State has over the property of its Citizens to require their subjection and obedience in this regard.(5) In its extreme effect however, *subjectionis* placed an absolute power in the hands of the State, as the embodiment of the will of the people, and it was in aversion to the excesses that this could connote, that certain later democratically-spirited theorists were to attempt to place constraints and qualifications upon the *subjectionis* postulate.

Where it was accepted that the Social Contract embraced both *pacta*, the question necessarily arose : did the *pacta* occur contemporaneously, or did the *pactum subjectionis* occur subsequently displaced in time? Friedman in suggesting:(6)

> *"To this contract (the pactum unionis), is added simultaneously or subsequently a second pact (the pactum subjectionis),"*

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(5) Vide Section 1.3 supra.

(6) Op cit p 68 (emphasis added).

surprisingly sidesteps the need to assess the temporal relationship of the two *pacta* inter se. Although he impliedly provides the guidance that the former could not have preceded the latter (since intuitively the universal or corporate 'union' as a collective could not have agreed to subject itself to the State or Sovereign before that 'union' had come into being), and although he (perhaps correctly) suggests that both *pacta* conjunctively and inseparably constituted the Original Social Contract, the word "added" in its context, if not being prima facie antithetical or negatory to the word "simultaneously", is at least to be questioned. Friedman's words then do not resolve the temporal issue unambiguously.

The power of dominium eminens (being one of the instruments of subjection to which the contracting participants - the prospective Citizens - are collectively consenting), provides a valuable indication firstly of the nature and composition of the Social Contract, and secondly of the relative ranking in time of the two *pacta*.

As regards the first aspect supra, since the intention of the individuals in so aggregating into societies must necessarily have been that it contemplated the knowing of some restraint and limitation upon the former unrestricted exercise of individual expression (for in the absence of such limitation, the sovereign would be unable to fulfil its function of protection), it appears on the one hand that a *pactum unionis* in isolation could not have given fulfilment to these objectives that motivated the societalisation that took place, and on the other hand that a *pactum subjectionis* of a qualified character at least) was part of the Social Contract created. From the fact

that unreserved subjection would have conflicted with the dominant goal of promoting selfadvancement, it is evident also that the *pactum subjectionis* notionally and rationally was not absolute. It appears moreover that although this qualified *pactum subjectionis* as postulated, need not necessarily in logic have stemmed from the prior existence of a unified collective capable of consenting (since that consent could have been given on an individual basis), it would seem however that a universal contemporaneous and congruent common purpose among all individuals regarding consent, would in probability appear highly unlikely without some form of preceding *pactum unionis* - accordingly it emerges that pragmatic probability here operates to modify pure logic and to suggest that it was a collective body (unified, not necessarily upon a formal basis, but in likelihood tacitly, via medium of the common purpose shared) that gave the requisite consent. In outline then, the Social Contract appears to be composed of both *pacta*.

As regards the second aspect supra - the relative time ranking of these two *pacta* - it appears, alternatively yet consistently viewed, that the creation or formation of the devices of subjection (inter alia dominium eminens) must necessarily have been contemplated at the time of union, for without them, that union would have been unable to justify its inception. It appears accordingly that *unionis* must necessarily have taken place either prior to or contemporaneously with the agreement of subjection - however since that union could not have had its intended operation and nor could it have been effective until the instruments of subjection had a practical reality, it appears that the entering into of a pact of subjection was a suspensive condition attached to the agreement of union. Accordingly, it is submitted

that the *pactum unionis* ranked earlier in time than the *pactum subjectionis*, although both were interconnected organs of the Social Contract organism.

From the analysis of dominium eminens in relation to the Social Contract, it emerges then in overview in the submission of this writer that:

(i) the two constituent *pacta* were interdependent;

(ii) they were entered upon collaterally;

(iii) the *pactum unionis* was made prior to the *pactum subjectionis*, but was subject to the suspensive condition that the latter pact came into existence;

(iv) the *pactum subjectionis* was made thereafter in order that the intention underlying the former pact might not be frustrated (alternatively expressed, in order that the suspensive condition might be fulfilled);

(v) in the South African jurisprudence, by virtue of the fulfilment of that suspensive condition, the *pactum unionis* would be considered to have originated retrospectively,(7) ie from the time

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(7) 'A suspensive condition is one which suspends the operation or effect of one, or some, or all, of the obligations under a contract until the condition is fulfilled. If the condition is fulfilled the contract, or that part of it which was suspended, is deemed to have been in force from the date of agreement, not from the date of the fulfilment of the condition'. Vide inter alia:

(a) A J Kerr - The Principles of the Law of Contract (Second Edition 1975) (Butterworths) p 230.

(b) Pothier - Obligations : A Treatise on the Law of Obligations, or Contracts by R J Pothier, translated from the French by William David Evans, Barrister-at-Law, Butterworths Dublin 1806 reprinted by S Pagunatt & Co, Jaffra Ceylon 1907, at paragraph 220.

(c) Sir J W Wessels, The Law of Contract in South Africa 2nd ed edited by A A Roberts assisted by E L Jansen and J J Trengrove, Butterworth & Co (Africa) Ltd 1951 at paras 1352 and 1380.

(d) Peri-Urban Areas Health Board v Tomaselli and Another 1962 (3) SA 346 AD at 351 H.

(e) Provident Land Trust Limited v Union Government 1911 AD 615.

of it having been entered upon and concluded and not from the (later) time of the said fulfilment;

(vi) it accordingly appears that if the existence of both *pacta* is accepted, although they are interdependent and collateral, the *pactum unionis* predates the *pactum subjectionis*.

It is noted that although a principle of private contractual law has been employed in the determination of the relative time ranking of the two *pacta*, (viz: the retrospective validation of contracts that are subject to a suspensive condition), this is not to suggest that the two *pacta* separately, or collectively in the Social Contract in which they are comprised, constitute contracts within the private law. The Social Contract is perhaps best viewed as a contract *sui generis* since inter alia it operates in a public law forum; furthermore, it is from this Contract broadly that the State itself knows existence, and without which the divisions of public and private law can know no substance. The use of a predominantly private law principle to rationalise the relative time rankings of these constituents, does not, it is submitted, represent a departure from logic in using a conclusion to validate a conclusion. That principle used (and labelled as a private contractual law principle) is justified in its operation in the public law by considerations which have equivalent application in the context in which that principle is employed in the private law.

If the existence of the *pactum unionis* is accepted, then the method by which the Civitas was formed, is rationalised. If the existence of the *pactum subjectionis* is accepted, then the question is resolved as to how it was that

the original contracting parties incurred civil obligations under the Social Contract. Conceptual difficulty attaches however to the issues, firstly of how it is that those who did not consent are bound, and secondly of how it is that this Social Contract is transmitted from generation to generation - it is frequently upon these bases that Social Contract theory is rejected by critics.(8)

In regard to the first aspect, *consensus ad idem* rears its head in an attempted denial of the view that those who have not consented are still bound. Were it not for the fact (as reasoned supra) that *subjectionis* is preceded by *unionis*, and were it submitted instead that the consent was given individually (and not as a body), then it would seem credible that nonconsenting participants would be free to reject the allegation that they had civil obligations. The submission that consent emanated from the '*Volonte Generale*' following a *pactum unionis*, indicates then that the nonconsenting minority was still bound, notwithstanding the possible absence of their consent on an individual level. In the words of Hobbes in Leviathan:(9)

> *"(B)ecause the major part hath by consenting voices declared a Soveraigne, he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. For if he voluntarily entered into the Congregation of them that were assembled, he sufficiently declared thereby his will, (and therefore tacitely covenanted) to stand to what the major part should ordayne; and therefore if he refuse to stand thereto, or make Protestation against any of their Decrees, he does so contrary to his Covenant; and therefore unjustly; And Whether he be of the Congregation, or not; and whether his consent be asked, or not; he must either submit to their Decrees, or be left in the condition of Warre he was in before; wherein he might without injustice be destroyed by any man whatsoever".* (10)

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(8)Cf: Section 2.1 supra.

(9)Part 2 Chapter 18 p 92.

(10)It is noted that Hobbes' reasoning, although similar to that of the writer herein, differs in degree. The subjection that Hobbes envisages is unconditional, whereas that postulated by this writer is qualified. Hobbes' words however elucidate the proposition of tacit consent to the will of the "Congregation".

In regard to the second aspect - the devolution of the Contract (and its obligations) upon subsequent generations - privity of contract,[11] and the doctrine that the acts of one sovereign cannot bind its successors[12] (for to be able to do so would be to imply that the successor lacked sovereignty), are here too raised by some in attempted refutation of the postulate of transmissibility. The argument is, so it goes, that within any modern society, since (consistently with the jurisprudence of Marsilius[13] and some that followed) the people are the original *de iure* sovereign, and since the authority of government is accordingly derivate and revocable, the people

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(11) It would here perhaps not be appropriate to note that privity (as it exists in English law) does not constitute part of the South African law of contract, since that observation would be germane only in a private law debate, and not necessarily in respect of the sui generis public law Contract here hypothesised. If this aspect accordingly remains relevant, then it could be contended on this basis that since the subsequent generation is not one of the original participants, it cannot be regarded as being bound. That view can however be rejected, either by regarding the Original Contract as a stipulatio alteri (in terms of Roman Dutch Law) (although this is weakened by the co-existence of both burdens and benefits), or can be more convincingly rejected on the basis of implied consent, as reasoned infra.

(12) Vide inter alia Section 59(1) of the Republic of South Africa Constitution Act 32 of 1961 :

> *"Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace order and good government of the Republic."*

This is effectively readopted in the corresponding provision (S30) of the 1983 Constitution Act, 110 of 1983, although the President is now vested with greater powers. Vide also Section 37(3) of the Transkei Constitution Act 48 of 1963.

Cf: Maugham LJ in Ellen Street Estates v Minister of Health (1934) 1 KB 590; contra Blackburn v Attorney General (1971) 2 AER 1380 at 1381-2 (per Lord Denning MR) (regarding the EEC and the Treaty of Rome). Vide also Ogilvie-Thompson CJ in (1972) 89 SALJ 30 at 33-4; discussed in Cochram The Interpretation of Statutes at p 2 - 3.

(13) Vide Section 2.2 supra in main text at footnote 7 et seq.

can displace[14] the legislative sovereign in the event that the latter violates its obligations to the former - it is on this basis that it is contended by some that a subsequent sovereign people cannot be bound by a former consent to subjection. Although not rejecting in any way the correctness of this broad principle, the interpretation that is attached to it however is disputed - alternatively expressed, although it is not denied that the original *de iure* sovereign has the power to withdraw (as a collective) from the Social Contract, the central point that would appear is that it is able as a body to withdraw only by an overt and external act of a continuing nature that manifests such withdrawal, and further, perhaps also only in circumstances of severe sovereign abuse or excess which under naturalism would justify such withdrawal. In the absence of such manifested intention and such excesses, the presumption under the doctrine of implied consent will be that the subsequent body of Citizens has impliedly and retrospectively validated and adopted the Social Contract relationship that

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(14) An example that would be available in support of such a thesis would be found in America at the time of the Declaration of Independence or more recently perhaps, in the Unilateral Declaration of Independence in Rhodesia, although the latter example would seem more an instance of a de facto exercise of sovereignty.

In Munn v Illinois (94 US 113 at 124 24 L Ed 77) it was held:

> *"When the people of the United Colonies separated from Great Britain, they changed the form but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament and through their state constitutions or other forms of social compact undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property."*

the former Congregation[15] entered upon and concluded.[16] It is accordingly by the conduct of implied acceptance and ratification, that subsequent generations may be bound under the Original Social Contract, and that social obligations under this Contract will devolve upon those persons.

From this broad outline of the *pactum unionis* and the *pactum subjectionis*, and the interpretation thereof advocated by this writer, it remains to consider the primary texts to analyse in greater detail the views that have been expressed by the Social Contract jurists. An assessment of the writings of the contractarians from Hobbes and Grotius to Rawls is accordingly undertaken in the sections that follow.

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[15] Cf: Sir Robert Atkyns in The Trial of Sir Edward Hales, 1686, II How St Trials 1204 (cited by Norton-Kyshe in Dictionary of Legal Quotations, Sweet and Maxwell, London 1904 republished 1968 at p 225) (emphasis added):

> *"A people whom Providence hath cast together into one island or country are in effect one great body politic, consisting of head and members, in imitation of the body natural, as is excellently set forth in the statute of appeals, ... which stiles the King the supreme head, and the people a body politic (these are the very words), compact of all sorts and degrees of men, divided into spirituality and temporality. And this body never dies."*

[16] Grotius, op cit II 9 3 Whewell translation, observes in this regard:

> *"Thus a People ... is reckoned the same now as it was a hundred years ago, though none of those who lived then is alive now - As long as that communion which makes a People and binds it together with mutual bonds preserves its unity ... the (mere) change of the component parts does not make a people cease to be what it was, even for above a thousand years...."*

2.4 THE SOCIAL CONTRACT THEORY PROPER IN THE WRITINGS OF GROTIUS HOBBES LOCKE ROUSSEAU AND MONTESQUIEU

2.4.1 INTRODUCTION

In the philosophical and political discourses that took place on the Social Contract in the seventeenth and eighteenth centuries, the balances shifted and vacillated along the jurisprudential spectrum. Although the origins of Social Contract theory were clearly rooted in naturalism, the swelling tides of the Age of Reason and positivism at the close of this period, undermined and eroded the natural law bastions, and in a curious inversion, brought the theory proper to a conclusion in an age characterised by an absence of naturalist commitment or conviction.

The core of the rationalist school[1] of natural law is centred in its fundamental postulates - that legitimate authority rests directly and originally in the people and not in the *ius divinum* or in the monarch (via medium of the Divine Right of Kings); that naturalist principles and law itself flow from the nature of Man and his yearning for a rational peaceful and ordered existence (and are deduced either *a priori* or *a posteriori*); that transgressions of naturalist principles are invalid; and that contrary to the organic mediaeval conception, society and the State (as the creations of individual will) are to be conceived in an atomistic manner.

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(1) Cf: Friedman, op cit p 64.

The particular interpretation of the Social Contract by each of the jurists varied, both in respect of whether social aggregation was hypothesised on the basis of historical actuality or on the basis of reasoned inference, and in respect of whether it was the *pactum unionis* or the *pactum subjectionis* or both that represented the essence of the Social Contract - the transition from one standpoint to another was gradual. What was evident however was firstly a common and unqualified subscription to the individualistic nature of property ownership; secondly, an interpretation of naturalism which placed an original *de iure* sovereignty in the Citizens (as a body) without reference to a 'Higher Law' emanating from God (as had been the case in the mediaeval backdrop to contractarianism); thirdly, an interpretation of the State as holding a derivative *de iure* political sovereignty in consequence of its formation through and by way of the exercise of individualistic intention that manifested itself in the Original Compact; and fourthly, in accordance with the spirit of individualistic assertion that was prevalent, an atomistic flavour was attached to the society that was consequent.

Grotius, Hobbes, Locke, Rousseau and Montesquieu each made significant contributions to the development of the Social Contract theory proper - an analysis of their writings is accordingly undertaken herein.(2)

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(2) Vide respectively Sections 2.4.2, 2.4.3, 2.4.4, 2.4.5, and 2.4.6 infra.

2.4.2 THE SOCIAL CONTRACT UNDER GROTIUS : 1583 - 1645

In De Iure Belli ac Pacis,[1] Grotius' assessment of Social Contract Theory initiates in his acceptance of an Original Compact as historical actuality or fact. In this, his jurisprudence differs significantly from the later transcendental idealism[2] in Germany at the close of the eighteenth century, where the Contract was viewed exclusively as a postulate of pure reason. On this contractarian basis, he accounted for the existence of the State and the inception of private property as an institution:

> *"And thus we learn how things became Property; not by an act of mind alone: for one party could not know what another party wished to have for its own, so as to abstain from that; and several parties might wish for the same thing; but by a certain pact, either express, as by division, or implied, as by occupation: for as soon as community was given up, and while division was not instituted, it must be supposed to have been a matter of agreement among all, that what each had occupied, he should have as his own...."* (3)

Reasoning from this primary historical premise, Grotius considered on the international level the relation between Sovereigns (whom he regarded as being still within the natural phase that individuals were in prior to the Original Compact), and concluded that it was the absence of restraints that

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(1) Cf Section 1.1, footnote 1. It is noted that the full title of Grotius' work is "Hugonis Grotii De Jure Belli ac Pacis Libri Tres, in quibus Jus Naturae et Gentium, item Juris Publici, Praecipua explicantur".

(2) Vide Section 2.5 infra.

(3) II 2 5 (Whewell) translation (emphasis added); Cf II 2 1.

gave rise to international belligerence.[4] His advocacy of an international reconciliation (guided by contractarian principles and extended from the natural law) has led to his being styled the "Father of International Law".

More significant however to the theme of this exposition, is Grotius' reasoning on the intranational or internal level. Here he considered that man was innately good (a *"Deo carissimum animal"*)[5] and was driven into society by a social impulse (an *"appetitus societatis"*),[6] which broadly was the basis of all *Jus*, the cause of societalisation, and the font from which the institution of private property sprung.[7] It appears then, notwithstanding the rationalist devotion to individualism that Grotius cherished, that his individual was to be considered as a social creature and not purely in isolation. In the words of Hartenstein in Darstellung der Rechtsphilosophie des Hugo Grotius:[8]

> *"Grotius does not ... seek the ground and basis of Rights in the insulated existence of the individual (alone), but in the social relations of men."*

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(4) Grotius in Article 28 of his Prolegomena described the bellicose attitude that he saw prevailing among nations, and which in part was responsible for motivating the writing of De Iure Belli ac Pacis:

> *"I saw prevailing throughout the Christian world a licence in making war, of which even barbarous nations would have been ashamed; recourse was had to arms for slight reasons, or for no reason; and when arms were once taken up, all reverence for divine and human law was thrown away; just as if all men were thenceforth authorised to commit all crimes without restraint."*

(Whewell translation; discussed in Whewell's Introduction at p x). Cf also: Section 2.4.4 infra at footnote 29.

(5) III.25.8, being his final words in De Iure Belli ac Pacis; as translated by Whewell: "a creature most dear to God".

(6) Cf Whewell's Introduction at p vii and p xiii.

(7) Vide Prolegomena Articles 8 and 16; cf II.2.5 supra.

(8) Darstellung der Rechtsphilosophie des Hugo Grotius, (Whewell transl.), in The Transactions of the Royal Society of Saxony 1850.

The particular *genre* of contractarianism that Grotius articulated, recognised a multilateral contract of interaction between the Citizens *inter se* without the participation of the sovereign,[9] in terms of which the sovereign incurred no 'contractual' obligations;[10] by which man was subject to certain civil subjection;[11] and under which his place in society was created and regulated. 14 Encyc.Soc.Sciences[12] submits in this regard that:

> *"With Grotius, (the Social) Contract is the basis at once of the right to private property and of the sovereign power of the ruler. The latter for him rests upon a pactum subjectionis and becomes accordingly the basis of absolutism..."*

It is important however to note that in Grotius' writings, this subjection, although perhaps appearing absolute, was in substance constrained however by the sovereign's obligation to uphold the inviolable and irrevocable tenets of the natural law, in observance of which all (including the State) were bound:

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(9) To Grotius, the Sovereign was not a party to the pactum subjectionis he contemplated. He accordingly notes in I.3.9(1) (Whewell translation) that although "(s)ome assert that there is a mutual subjection, so that the whole people ought to obey the king when he rules rightly, but when a king rules ill, he is subject to the people", he in I.3.10(1) rejects this "opinion... (as being)... false".

(10) Cf: I.3.14(2) (Whewell translation):

> *"... it is not universally true that all government is for the sake of the governed .... So some kingly governments may be established for the good of kings, as those which are won by victory.... But I do not deny that in most governments, the good of the governed is the object...."*

He added in I.3.15:

> *"... the vices of Princes are to be tolerated like bad seasons ... (since) ... magistrates judge private men; Princes, the magistrates; God, Princes".*

(11) Cf: 1.3.8(1):

> *"And here we must first reject their opinion who say that Sovereignty everywhere belongs to the people; so that it has the power of controlling kings, and of punishing them if they abuse their power. What evil this opinion has caused and may cause, any wise man may see. We refute it...."*

(12) 127 at 129.

> *"(Although) it is the general pact of human society to obey kings ... by natural law, all have the right of repelling wrongs. But civil society being instituted to secure public tranquillity, the State acquires a Superior Right over us and ours ... (only) ... as far as is necessary for that end."* (13)

The Grotian rationale on the one hand was that it was the Citizen's unreserved duty and obedience to his freely-chosen Sovereign that was the factor permitting and enabling the attainment of order and municipal stability (objectives that each Citizen sought), and on the other hand, it was the existence of binding naturalist principles that prevented sovereign abuse. There was accordingly in Grotius' writings only a *quasi-pactum subjectionis* that was not of the pure and absolute form later postulated by Hobbes; but it brought nevertheless with it the far-reaching effect that the original sovereign's surrender or submission to his freely chosen *de iure* political sovereign, implied the loss by the former of the power to punish the latter for transgressions - in short, in terms of Hohfeld's analysis,(14) sovereign immunity was born.

As regards the composition of the Social Contract he envisaged, Grotius does not appear then to have gone as far as adopting a direct division between the *pactum unionis* and the *pactum subjectionis*. His emphasis is on the latter, although both *pacta* consolidate to an extent under his naturalist stress on the importance of promises and undertakings,(15) and as a dictate of right

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(13) I.4.2(1) and (2) (Whewell translation); (emphasis added). Cf: Locke's view, discussed in Section 2.4.4 infra at footnote 21.

(14) Vide Chapter 3 infra.

(15) Vide II. 11 at p 146 et seq (Whewell translation). The importance of promises is embodied in the 'pacta sunt servanda'principle discussed by Friedman Legal Theory p 65.

reason ". Subsequent writers however have criticised Grotius in the consistency of that reasoning,[16] but what emerges is that Grotius has attempted to reconcile the natural law and the principle of consent expressed in the Social Contract, with the rising spirit of individualism and the consequent need for limitations upon sovereign excess, in a way that afforded a rationale inter alia for his enunciation of the State's powers. His reasoning on the intranational level, although perhaps in a modern context not without some weakness,[17] appears however to have been accurate and appropriate within the era in which he wrote.

The effect of the Social Contract that Grotius contemplated was that the State was imbued with certain transcending powers, in accordance with which, private ends gave way to public utility, and the private right of revolt remained only in the most limited of circumstances. Dominium eminens emerged in Grotius' works as a corollary to the form of *pactum subjectionis* he postulated. He manifested also however his naturalist and individualistic interpretation

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(16) Vide Dias Jurisprudence p 575 argues that he derives "ought" from "is"; Friedman, op cit, p 69, suggests that he is "strangely vacallating"; Mann Outlines of a History of Expropriation p 192 submits that "his remarks are not always free from ambiguity"; Gierke Natural Law and Theory of Society p 55 et seq argues that he moves from an expounding of the State as individualistic or atomistic to an organic view thereof.

(17) Weakness attaches to an extreme interpretation of the internal purpose Grotius contemplated. If the power to punish a ruler is forfeited, then his authority cannot subsequently be usurped. By reason of the initial support of his people and notwithstanding their later opposition, Gadaffi (for instance in modern times) would under Grotius' view, have been unjustly deposed. A further weakness perhaps in Grotius' theory is that modern governments are not permanent to the extent he postulated - they must stand for re-election (in a democracy) and the people accordingly have a right to replace their Ruler. It is noted however that Grotius did not take a stand in favour of any particular political form of government, and for this reason his writings have a wide application: "... as there are many ways of living, one better than another, and each man is free to choose which of them he pleases; so each nation may choose what form of government it will: and its right in this matter is not to be measured by the excellence of this or that form, concerning which opinions may be various, but by its choice". (I.3.8(2)) (Whewell translation).

of society in stipulating in his celebrated dicta[18] that "the State is bound to make good the loss" suffered by those over whom dominium eminens is exercised. The expropriatee's compensation entitlement is accordingly an unspoken naturalist obligation to which the State (in recognition both of the natural law and of its contractarian origin) is "bound", but which in view of sovereign immunity, accordingly falls short of being a directly enforceable positivist right of the Citizen. Although fair compensation ought to be awarded (wherever possible) since in Grotius' words "it is a wicked thing to take away from a man (without compensation) a thing that is rightfully his own", this is not to suggest that Grotius stated that this was what the state of the law is. In reconciliation, it seems that in spite of the paradox between sovereign immunity and the entitlement under naturalism to compensation, Grotius confirmed his adherence to the principle that the State remains subject to a fundamental law, either notwithstanding, or in terms of, the Social Contract.

It emerges then that, as with the concept of dominium eminens,[19] Grotius did not develop the Social Contract theory to any deep level, although he pre-supposed the contractarian foundation. The first detailed exposition in this regard was to come in the later writings of Hobbes.

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[18] Vide extracts under Section 1.1 supra.

[19] Cf Section 1.7 supra.

2.4.3 THE SOCIAL CONTRACT UNDER THOMAS HOBBES (1588 - 1679)

Whereas Grotius' focus was more upon the effects of the Original Compact, and the operation of the relationships between the Sovereigns formed, Thomas Hobbes directed himself primarily at what motivated men to aggregate into Societies, and at the consequent consideration of the nature of the Sovereignty and sovereign power created. When Dias[1] and Friedman[2] assert respectively that Hobbes'"passionate preoccupation" and "definite political purpose" was the relevance of his works to the political conflict of his time between the Long Parliament and Charles I, they lose sight perhaps of the valuable point that Minogue raises in his Introduction to Leviathan[3] - that Hobbes' conclusions are the product of an incisive logical development, and although they relate significantly to the prevailing parliamentary questions, they were not caused or motivated by that struggle - similar themes are in fact found in Hobbes' first thesis Elements of Law (1640) which predates that conflict.

In his principal treatises De Cive (1642) and Leviathan (1651), Hobbes postulates the formation of an absolute sovereign power vesting in a Leviathan State, (a notional creation - "an Artificiall Man" - "a Mortall God") which arises from an original Social Contract "by the Art of man", and in which creation "Soveraignty" vests as an "Artificiall Soul".

> *"The Pacts and Covenants, by which the parts of this Body Publique were at first made, set together and united, resemble that Fiat, or the 'Let us make man', pronounced by God in his Creation".* (4)

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(1) Jurisprudence p 573.

(2) Legal Theory p 71.

(3) P xxiii.

(4) Leviathan p 1.

To Hobbes then the State was a creation of individual will in terms of which, as he later amplifies, the Citizens each subject themselves unconditionally to the power of the State:

> *"The only way to erect such a Common Power ... is (for men) to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills unto one Will.... This is more than (mere) Consent or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner as if every man should say to every man:*
>
> > *"'I authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition that thou give up thy Right to him, and Authorise all his Actions in like Manner.'"* (5)

Relevant also is Hobbes' view of the omnicompetent Sovereign, which he defines as:

> *"One Person, of whose acts a great Multitude, by Mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence."* (6)

It is here that Hobbes places the crucial imprint and the hallmark of his interpretation of the Social Contract. He stresses that in his view the only way in which Sovereign power can be created, is by men conferring all their power upon one Sovereign. This *pactum* is formed:

firstly, not with the Sovereign itself but in favour of a third party(7) (*de iure*) Sovereign;

secondly, not by the individual alone, but by the individual acting mutually and together with the other individuals in that society.

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(5) Ibid, p 89.

(6) Ibid, p 90.

(7) In this respect it is not dissimilar in structure to the *stipulatio alteri* in Roman law.

The effect of that *pactum* is that:

firstly, a *de iure* Sovereign is created, being a notional or "Artificiall" creation, a product of the exercise of individual will in the *pactum*, and a logical extension of that *pactum*;

secondly, the individual surrenders his right of self-determination and the unrestricted exercise of his will, in favour of an adopted subjection to the State or Sovereign;

thirdly, the Sovereign acquires an absolute power over its Citizens;(8)

fourthly, "there can happen no breach of covenant on the part of the Soveraigne;"(9) and

finally, that it is in the conceiving of a sovereign, that the individuals receive a "reall Unitie of them all".

It was in Hobbes' deduction that the Sovereign enjoyed absolute power, and by extension, immunity from the suit of its Citizens, that the Royalist cause found support in his writings;(10) that critics were able to accuse him of structuring his philosophy to suit his era; and that later writers were to find the need to explore limitations on Sovereign powers in view of the abuses thereof that were in theory facilitated(11) and that in practice ensued.

It was the inference that the Social Contract could not have arisen without (or alternatively, only by way of) a *pactum subjectionis*, that led Friedman to observe that in Hobbes' writings, *"there is only one kind of pact,*

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(8) Cf: Leviathan p 97.

(9) Ibid, pp 91 and 96.

(10) Cf: Ibid p 98.

(11) Vide ibid p 96.

an unconditional pactum subjectionis".[12] Where Friedman may however (with respect) have erred in this regard, is in that the act of subjection in itself required, and was conditional upon, a "reall Unitie of them all", a condition that "thou (shall also) give up thy Right to him (the Sovereign)".

In these thoughts then, Friedman's word "unconditional" is perhaps inappropriate, or at least, it is ambiguous, since as far as the Citizen was concerned, the *pactum subjectionis* by any individual was conditional upon other such individual *pacta*. In fairness to the learned Dr Friedman however, the *pactum* was unconditional in Hobbesian writings inasfar the Sovereign itself was concerned when the *pactum* was viewed from its standpoint. Objection is still however called for in respect of Friedman's conclusion that since no obligations accordingly attached to the sovereign, "his 'social contract' is therefore no true contract but a logical fiction".[13] Although such an assessment could find substance within a private contractual law based upon a doctrine of valuable consideration or upon privity of contract[14] (as in England for instance), it certainly is not an acceptable observation within the South African jurisprudence.

What was it in Hobbes' view that motivated men to surrender their "Rights" to that "Artificiall Soveraigne"? Essentially it was man's fear, his selfishness, his desire for self-preservation, and his yearning (in terms of the rationalist school) for order, security and stability - these were all externalised and embodied in the Social Contract as an exercise by man in his

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(12) Legal Theory p 68.

(13) Ibid.

(14) As discussed supra.

rational self-interest. In Hobbes' view it was necessary for men to escape from the state of nature or "Warre" into which he was born, and which rendered his life "solitary, poore, nasty, brutish and short" - the Social Contract provided the necessary instrument for this:

> *"...during the time men live without a common Power to keep them in awe, they are in that condition which is called Warre; and such a Warre is of every man against every man. For Warre consisteth not in Battell onely, or in the act of fighting ... but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is Peace.*
>
> *Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall ... there is ... consequently no Culture ... no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, is solitary, poore, nasty, brutish, and short."* (15)

In Hobbes' rationalism and individualism, his absolutism and his quasi-utilitarianism, it was the existence of an Original Social Contract that imbued the Sovereign or State with transcending powers over its subjects,(16) inter alia, that of Eminent Domain:

> *"From this institution of a Commonwealth are derived all the Rights or Facultyes of him or them on whom the Soveraigne Power is conferred by the consent of the People assembled. ... (inter alia) ... it is annexed to the Soveraigntie, the whole power of prescribing the Rules; whereby every man may know what Goods he may enjoy ... and this is it men call Propriety (or Meum and Tuum)."* (17)

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(15) Leviathan p 65.

(16) Ibid, p 90.

(17) Ibid, p 93 - 94.

The Social Contract in its interpretation by Hobbes, accordingly emphasised the subjection of the subject and the absolute power of the Sovereign. Although he notes [18]

> *"(t)he Obligation of Subjects to the Soveraigne, is understood to last as long, and no longer than, the power lastest by which he is able to protect them",*

it is evident that during the currency of the *de iure* political Sovereign's rule, his powers (inter alia of dominium eminens) knew little if any restriction in the Hobbesian vision, and the entitlement (if any) to compensation by an expropriatee, would flow from a moral claim, rather than from any direct legal guarantee or right. The question of restraints on sovereign excess, condoned and accepted by Hobbes, came to know later restatement in crucial respects in the writings of John Locke.

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[18] Op cit, Part 21 Chapter 21.

2.4.4 THE SOCIAL CONTRACT UNDER JOHN LOCKE : 1632 - 1704

If Hobbes' theories are celebrated for their incisive logic, John Locke's theories are noted for their popular appeal. His liberalism provided in the political and jurisprudential field an avenue for the translation and expression of those principles that were foreshadowed in the religious works of Calvin.(1) Locke became spokesman for the interests of the middle class and provided a rationale for their mercantilist ethic. He presented the counterpoise to the early mediaeval notions that the institutions of private property and of the State were innately sinful (being God's retribution heaped upon a Man bearing Original Sin), and achieved in his writings the restoration of naturalist individualism to its latter-day mediaeval heights. He imbued private property with a spirit of inalienability and justified the conduct of acquisitiveness that attended its appropriation. In that his conclusions were eminently suited to the popular cause, by contrast to the Royalist and monarchial flavour of the writings of Hobbes, Locke's works contributed significantly to the revolutions of liberation and democracy to come, and showed how it was that Social Contract theory was capable of serving a whole spectrum of divergent political philosophies.

Although Locke and Hobbes shared sentiments of and a subscription to rationalism and individualistic naturalism, they separated widely on the absolutism or otherwise of the Sovereign power as viewed against the individual's claim to liberty. Thus it has frequently been said (but as

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(1) Vide Section 2.2 supra, at footnotes 15 to 18, and in main text thereat.

qualified infra)[2] that Hobbes and Locke were great opponents in their respective views of Social Contract theory. By way of illustration, in his Second Treatise, Locke refutes the postulate upon which Hobbes' view is centred:

> *"...(one cannot) give just occasion to think that all Government in the World is the product only of Force and Violence, and that Men live together by ... (no other cause than by having been) ... Beasts".* (3)

To Locke, man's natural state prior to the formation of societies, commands an image of "a State of Perfect Freedom[4] ... a State also of Equality".[5] Although he says "(b)ut though this be a State of Liberty, yet it is not a State of Licence",[6] what is clear is that is not the state of "Warre" that Hobbes postulated. Peace and the self and mutual preservation of the human race as instruments of God's Creation and as equal beings in His Image, were the cornerstones of Locke's vision - a "state of Peace, Good Will, Mutual Assistance and Preservation ... is properly the State of Nature".[7]

The question which naturally springs to the mind of the reader of Locke is what then was it that motivated man to move from this apparently idyllic

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(2) Vide main text at footnote 18 infra.

(3) Second Treatise 1689 S 1. It is noted that the first Chapter of the Second Treatise attempts to encapsulate the broad themes of his somewhat fragmentary First Treatise. The full title was The Second Treatise of Government: an Essay concerning the True Original, Extent and End of Civil Government.

(4) Cf: Milton Paradise Lost where the image "He for God alone, she for God in him" finds some consistency with Locke's view of Adam and Eve in the First Treatise.

(5) Ibid, Section 4.

(6) Ibid, Section 6.

(7) Ibid, Section 19.

natural state to a state of subjection in Society? Locke's interpretation as he himself described it is indeed a "*Strange Doctrine*"[8]:

> *"If Man in the State of Nature be so free, ... if he be absolute Lord of his Own Person and Possessions, equal to the greatest and subject to no Body, why will he part with his Freedom? Why will he give up this Empire and Subject himself to the Dominion and Controul of any Other Power? "* (9)

He later answers this in the words:

> *"... 'tis obvious ... that although in the State of Nature, man hath a (natural) Right, yet the enjoyment of it is very uncertain, and constantly exposed to the Invasions of others. For all being Kings as much as he, every man his equal, the Enjoyment of the Property he has is very unsafe, very insecure. This makes him willing to quit this condition, which however free, is full of Fears, and continuall Dangers; and 'tis not without Reason that he seeks out ... others ... to unite, for the mutual preservation of their Lives, Liberties and Estates,*(10) *which I call by the general Name, Property".* (11)

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[8] Ibid, Sections 9, 13, 180.

[9] Ibid, Section 9 at 123.

[10] It is noted however (vide Second Treatise, sections 25-29, 31-33, 40, 46-47) that Locke observes:

> *"The chief matter of Property ... (is) ... now not the Fruits of the Earth, and the Beasts that subsist on it, but the Earth it Self; ... As much Land as a Man tills, plants improves, cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common".*

It appears accordingly that Locke's notion of property in land is pre-capitalist, and the value thereof is based upon personal labour. (cf Second Treatise, Sections 43, 48,50). It has been observed in modern times that while Locke's comments here are valid while the supply of land is unrestricted, they are of a lesser application when supply is limited. Vide also Grotius, op cit, III.6.24.

[11] Ibid, Section 9 at 124.

Locke had earlier laid the foundations for his Two Treatises on Government in his definition of the State or '*respublica*' in Epistola de Tolerantia (1689), and had suggested there also the motive of men for aggregating into civil communities:

> *"The commonwealth seems to me to be a society of men constituted only for procuring and preserving their own civil interests (bona civilia) ... therefore is the magistrate armed with the force and strength of all his subjects in order to the punishment of those that violate any other man's rights".* (12)

It is important to note, as Laslett does in his Introduction to Two Treatises of Government,[13] that Locke's writings were primarily an attack on Sir Robert Filmer's Patriarcha (1680),[14] which contended strongly that the monarch held a Divine Original (or "Natural") Right of Sovereignty. If such was the case, as Locke realised, then man would have lacked the capacity to contract freely (having been born subordinate to a Divinely-ordained Monarch), and would therefore have been unable to form a Social Contract. Locke was cognisant of the need to disprove the Divine Right doctrine and his First Treatise[15] is accordingly directed to this purpose. As Laslett notes,

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(12) Epistola p 5 (as translated by Popple (1765) at pp 35-6). It is noted that the words "*bona civilia*" have been expressed as "civil interests" in order to capture Locke's view that Property broadly embraces "Life, Liberty and Estate"(see supra). They accordingly imbue the text with a greater 'correctness', and are thus more accurate than their literal form "civil goods". Interesting also is his reference to the magistrate as symbol of the people, in direct contrast to what Hobbes here would have used - the Sovereign - which, in his absolutism, was the antithesis of the liberal ethic.

(13) Chapter IV: "Locke and Hobbes"(1960).

(14) Vide Section 2.1 supra at footnote 1.

(15) The full title of his First Treatise is : The First Treatise of Government: in (which) The Falfe Principles and Foundations of Sir Robert Filmer and His Followers are Detected and Overthrown.

notwithstanding the points of distinction[16] between Locke and Hobbes:

> *"If Locke wrote his book as a refutation of Sir Robert Filmer, then he cannot have written it as a refutation of Thomas Hobbes."* [17]

Against this background, it is submitted that Locke's and Hobbes' conceptions of why it was that men formed societies, although divergent, are not as dissimilar as some have supposed.[18] Firstly, both agree that a Social Contract took place. Furthermore, there are common themes in the writings of both - man's egoism and individualism in his natural state; the "Fears and Continuall Dangers"to which he is exposed in this original condition; and his rational propensity to move towards the promotion of his self-interest - these are shared as a rationale for the Social Contract, and in these respects, their views are clearly not antithetical.

Where however their standpoints found a wider disparity, was in their respective views of the nature of men and of their natural state, and accordingly of what it was that motivated Man's Original Compact. The distinctions here between them are revealed in the following submissions. Firstly, the hallmark of Locke's interpretation is that man (who is innately good)contracts out of his natural state by tacit consent, whereas the inflexion adopted by Hobbes is that "brutish" men are impelled by the "Force" of their circumstances to leave the condition of "Warre" in which they had first found themselves.

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[16] Vide infra.

[17] Laslett, op cit, Chapter IV.

[18] Vide main text at footnote 2 supra.

Secondly, whereas Hobbes contends that men were actuated primarily by "Feare", Locke concedes that this was present, but emphasises that the main motivation for societalisation lay elsewhere in the desire for the "Preservation of their Property" - he submits accordingly that the Citizens created and instituted a political sovereign under the Original Social Contract to make laws and to uphold this property ideal. Finally, whereas Hobbes argued in support of an absolute and almost irrevocable Sovereign power, Locke (although confining his express words to those instances in which the Sovereign has acted *ultra vires* its mandate from the people), clearly stressed that the preservation of private property was the central function and duty of the State, and contended accordingly that its sanctity could be violated if and only if a recognised public interest was thereby served:

> *"Whensoever therefore the Legislative shall transgress this fundamental Rule of Society (the protection and preservation of private property) and endeavour ... to grasp the Properties of the members themselves, ... for quite contrary Ends, ... (the Sovereign) forfeit(s) the Power, ... and it devolves to the People, who have a Right to resume their original Liberty ... and to provide for their own Safety and Security, which is the End for which they are in Society".* (19)

Locke's Sovereign then is considerably displaced from the absolutism of the Hobbesian vision, and possesses only those powers necessary for the promotion of the "Publick Good", holding them "in Trust"[20] or in a fiduciary capacity. Man in Locke's view is a moral animal who creates a moral state, which not only should, but "ought" to, promote his wellbeing. Upon the Sovereign, are

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(19) Second Treatise, Section 19 at pp 219 - 222.

(20) Ibid, Section 13 at 149. Locke's vision of moral natural man is almost one of the 'noble savage'.

conferred only those powers necessary for the fulfilment of this Original Intention. Where the *de iure* Sovereign violates and acts *ultra vires* what Locke clearly interprets to be a natural and fundamental obligation to protect its Citizens' property (broadly), its laws and actions begin to lose their derivative validity and bindingness - here then Locke's interpretation has a similarity to that of Grotius.(21)

In regard to his view of the constituents of the Social Contract, Locke confirms his subscription to the existence of both a *pactum unionis* and a *pactum subjectionis*:

> *"Whosoever therefore out of a State of Nature unite into a Community, must be understood to give up all the power necessary to the ends for which they unite in Society, to the majority in the Community.... And this is done by barely agreeing to unite into one Political Society, which is all the Compact that is, or needs be, between the Individuals that enter into, or make up, a Commonwealth. And thus that which begins and actually constitutes any political society, is nothing but the consent of any number of Freemen capable of a majority.... And this is that, and that only, which did, or could give beginning to any lawful Government in the World."* (22)

The interpreter must exercise caution not to accord to these words in the isolation in which they here appear, an emphasis not intended by Locke. Although he states that it is "that (*pactum unionis*) only ", that act of "barely agreeing", which is "all the Compact" is, he does not intend to stipulate that there is no *pactum subjectionis*, for in the same breath he says that the Citizens "must be understood to give up all the power necessary to the ends for which they unite".

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(21) Vide Section 2.4.2 supra at footnote 13, regarding Grotius, op cit II.4.2.

(22) Second Treatise, Section 99.

The *pactum subjectionis* is accordingly an essential constituent [23] too in the Social Contract Locke envisages, but in point of distinction with Hobbes, it is clearly limited to that subjection "necessary" for the Sovereign to fulfil its mandate of protection. On this basis, inter alia, Locke rejects Filmer's Divine Right of Kings. In the context of the Sovereign's dominium eminens in property law, Locke by extension contends on this basis further that although the Citizen has surrendered in a partial degree his original absolute title over his possessions in order to confer upon the majority Sovereign the necessary powers to fulfil its functions, he has not conferred upon that Sovereign more powers than are necessary to that end.[24]

A final point central to the understanding of Locke's vision of the Social Contract, relates to the realisation that Locke was a humanist with a philosophy rooted deeply in the natural law. His interpretation of man's natural state is not a positivist assertion of how men were, but a naturalist conviction of how men ought to be if they uphold the fundamental law that justifies and guides their existence.[25] Paradoxically then[26]

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[23] Cf: Ibid, Section 96, where this submission is amplified.

[24] Friedman, op cit, p 74ff, critises the weaknesses in Locke's reasoning here, but concedes that his influence on subsequent political development was nevertheless extensive.

[25] In his Second Treatise in Section 7 at 90 - 93, Locke distinguishes between "rights" (being moral claims) and "liberties" (being the condition which permits the expression of those rights) - his writings afforded much substance accordingly for later writings by Hohfeld et al. (Vide Chapter 3 infra).

[26] Although Locke's work is of a lesser logical extreme than that of Hobbes, he here does not fall into the trap in which Hobbes is accused of being ensnared - that of reasoning (on the rare occasion) the "ought" from the "is".

his concept of man's natural state as being one of freedom is not as much an assertion that all men were or could have been in that condition inasmuch as it is a guideline as to the condition in which it behoved men to be, being creatures of God.(27) Indeed, Locke(28) goes so far as making the same point as Hobbes(29) - viz: that political sovereigns themselves are still within a state of nature. Locke however points out that although their relationships *inter se* do not find the concord that would *ex hypothesi* supposedly attend upon his view of the natural condition, such concord is undoubtedly what 'ought' to be the characteristic thereof. In this regard then, many of his sentiments are coloured with the Grotian dialect.(30)

For the reasons that Man's natural state, although free, lacked firstly "an establish'd settled known Law, received and allow'd by common Consent"; secondly "a known and indifferent judge, with authority to determine all Differences"; and thirdly "the Power to give the Sentence due Execution"; Locke concluded:(31)

> *"The great and chief End therefore of Men's uniting into Commonwealths and putting themselves under Governments, is the Preservation of their Property."*

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(27) Cf: Second Treatise, Section 7 at 77.

(28) Ibid, Section 14.

(29) Cf: Leviathan part I, Ch 13. Vide also: Grotius in Section 2.4.2 supra at footnote 4.

(30) Cf: the Internationalist principles of Grotius in De Iure Belli ac Pacis discussed in Section 2.4.2 supra.

(31) Second Treatise, Section 9 at 125.

This spirit was to dominate the liberalist cause in English law, and the doctrine of the inalienability of propety in American law in years to come. In Entick v Carrington,[32] a *locus classicus* in the English law decided in 1765, Pratt CJ reiterated Locke's famous words:

> *"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole."* (33)

Enunciating then the core of the Social Contract theory under Locke prevailing at that time, the learned Chief Justice established clearly the sanctity and inviolability of private ownership, not as an end dominant in itself, but as a general principle governing and explaining the aggregation of individuals into a community. The spirit of Locke's writings kindled the popular revolutionary cause, and with its reception into American jurisprudence in the writings of Madison and The Federalist Papers,[34] it

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(32) Common Pleas, (1765) 19 State Trials 1029; vide also discussion under Section 1.3.4 supra.

(33) Vide: Dias Jurisprudence, commentary on this case at p 168 footnote 3.

(34) Vide: The Federalist Papers (with introduction by C Rossiter) (New York, Mentor, 1961) p 325ff; and Lees, The Political System of the United States (Faber, London, 1969) pp 32 33 38 73-4 and 134. Madison for instance in Federalist 51 in defending the American Constitution of 1787, reiterates the Lockesian concept of majority (developed by Rousseau) and anticipates even the principle of 'justice as fairness' enunciated later in depth by Rawls (discussed in Section 2.6 infra):

> *"... in the extended republic of the United States, and among the great variety of interests parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other good principles than those of justice and the general good ... the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of government. And happily ... the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the federal system."*

constituted a cornerstone of the American ethic that remains still today.(35)

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(35) The contractarian spirit is manifested in the American Constitution itself. In the words of the Preamble thereto:

> *"We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America".*

In South Africa the Preamble to the Republic of South Africa Constitution Act 32 of 1961 articulates similar ideals:

> *"IN HUMBLE SUBMISSION to Almighty God, Who controls the destinies of nations and the history of peoples;*
> *Who gathered our forebears together from many lands and gave them this their own;*
> *Who has guided them from generation to generation;*
> *Who has wondrously delivered them from the dangers that beset them;*
> *WE, who are here in Parliament assembled, DECLARE that whereas we*
> *ARE CONSCIOUS of our responsibility towards God and man;*
> *ARE CONVINCED OF THE NECESSITY TO STAND UNITED*
> *To safeguard the integrity and freedom of our country;*
> *To secure the maintenance of law and order;*
> *To further the contentment and spiritual and material welfare of all in our midst;*
>
> *ARE PREPARED TO ACCEPT our duty to seek world peace in association with all peace-loving nations; and*
> *ARE CHARGED WITH THE TASK of founding the Republic of South Africa and giving it a constitution best suited to the traditions and history of our land."*

The Preamble to the Republic of South Africa Constitution Act 110 of 1983, signifies a significant departure from the liberalism and egalitarianism of the Social Contract ethic in institutionalising a division among Citizens based on race, to the exclusion even of the Blacks (Cf Section 1.3.8 supra at footnote 5 and Section 2.6 infra at footnote (23) in the main text thereat):

Continued/ ...

Footnote (35) continued

"IN HUMBLE SUMBISSION to Almighty God, Who controls the destinies of peoples and nations,
Who gathered our forebears together from many lands and gave them this their own,
Who has guided them from generation to generation,
Who has wondrously delivered them from the dangers that beset them.

WE DECLARE that we
ARE CONSCIOUS of our responsibility towards God and man;
ARE CONVINCED of the necessity of standing united and of pursuing the following national goals:

To uphold Christian values and civilized norms, with recognition and protection of freedom and faith and worship,
To safeguard the integrity and freedom of our country,
To uphold the independence of the judiciary and the equality of all under the law,
To secure the maintenance of law and order,
To further the contentment and the spiritual and material welfare of all,
To respect and to protect the human dignity, life liberty and property of all in our midst,
To respect, to further and to protect the self-determination of population groups and peoples,
To further private initiative and effective competition;

ARE PREPARED TO ACCEPT our duty to seek world peace in association with all peace-loving peoples and nations; and

ARE DESIROUS OF GIVING THE REPUBLIC OF SOUTH AFRICA A CONSTITUTION which provides for elected and responsible forms of government and which is best suited to the traditions, history and circumstances of our land."

2.4.5 THE *CONTRAT SOCIAL* UNDER ROUSSEAU : 1712 - 1788

Although there may still have been a superficial voicing of principles of natural law in the eighteenth century, in substance the bastions of its former Golden Age were rapidly crumbling in this Age of Reason under the collective onslaughts of nationalism, rational skepticism and empiricism.(1) The writings of Jean-Jacques Rousseau, in particular Du Contrat Social (1762), although revising former conclusions, continued Locke's Social Contract theme of expounding the evils of uncontrolled Sovereign absolutism, and paved the way to, if not necessitating, the popular revolutions that followed. Rousseau's works reflect also the trend that had been hinted at in the Social Contract under Locke - a less philosophic and more popularly-emotive rhetoric than Hobbes, set out with not as dogmatic and logic; a movement away from the Social Contract as an historical fact, to its view more as a rational postulate in legal history; a concept of a non-absolute *de iure* Monarch against an absolute inalienable and indivisible sovereignty of the General Will;(2) and a view of independent individualistic men forming a moral state or collective in their own rational self-interest. But Rousseau expounds his interpretations to a far greater democratic extent than does Locke - not only is Rousseau's democratically-spirited sovereignty of the "General Will" ('*volonte generale*')(3) of the people of so far-reaching a nature that the

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(1) The writings inter alia of David Hume (1711-1776) (Treatise of Human Nature 1748 and Inquiry Concerning the Principles of Morals 1751) contributed significantly also to this movement. Vide also Section 2.5 infra at footnote 2.

(2) Cf: Du Contrat Social II, 1, 2.

(3) As Cole remarks in his Introduction to the Social Contract (1955 p 37) this will is "General" in two respects - it has a universal object of promoting freedom, and is shared by the majority. In that this will furthermore is rational, the cue is given to Kant: as Rousseau himself stated - in obeying the General Will, man obeys himself.

de iure Sovereign can know restriction[4] even in those respects that Locke saw as being "necessary" for the State's continued existence, but also he substitutes for Locke's concept of a tacit Original Compact, the far more active and dynamic concept of a periodically-renewed or continuously-ratified Social Contract.[5]

The paradox of Man's political existence is enunciated by Rousseau in his famous opening words: "Man is born free; and everywhere he is in chains."[6] Against this introduction, Rousseau proceeds to analyse the legitimacy of man's passage from the state of nature, into his aggregation in societies, and to inquire into the essential features of his '*Contrat Social*'.

To Rousseau, true freedom is not the unfettered licence of individual egoistic man - instead it is a condition which knows the limitations imposed by the democratic majority - realising as he did that it was the excesses of an unrestrained and illegitimately *de iure* Sovereign (Monarch) that constrain the freedom man should, yet seldom does, enjoy. "Since no man has a natural

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(4) Cf: Du Contrat Social III 13, 14,18.

(5) Cf: Jones Masters of Political Thought p 280, footnote 3 and p 281; Vide also Cole; Introduction p 16.

(6) Du Contrat Social I,1 (Cole Translation 1955). Vaughan (1915) translates these words as "Man is born free; however he is everywhere in chains", and Lloyd, in the Idea of Law (p 138), as "Man is born free; yet he is everywhere in chains". In their context however, the meanings of these translations are substantially the same. Lloyd appends the interesting interpretation (p 138):

> "... *(these words) may have derived from the romantic notion that the savage lives a life of primitive freedom and simplicity, but in practice - as Rousseau realised - man is never isolated and free in this sense but always part of a community, and the degree of freedom he enjoys or the extent of the social restraints imposed upon him will depend upon the social organisation of which he is a member*".

authority over other men,[7] and since might never makes right, it follows that agreements are the basis for all legitimate authority among men."[8] He continues:[9]

> *"But how can a man pledge his strength and his liberty of action, together the chief instruments of his own preservation, without harming himself and without neglecting those duties which he owes to himself? This difficulty ... can be formulated as follows:*
>
> > *'To find a form of association capable of defending and protecting with the total common force, the person and the property of each associate, and by means of which, each one, uniting himself with all the others, nevertheless obeys only himself and remains as free as ever before.'*
>
> *Such is the fundamental problem of which the Social Contract gives the solution".*

Rousseau accordingly interpreted the Social Contract primarily (some may even say exclusively) as a *pactum unionis* made by "the Whole Body with each of its members"[10] - this *pactum* reconciled on the one hand the wish for aggregation, and on the other hand the inalienability of certain fundamental human freedoms; but such stated inalienability is not to say that this freedom could not know qualification or displaced embodiment in the "General Will":[11]

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(7) Thus was ended Filmer's 'Divine Right of Kings' Doctrine in Patriarcha. Vide Section 2.1 supra at footnote 1.

(8) Du Contrat Social, I 4.

(9) Ibid, I 6.

(10) Ibid, II 4

(11) Ibid, I 7.

> *"Let us reduce the items lost and gained in this transaction to terms easily compared. What man loses by the Social Contract is his natural liberty and an unlimited right to whatever he can get and hold on to. What he gains is civil liberty and the ownership of all that he possesses ... We might, over and above all this, add to what man acquires in the civil state, moral liberty, which alone truly makes him master of himself; for the mere impulse of appetite is slavery, while obedience to a law we prescribe to ourselves, is liberty".*

To Rousseau, there was accordingly a distinction, firstly, between natural liberty (determined only by individual will) and civil liberty (limited by the General Will); and secondly, between natural possession (which is only the right of "force" or of first title), and ownership (which is founded upon a positive civil title).[12] There was a distinction furthermore between the "General Will" (of a democratic majority Sovereign) and the "Will of All" (in the broadest sense).[13] In what W T Jones in Masters of Political Thought[14] regards to be a "strange mixture of utopian idealism and plain common sense", Rousseau determines that:

> *"However one looks at the principle of Social Contract, we reach the same conclusion, viz, that the Social Contract establishes a real equality among the citizens, all of whom have the same duties under it and ... enjoy the same rights ..."* [15]

Central to Rousseau's Social Contract, is his postulate that the General Will shares some considerable community of purpose and identity with the private

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[12] Ibid, II 3

[13] Ibid, I 7.

[14] Vol II at p 271.

[15] Du Contrat Social II 4.

will. Although the Citizen may attempt to distinguish his own private interest from the common good when he views his affairs from his personal perspective:

> *"... he cannot separate his (own private) interest completely from the common interest ... therefore he wills the general good for the sake of his own private interests, just as strongly as anyone else".* (16)

Since social order is in Rousseau's view a "sacred right which is the basis of all other rights ... (and) ... does not come from nature, ... (it) ... must therefore be founded on conventions."(17) Since there is "a great difference between subduing a multitude and ruling a society",(18) this convention cannot have sprung from the compulsion of Hobbes' "Warre", each man realising that "in giving himself to all, (he) gives himself to nobody".(19) In this then, the *pactum subjectionis*, as it exists in this very limited form in Rousseau's thought, is so rooted in the correlation and equivalence of private will with the "General Will", that this *pactum* does not constitute a consent to an abuse by the general collective.

The essence of Rousseau's philosophy is contained in his words:(20)

> *"Each of us puts his person and all his power in common under the supreme direction of the General Will, and in our corporate capacity, we receive each member as an indivisible part of the whole".*

In short, his formula indicates that unity through a political association involving the surrender of their former licence and unlawfulness,

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(16) Ibid, IV 1. (17) Ibid, I 1. (18) Ibid, I 5.

(19) Ibid, I 6. (20) Ibid, I 6 (Cole translation at p 13).

is the basis enabling men to achieve political liberty. The *'Contrat Social'* creates a moral corporate collective to which the promotion of the well-being of that collective is entrusted; and it emerges that in this act of association, mutual and reciprocal undertakings are made and given. Each individual accordingly[21] is bound in a double capacity - as a member of the Sovereign, he is bound to the individuals, and as an individual he is bound to the Sovereign. Accordingly it is that his former independent individualistic natural condition, is substantially changed:[22]

> *"The passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they formerly lacked".*

The atomistic Social Contract upon which Rousseau based this notion of the State afforded man the rational avenue to guarantee and permit, through social aggregation, the freedom and equality primitive man had lost in his transition into the collective modern society, and which enabled that individual to become "an intelligent being and a man".[23]

Rousseau,[24] like Grotius,[25] accordingly comes close to enunciating a theory of the State as original proprietor of all property. In postulating: firstly that the real property that individuals possessed (as distinct from 'owned') prior to their Social Contract, was given in that Contract, along with their person, into the hands of the general collective they created; secondly that the rights of private ownership could arise only once the

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[21] As amplified in : Ibid, I 7.

[22] Ibid, I 8. [23] Ibid, I 7. [24] Ibid, I 9.

[25] Vide Section 1.2.2 supra.

institution of private property had been established (which in turn was dependent upon the prior existence of the State); and thirdly that "the Social Contract ... is the basis of all rights";[26] he postulates (perhaps) accordingly that the State was the first proprietor of all property (by way of convention) as a result of the transfer to it of the rights of first occupation (possession) that man had prior to the Social Contract (by way of the exercise of "force" (or *detentio*) over physical things). It is noted that the reason for which it is necessary to qualify the preceding statement with the inclusion of the word "perhaps", is that Rousseau in the same breath says: "this act (of giving the goods he possesses, to the State) does not make possession, in changing hands, change its nature, and become property in the hands of the Sovereign". Although many writers[27] have suggested that Rousseau's work abounds in contradictions, (but that "it is seldom logical consistency that has decided the success of theories and movements"), it appears that what Rousseau may have intended in this latter extract was that it was not this act alone (of giving) which founded private ownership - its conjunction inter alia with the exercise of the "General Will" would too be a necessary *sequitur* for the institution of private property to have been created.

Rousseau makes reference also[28] to the distinction between "the rights which the sovereign and the (private) proprietor have over the same estate",

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(26) Du Contrat Social I 9.

(27) Cf: Friedman, Legal Theory p 75; Jones Masters of Political Thought II, p 256; Laski Introduction to Politics p 22.

(28) Du Contrat Social I 9.

and hints accordingly at a concept of private ownership (or *dominium plenum*) which knows some latent State participation - in this he accordingly gives his implied approval to the dominium eminens[29] postulate that Grotius had earlier enunciated, and perhaps foreshadows the 'bundle of sticks' or rights[30] image that was later to be adopted.

In his chapter on "The Limits of the Sovereign Power"[31] Rousseau stipulates that the State, having derived its authority and powers (inter alia, impliedly, dominium eminens) from the Social Contract by convention, must know accordingly restraint in its exercise thereof; and presumably, in such exercise for the promotion of the general well-being, is obliged to compensate in full any private member in the event of his expropriation (or disentitlement) in order that no more "charges" may be placed upon him than are proportionately equitable:

> *"... the sovereign power (vesting in the General Will), absolute, sacred, and inviolable as it is, does not and cannot exceed the limits of general conventions ... so that the Sovereign never has a right to lay more charges on one subject than on another...."* (32)

In final analysis, when Sabine in A History of Political Theory[33] contends that Rousseau's Social Contract was "so vague that it can hardly be said to

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(29) Vide Section 1.1 supra.

(30) Vide Chapter 3 infra.

(31) Du Contrat Social II 4.

(32) Ibid, II 4.

(33) At p 523.

to point in any specific direction", he does Rousseau a gross injustice. Du Contrat Social has as dominant themes human freedom, and the fiduciary responsibility of the real and popular Sovereign (as instrument and manifestation of the '*volonte generale*') to honour and uphold the noble purposes for which it was instituted under the Social Contract - despotic violation and abuse of individual freedom and property rights are inconsistent with the equal participancy in Sovereignty that Rousseau postulated. Although Rousseau may have failed to solve many of the issues he uncovered, his work does point in a specific direction - in the words of Cole in Introduction to the Social Contract:(34)

> *"His approach rested on a consistent belief in three things - the inalienability of human liberty, the natural propensity of man to goodness, and the necessity of basing political institutions on democratic sovereignty as the means of expression of the General Will".*

Perhaps the final indictment of Sabine's criticism lies in that it was to the subsequent unfolding of history that Jean-Jacques Rousseau pointed. In the cause of political freedom, his deification of the collective will was to contribute to the Battlecry of the popular cause in France and the United States; in the forum of philosophy, his equation of a direct Sovereignty in the *Volonte Generale*, with noble ideals based upon reason, was to orchestrate the melodies of German transcendental idealism; and, as with Locke,(35) his linking of proprietary acquisitiveness with the loftiness of legal heritage, conducted the anthem to come in Western property law (with its principles of just compensation upon expropriation).

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(34) At p 38.

(35) Vide Section 2.4.4 supra at footnotes 34 and 35.

2.4.6 THE *ESPRIT DES LOIS* OF MONTESQUIEU (1689-1755)

The writings in Esprit des Lois (1748) et al of Montesquieu announced a significantly new perspective in jurisprudence - major innovation came in his sociological theory of climate and environment, and in his celebrated Doctrine of the Separation of Powers.(1) His departure from naturalism was still not yet however in the form of an extreme positivism - rather it was a transitory movement that gave momentum for the nineteenth century jurisprudence that followed. Although Montesquieu's focus lay elsewhere, he incorporated(2) in his voluminous writings still a brief but succinct affirmation of the Social Contract and a recognition of rights to property (similarly to Locke) as being of a singularly high order:(3)

> "[1] *As men have given up their natural independence to live under political laws, they have given up the natural participation of property to live under civil laws.*
>
> [2] *By the first they acquired liberty; by the second, property. We ought not to decide by the laws of liberty, which as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. 'Tis a paralogism to say that the good of the individual ought to give way to that of the public: this can never take place, but when the government of the community, or in other words the liberty of the subject, is concerned. This does not affect those cases which relate to private property, because the public good consists in every one's having that property, which was given him by the civil laws, invariably preserved*".

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(1) Cf Lees, The Political System of the United States, p 33.

(2) Esprit des Lois (transl. by Carrithers) Book XXVI Chapter 15. It is noted that whereas Montesquieu's writings precede those of Rousseau chronologically, they bear a greater similarity in substance to those in the period that followed - for this reason, Rousseau's contribution is considered herein before that of Montesquieu.

(3) Ibid XXVI 15. It is noted however, on the political level, that Montesquieu was not as committed to majority rule as were Locke and particularly Rousseau.

To Montesquieu then, Social Contract was again an historical fact, in which natural independence was exchanged for political liberty, and the institution of property was established in terms of the civil laws created. It was however of paramount importance in Montesquieu's formulation (as stressed by his heading to Chapter 15), "that we should not regulate by the principles of political law those things which depend on the principles of civil law". Although he acknowledges indirectly that the State holds the power (of dominium eminens) entitling it to dispossess private persons of their property, he argues strongly that the public good requires the preservation and sanctity wherever possible of the institution of private property, and that if expropriation is necessary, then such expropriation must take place under the civil law (with a concomitant indemnity for the expropriatee) and not as an exercise of political might in which private interests are abused without compensation.(4)

> "[4] *Let us therefore lay down as a certain maxim, that whenever the public good happens to be the matter in question, it is never for the advantage of the public to deprive an individual of his property ... by a law or political regulation. (Rather) we should follow the rigour of the civil law, which is the Palladium of property.*
>
> [5] *Thus when the public has occasion for the estate of an individual, it ought never to act by the rigour of political law; it is here that civil law ought to triumph, who with the eyes of a mother regards every individual as the whole community.* (5)
>
> [6] *If the political magistrate would erect a public edifice, he must indemnify those who are injured*

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(4) Ibid XXVI 15 (continued)

(5) Much of this viewpoint under subparagraph [5] corresponds with the standpoint of Dworkin in Taking Rights Seriously, Chapter 7.

> *by it. The public is in this respect like an individual, who treats with an individual. It is full enough that it can oblige a Citizen to sell his inheritance, and that it can strip him of this great privilege which he holds from the civil law, the not being forced to alienate his possessions."* (6)

Although Montesquieu's works may broadly have undermined the naturalist ideology, he stressed the need for the state to exercise its fiduciary mandate and powers in accordance with the intention of the Citizens that had instituted its formation. That expropriation can take place, is in his view already sufficiently vast an inroad upon the sanctity of private ownership, without this disruption of private rights being compounded through its use in a political forum as an exercise of political might against the Citizen. For Montesquieu, a partial naturalist adherence remained in as far as that the State ought to use its dominium eminens temperately and only within the framework of the civil laws; it ought to observe the implied Social Contract and preserve the wish for security of property ownership that motivated that Contract and that gave expression to that intention; and above all, the State ("the political magistrate") must "indemnify" Citizens who are prejudiced in their individual capacities by the State's exercise of its dominium eminens. "With the eyes of a mother", the State must nurse and soothe the individual aggrievement, never permitting inequity to enter the surrender of private property for public purposes.

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(6) These dicta contribute significantly to the Compulsory Purchase postulate (vide Section 1.2.4 supra) which emerged in English Law. Blackstone in his Commentaries, writing shortly thereafter, followed the principles enunciated by Montesquieu and incorporated them into the foundation which underlie the present English law.

From the belltower of Montesquieu's Spirit of the Laws, rings out a message of justness in expropriation compensation that should not go unheeded in South Africa. His voice chimes out a deep criticism of expropriations manifesting political might[7] - expropriations for purposes of Group Areas consolidations (if that is not an intention and public purpose of a Social Contract by all Citizens) and expropriations disentitling persons without compensation (as is the case in South Africa where unregistered rights are noncompensable, subject to certain exceptions), are for Montesquieu unjust exercises of political force. Whereas the United States Constitution,[8] in its Fifth and Fourteenth Amendments, upholds exemplarily the spirit that Montesquieu advocated, South Africa's Expropriation Act[9] (read in the context of the Group Areas Act[10] and Community Development Act),[11] displays a positivist timbre that denies the expression of Montesquieu's principles.

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(7) Cf Plato, in main text in Section 2.2 supra at footnote 2 and thereafter.

(8) Cf: Section 2.4.4 supra at footnote 35.

(9) Act 63 of 1975, as amended.

(10) Act 36 of 1966, as amended.

(11) Act 3 of 1966, as amended.

2.5 SOCIAL CONTRACT UNDER THE GERMAN SCHOOL OF TRANSCENDENTAL IDEALISM

2.5.1 INTRODUCTION

The prominence that had formerly been ascribed to individualism, and the heights that naturalism had known in its Golden Age, came in the late eighteenth century and in the nineteenth century to find rejection in the prevailing legal philosophies. At the hands of Austin(1) (1790 - 1859) and others, positivism surged as a dominant standpoint in jurisprudence. The Social Contract theme that had preoccupied the jurists from Hobbes to Rousseau, declined in its broad recognition as societies, consistently with the emergent forces of nationalism, came to be interpreted in a social and collective sense. The empiricism and scientific pragmatism that characterised legal methodology; the scepticism with which David Hume(2) had attacked metaphysical notions of the State; the 'felicific calculus' of pain - avoidance or the utilitarian 'greatest happiness' principle that Jeremy Bentham(3)

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(1) Cf: latter section of footnote 8 in Section 2.2 supra.

(2) Hume (1711 - 1776) Treatise of Human Nature (1739); Inquiry concerning the Principles of Morals (1751). Vide also Section 2.4.5 supra at footnote 1.

(3) Jeremy Bentham (1748 - 1832) Fragment on Government (1776) (Ed: Montague, Oxford 1931); and Introduction to the Principles of Morals and Legislation in Ch 1 Section 1 of which Bentham states:

> *"Nature has placed mankind under the governance of two Sovereign masters, Pain and Pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne".*

He adds in his Theory of Legislation (p 1)

> *"The end aim of a legislator should be the Happiness of the People. In matters of legislation, General Utility should be his guiding principle".*

introduced; and the sociological considerations[4] that attended prevailing legal approach; contributed significantly also to this decline of the Social Contract and the natural law.

Social Contract theory, notwithstanding the decline of naturalism, retained however an adherence in the German School of transcendental idealism, principal among the members of which were Kant, Fichte and Hegel. These philosophers returned to the Social Contract postulate and developed it in a way that was characterised by an insistent emphasis upon true individual freedom as being possible only within the parameters of the State, and upon the Social Contract, not as historical actuality, but as a postulate of pure reason alone. Their philosophic idealism imprinted the State with a corporate supremacy, and their "*korperschaftelike Gesamtakt*" interpretation of Social Contract led the way to the dangerous later climaxes of Fascism and National Socialism. History revealed again the chameleon - like adaptability of Social Contract theory in suiting a range of circumstances within the political spectrum.

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(4) Such as in Montesquieu's writings - vide Section 2.4.6 supra.

2.5.2 THE SOCIAL CONTRACT UNDER IMMANUEL KANT (1724 - 1804)

Whereas Rousseau had tempered his writings with a degree of political expediency, Immanuel Kant conducted his analysis largely, even exclusively, within the forum of pure philosophy, although from his conclusions, definite legal parallels exist. In attempting in his transcendental philosophy to synthesise pure rationalism and pure empiricism,and to reconcile these extremes, Kant adopted a midway critical stance. In his humanist view, man was, as Aristotle had held, a rational willing being to whom freedom was fundamental. Man however in Kant's view participates in two levels of experience - the sensory (governed by the senses) and the rational (governed by reason). Since Man's ultimate fulfilment arises through his opportunity to exercise his free will, but since action based purely upon selfinterest is not moral (unless fortuitously coinciding with a universalisable maxim), Man's true freedom arises within a society characterised and constituted by reason. Although some restraint on the uninhibited exercise of individual will must of necessity be known for all men to be free, social organisation must however not impose undue or unnecessary constraints upon the individual. Kant postulated accordingly a "Kingdom of Ends"- which is a systematised political union notionally created by rational and willing men (who are ends in themselves) acting in accordance with universalisable maxims to create a societal structure - an intelligible world: in which, man's dignity and autonomy are protected; within which, freedom has an absolute quality transcending individual conceptions of freedom; and through which, man by his rational exercise of freedom,transcends the imperatives of the natural world. Freedom of human will accordingly arises for men in the intelligible world of their rational and willing creation; it is a society under universalisable laws of which men are the authors - a collectivism reconciled with individualism and based squarely upon reason.

The Kantian ideal is formulated in terms of two fundamental principles. The first, the Categorical Imperative, has meaning in an objective sense, being rationally derived and being a principle of what is good for every rational being - in short it is a statement that the individual ought not to act unless the maxim of his individual action is universalisable as a maxim for general action. The second, the Principle of Right, establishes that the morality (goodness) or otherwise of an action is determined upon the basis of the ability of that action to co-exist with the rationally-construed freedom of others. Morals and good conduct therefore are not based upon emotions or the sensory, but must be "adjusted to universal ends" by a process or reason; and accordingly the only action which is good is one which gives expression to what reason dictates in its operation in a civil intelligible society of "balanced harmony". To Kant then law is deducible from the Categorical Imperative as:

> *"the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom".*

Society, for Kant, has the function of permitting and maintaining the freedom of the rational individual. Political power is as extensive as is necessary to uphold individual freedom and as constrained as is necessary not to violate this end. The Social Contract as a postulate of reason, and as the consequence of the exercise of the autonomous (as opposed to heteronomous) will of men, is the medium which Kant envisaged as having permitted the transfer of such power to the instrument of the universal collective (embodied in the State). The reconciliation of the spirit of freedom with the need for obedience and loyalty to the State, is the political objective and ideal to which the State, as *corpus* and embodiment of the collective will, should direct itself.

From his fundamental premise of human freedom, Kant deduces property ownership as a derivative right, and property itself as an object into which men project their personality. Since human freedom has inviolability as its parallel, the property of man derivatively acquires this character too. This is not to say though that the inviolability of property knows no restraint - as is the uninhibited freedom of men restrained by reason in consequence of the act of collective aggregation, so is property ownership restrained accordingly. In terms of the Categorical Imperative by extension, the individual would appear to have no right to withhold his property if it is required for the collective good, because such conduct is not universalisable as the maxim of a general action. In the same way that any rational man would require others to surrender their property if collective well-being so required, so accordingly must that man surrender up his property where this serves the public good. Furthermore though, in the same way that such man would require the collective will to take cognisance of his individual loss and require just compensation and indemnity, so must that rational man acknowledge the universalisable right of any expropriatee to receive due compensation. In short, whereas the right to refuse to surrender up expropriated property is not universalisable and is accordingly not lawful, the individual's right to require compensation is a universalisable maxim for general action under natural law. Just compensation upon expropriation is therefore a necessary and essential condition "under which the arbitrary will of one individual was combined with that of another" in the creation of a "general law of freedom", and without which the substance of rational intelligible society and the intention of the postulated underlying Social Contract, are defeated.

2.5.3 THE SOCIAL CONTRACT UNDER FICHTE (1762 - 1814)

As was true also with Kant and Hegel, Fichte envisaged man too in terms of the Greek conception - as a free willing and rational being who adopted and created by the rational postulate of Social Contract, the institution of the State, in order that laws might be made to preserve and uphold his person and his property and to regulate the interrelationships of men with a view to their protection. Fichte accepted and extended Kant's doctrine that the freedom that men create through the Social Contract and the institution of the State, is not uninhibited in an absolute sense, since one man's free activity is necessarily conditioned by the equal free activity that rationally must be ascribed to others. Aggregation into a collective society has then the effect that man's rights and his freedom are at the same time both ensured as regards fundamentals and limited as regards infringements of the rights of others. A mutual and reciprocative recognition must be accorded by each Citizen to his fellow Citizens, and true and rational liberty arises accordingly only within the framework of the State.

The Social Contract that Fichte postulated was twofold. On the one hand there was a property *pactum* - in creating the State, the institution of private property arose; and from the ownership of private property, from the acknowledgement of civic duties, and from the undertaking to forebear in the infringment of the private property of others, men assumed the mantle of citizenship - but this Citizenship status was not an unconditional subjection, since beyond his civic obligations, man retained as full an

individual liberty as the system permitted. On the other hand, there was a second *pactum* - one of protection. The State undertook to uphold and protect the interests and wellbeing of those who aggregated under the Social Contract into the State created, and for purposes of fulfilling this objective, the State was vested with the necessary powers to regulate the inhibited exercise of individual freedom.

Fichte extended his Social Contract interpretation in a sociological fashion to include the protection by the State of the individual's right to work, and in doing so, introduced an economic aspect requiring State participation in labour and trade. His writings influenced accordingly the later politico-economic theories of Karl Marx; but the aspect of Marxian thought falls beyond the scope of this exposition since Marxian politics have had little (if any) influence in South African jurisprudence. To a large extent Fichte's works displayed a deeper reflection upon civic freedom and liberty than had those of Kant, and bridged the gulf to the vastness of Hegel's dialectic.

2.5.4 SOCIAL CONTRACT UNDER THE DIALECTICISM OF HEGEL : 1770 - 1831

Subsequent legal historians and jurisprudents are in unison that the writings of Hegel inter alia in Grundlinien der Philosophie des Rechts (1821)[1] represent one of the vastest, deepest and most abstract attempts to analyse not only history, but the universe itself.[2] Any attempt to summarize here the diversity and power of Hegel's thought would accordingly be an undertaking of impossibility laboured with fruitlessness and inadequacy - suffice it accordingly that those portions of his work relevant to the themes at hand be considered.

Hegel adopted a dialectic and historical method based on logic rather than empiricism in postulating an Absolute World Spirit (manifested in each nation's *Volksgeist*) which regulated the continuous and synthetic unfolding of History progressively revealed,[3] an unfolding (based upon reason) in which every phase was interconnected and interdependent. Reason and Spirit were accordingly embraced in Hegel's central proposition, the Idea of Reason or History. To Hegel, the Social Contract, as a postulate of reason, becomes a reality for men because "what is reasonable is real, and what is real is reasonable":[4]

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(1) English translation by T M Knox, Oxford, 1942.

(2) For example, Friedman, Legal Theory, p 164; Sabine A History of Political Theory p 620.

(3) "Each particular national genius (spirit) is to be treated as only one individual in the process of universal history". Philosophy of History, Introduction, Section 3, as translated by Sibree, Bohn Library, 1955.

(4) Rechtsphilosophie 40.

> *"What matters is to perceive in the appearance of the temporal and transitory, the Substance which is immanent, and the eternal, which is actual. For the reasonable, which is synonymous with the Idea in that it assumes external existence in its actuality, appears in an infinite variety of forms and phenomena, and surrounds its kernel, with the shell in which consciousness dwells first, and which the Notion then penetrates to find its pulse and to feel its manifold appearance".*

Hegel's interpretation of history dismissed the paramountcy of individualism that the Rationalist school had advocated, suggesting instead that political power was embodied in the national state - to the extent that the national state constituted a core element in Hegel's philosophy. Accordingly, Rousseau's '*volonte generale*' postulate was elevated and supplanted by Hegel's conception that:(5)

> *"The state is the divine will, in the sense that it is mind present on earth, unfolding itself to be the actual shape and organisation of the world".*

It is in the understanding of the Idea of History that an understanding of the state as an institution arises, since(6)

> *"By listing attributes, no progress can be made in assessing the nature of the state; it must be apprehended as an organism. One might as well try to understand the nature of God by listing His attributes".*

Although he refers to the State as "the divine will", his philosophy was a rationalisation not based upon mysticism. To Hegel, the State has grown and evolved consistently with Reason and the Spirit, and in terms of the Idea, under a universal and idealistic tripartite pattern of history - thesis,

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(5) Ibid, Section 270, Knox translation.

(6) Ibid Section 269.

antithesis and synthesis - phases that Sabine in A History of Political Theory[7] describes respectively as:

> *"a period of natural, happy, youthful, but largely unconscious, spontaneity; a period of painful frustration in which the Spirit is turned inward and loses its spontaneous creativeness; and a period in which it returns to itself at a higher level, embodying the insights gained from frustration in a new era which unites freedom with authority and self-discipline".*

The Kantian doctrine[8] that true freedom for any individual is found only within the structure of the state, finds accordingly a considerable support in the writings of Hegel. The state, as the temporal expression of political power, offers to the Citizen collective protection of person and property, and permits within its framework the ethical fulfilment and actualisation of the individual in the three dialectic stages - the family, which is characterised by "particular altruism"; civil society, which displays "particular egoism", and the State itself, which is "universal egoism".[9] In his distinction between the State and Civil Society, one of Hegel's most notable philosophical innovations lies - the principal distinction being that the former expresses ethical values and moral purposes and is superior and absolute, whereas the latter is merely "the resultant of the irrational forces of individual desires". It is the State which in Hegel's view permits the highest level of ethical actualisation, and is the embodiment of freedom and reason - and it is in the State that these earlier stages are not only preserved but also dialectically transcended.

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(7) At p 630. Cf: Section 3.1 infra at footnote 15.

(8) Cf: Section 2.5.2 supra.

(9) Lowenberg: Hegel's conception of the relation between the State and Civil Society: unpublished Political Science essay at the University of Natal, 1977.

The State, although supreme, ought to be minimally interventionist, interfering with the Citizen's private rights to person and property only where necessity so predicates; but where a conflict between the State and Citizen emerges:(10)

> *"The particular is for the most part of too trifling a value as compared with the general: individuals are sacrificed and abandoned".*

Freedom of the Citizen, to Hegel then, differed from the Rationalist interpretation of Locke for instance in that the State was made supreme, but shared a similarity with Locke, as emerges in Die Verfassung Deutschlands (1802),(11) in that Hegel here defines the state as existing for the collective protection of property, and in that its powers are limited to those necessary to this end. To Hegel, property acquires derivative substance as an extension and embodiment of the personality of men, but as such, although its existence is independent of and perhaps even prior to the State, its enforcement and recognition requires a State sanction - his view here then shared features present in the writings of both Locke and Kant. The movement of individuals into social collectives, by aggregation under a Social Contract, as a consequence of synthesis and as a postulate of reason in the minds of rational and willing men, was a movement brought about by a realisation, as expressed in Uber die neuesten innern Verhältnisse Wurttembergs (1798), that:

> *"The silent acquiescence in things as they are, the hopelessness, the patient endurance of a vast overmastering fate, has turned to hope, to expectation, to the will for something different.*

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(10) Philosophy of History, Introduction, Bohn Library p 34.

(11) The Constitution of Germany translated and edited by Lasson, Werke, Vol VII, P 17.

> *The vision of a better and juster time has entered alive into the souls of men, and a desire, a longing, for a purer freer condition has moved every heart ..."* (12)

The Social Contract, postulated as a creation of rational men acting in terms of and enacting the Idea of History, was accordingly to Hegel the foundation from which the State had emerged as embodiment of the national *Geist*, and was the ultimate historical synthesis in which its thetical and antithetical precursors in history were incorporated, reconciled and sublimated ("*aufgehoben*"). His conclusions dissented however from consistency with the French popular liberalism and revolutionary fervour - individualism in Hegelian thought connoted an extremism of egoistic caprice, and yielded to and could even be sacrificed in the attainment of the collective national fulfilment and expression. In the unfolding of History, in the opposition between the negatives of thesis and antithesis, and in the advancing affirmative instrument of synthesis, an eternally shifting equilibrium regulated the affairs of men through the institutions of its political expression, and any man in isolation or even in a civil collective, lacked the capacity to counter or even oppose these historical forces, remaining instead duty-bound to the sanctified national state in consequence of his membership and rationally-postulated co-authorship thereof. But important to realise is that the individual was author and creator of the State not on the basis of individual consent, but by means of a Social Contract in which the individual was perhaps merely a participant in or an agent or instrument of the dynamically progressively-advancing and synthetically-unfolding Idea of History.

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(12) Uber die neuesten innern Verhältnisse Wurttembergs (1798) translated and edited by Lasson, Werke, Vol VII p 150.

The Hegelian 'individual' had accordingly lost the glorification he found in Locke and the 'justified' revolutionary fervour with which he was imbued by Rousseau. Instead of the individual being enchained (as seen by Rousseau) by forces which were in opposition to the '*volonte generale*', he became instead incarcerated by Hegel within the confines the *Volksgeist* itself, although Hegel contended that this did not constitute a subjugation of men, since the individual acquires true freedom and personality as a social being in the forum that only the national state can provide.(13) To Hegel, the individual bore only an indirect relationship to the State - his personal life was regulated by the State's socio-economic institutions, and those institutions in turn were conditioned and determined by the *Volksgeist* elevatedly manifested in the national state.

In many respects then it emerged that the Social Contract under Hegel had turned full circle back to the sovereign absolutism of Hobbes,(14) the central difference however being that Hobbes' interpretation left absolute authority rooted in the monarch, whereas Hegel's considered that power as transferring from the (Prussian) monarch to a (German) national state. During the nineteenth century twilight of naturalism, Social Contract theory lay dormant with many of its questions unresolved, and it was only recently in the late twentieth century that it was to rise again to prominence in the writings of Rawls in his postulate of the Original Position.

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(13) To borrow from the verses of William Wordsworth, the national State to the Hegelian individual was "the nurse, the guide, the guardian of (his) heart and soul of all (his) moral being"

Tintern Abbey (1798) - Wordsworth in context was actually here referring to Nature - it is merely the phraseology and not the substance that is here borrowed.

(14) Cf: Section 2.4.3 supra.

2.6 CONTRACTARIANISM AND THE 'ORIGINAL POSITION' IN JOHN RAWLS' 'A THEORY OF JUSTICE' (1972)

Contractarianism found its revival in the twentieth century in John Rawls' A Theory of Justice (1972), hailed widely[1] as a singular treatise notable not only for its departures from the traditions of the analytical positivism and the utilitarianism[2] that had for over a hundred years since Austin and Bentham, dominated the prevailing Anglo-American politico-legal philosophies, but also for its advocacy and its providing of a viable and working liberalist alternative[3] to the challenge presented by the stepping

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(1) Daniels, Reading Rawls, Introduction pp xi - xvi cites a host of sources acclaiming the stature and relevance of Rawls' writings; inter alia, Bedau, Nation, 11 September 1972 p 180: "As a work of original scholarship in the services of the dominant moral and political ideology of our civilization, Rawls'treatise is simply without a rival". Cf: also Section 2.1 supra.

(2) Cohen, Social Contract Explained, New York Times Book Review, p 1:

> *"For too long now, the main tradition of moral philosophy has been utilitarian in its broad assumptions ... But the utilitarian attitudes are incompatible with our moral judgments and with the principles upon which our Constitution rests. It is therefore a crucial task of moral and political philosophy to make clear the inadequacy of utilitarian concepts, and, more important, to provide a persuasive alternative to them."*

This was the task that Rawls both undertook and more significantly, fulfilled. The comparison of Rawls with the utilitarians, although an important inquiry in jurisprudence, is not undertaken herein however, by reason of the alternative theme that this exposition develops.

(3) Notwithstanding his critique that Rawls' theory (although of exceptional value) is not workable, Barry, in The Liberal Theory of Justice : A critical examination of the principal doctrines in 'A Theory of Justice' by John Rawls, (Clarendon Press, Oxford, 1973) p 4, acknowledges that Rawls' theory is "a comprehensive and systematic statement of a thoroughgoing liberal position ... (which) ... it might be added, appear(s) at a time when liberalism is becoming unfashionable, dismissed in smart circles as shallow compared with the deep (not to say unfathomable) truths of Hegel or a Hegelianised Marx".

stones on the route from Hegel to Marx.(4)

Rawls in his chapter 'The Main Idea of the Theory of Justice' sets his writings in their philosophical perspective in stating:(5)

> *"My aim is to present a conception of justice which generalises and carries to a higher level of abstraction* (6) *the familiar theory of the Social Contract as found say in Locke Rousseau and Kant*".

To Rawls, the Social Contract was not, as the classical writers had suggested, a contract for purposes of entering society or of establishing government or of conferring powers upon government - instead, the original agreement he envisaged directed itself at determining the fundamental principles of justice that regulate the structure and operation of society in a spirit of social co-operation. His conception of justice was accordingly one of "justice as fairness". He framed his vision of the Social Contract, in conformity with the Kantian approach, as a postulate of reason:(7)

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(4) As Crick notes in On Justice in the New Statesman, 5 May 1972,p 602: "Truly (Rawls) forces us to see that theories of socialism without a critical moral philosophy are as undesirable as they are impossible. Who can answer him fully and go beyond?".

(5) A Theory of Justice S3 p 11.

(6) As Dworkin notes in Taking Rights Seriously (Chapter 6), there are deeper themes also in Rawls but these are beyond the scope of this exposition on Social Contract.

(7) A Theory of Justice Section 3 pp 11 - 12.

> *"Thus we are to imagine that those who engage in social co-operation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty ... determines the principles of justice as fairness".*

Central to Rawls' thesis, is his postulate of the 'Original Position',(8) which corresponds closely to the initial state of freedom that Locke suggested, but supplements Locke's interpretation in significant respects. Men in the state of nature are free rational and moral beings and a symmetrical equality attends their interrelationships, but they are postulated further by Rawls as being behind a 'veil of ignorance' in that they do not have knowledge (in advance of contracting) of what their particular circumstances and status will be under the social institutions that derive from the principles upon which they (in the Social Contract) agree. On the one hand this ensures their objectivity and rationality in their exercise of choice regarding the principles upon which their society is to be founded, no individual being advantaged or disadvantaged in principle disproportionately relative to others; and on the other hand, this ensures

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(8) He devotes the whole of Chapter III, SS 20 - 30, to the examination and assessment of this idea.

In regard to the analysis of Rawls' writings herein undertaken, the writer is grateful to acknowledge the considerable guidance he has received from lecture material presented by Professor R Wacks at the University of Natal in 1983.

that the principles so determined will manifest justice as fairness. This proposition then finds considerable consistency with Kant's Categorical Imperative,[9] in that the individual's rationally-based determination of the foundations of social justice, permits a congruence of the maxim of individual action with the maxim of general action, and in that rational individual choice is accordingly universalisable in a broad Social Contract as a postulate of reason.

Rawls develops Rousseau's theme that the Social Contract was a progressively and continuously shifting and ratified contract and not an historical actuality, but his writings afford a far more cohesive rationale than Rousseau's for the succession of this Contract from generation to generation.[10] He notes that since each person finds himself at birth in a specific society and at a particular station, that person cannot subjectively be considered in a direct sense to have entered voluntarily or to have adopted the scheme of social co-operation that prevails in that society - however, provided that the society in question manifests and gives expression to the principles of justice as fairness, then as a postulate of reason, that person objectively would have chosen to enter that society if notionally he had exercised that choice. That his circumstances might subsequently emerge to him as being unfortunate, would in the first place not be a basis for concluding that he would have exercised his choice in any other (non-rational) manner; and in the second place, would in an objective sense be acceptable rationally since not only are those circumstances consistent with justice as fairness,

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[9] Discussed in Section 2.5.2 supra.

[10] Cf Section 2.4.5 supra at footnote 5.

but also it was the exclusion of the specific individual pre-knowledge thereof that rendered the rational determination of those very principles of fairness possible. As Rawls states:(11)

> *"... a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances which are fair. In this sense, its members are autonomous and the obligations they recognise self-imposed".*

The original position becomes clear when it is considered in the context of the "reflective equilibrium" by which it is reached. The rational man in the original position, guided overwhelmingly by rational self-interest, will draw a distinction in his judgments regarding what constitutes justice and fairness, between what is authentic and what would be motivated by subjective prior knowledge of how those principles would affect him in the social position he is to occupy. Since the veil of ignorance as postulated, precludes his bias under the latter possibility, it is only the authentic judgments that will lead to the principles resolved, once these have been measured by the individual against his own judgments about justice. Any disparities that emerge between these assessments, are reconciled by the individuals under a rationally guided 'cobweb theorem'(12) of "reflective equilibrium" in which any conflicting standpoints are brought into balance by spiralling inwards towards the final and authentic expressions of justice as fairness. Since the veil of ignorance shrouds his societal

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(11) A Theory of Justice p 13.

(12) These words (cobweb theorem) are not used by Rawls, but are drawn from Economics by way of analogy as being an illustrative image of the nature of the reasoning process employed.

future and conceals from his awareness in the original position, what life plan lies before him, the individual will accordingly agree to those principles which afford him the best probability of securing the fruition and fulfilment of his life plan, subsequently and within the society to be revealed to him.

Rawls postulates that two principles[13] regulate or govern the choice that men in the original position would exercise. The first is that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all". His second principle is that "social and economic inequalities are to be arranged so that they are both (firstly) to the greatest benefit of the least advantaged, consistent with the just savings principle,[14] and (secondly) attached to offices and positions open to all under conditions of fair equality of opportunity".

It is upon the framework of these two principles that the core of the Rawlsian postulate rests. On a procedural level, he suggests that these principles find acceptability to men in the original condition in that they comply with certain necessary formal conditions - they are general; they are publicly known and accepted; and they represent a final choice. In addition, he imbues them with a substantive acceptability in that they are compatible with the rational self-interest of men in the original position (or in Kantian dicta, they share coherence with the autonomous -

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(13) A Theory of Justice Section 46 p 302.

(14) By the "just savings principle", Rawls (at p 284 - 293) refers to the problem of justice between generations. Social assets are conserved and not wasted because men in the original position have a regard for future generations, or at least, for the next generation, their children.

as opposed to heteronomous - will of such men). Furthermore they are substantively adopted in that they afford to any individual in the original position the best opportunity of acquiring the "primary social goods" he desires - liberty, opportunity, wealth, income, powers, authority and self-respect - as well as permitting the freedom for him to follow to as great an extent as possible, the life pattern he wishes for himself.

Rawls ranks his two principles in sequence and contends that the first (that of liberty) has lexical priority over the second (that of equality), his rationale for this submission being that men in the original condition, in anticipation of the lifting of the veil of ignorance, would be more concerned to safeguard the social primary goods than to uphold or entrench equality between themselves. Rawls does qualify this proposition to an extent however by stipulating that such would be the choice of such individuals only if the society that would arise, was capable of guaranteeing and protecting that liberty.

As Dworkin correctly observes in Taking Rights Seriously[15] however, this adherence to these principles and to this ranking flows not from the actual interest of individuals in relation to the social position they subsequently assume, but from their antecedent interest (objectively) while they remain in the original position.

Perhaps the most innovative and controversial aspect of Rawls' theory

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[15] Taking Rights Seriously : Ch 6:Justice and Rights p 153.

is the "difference principle" he embodies in his second proposition, in suggesting that social and economic inequalities are contemplated and even ratified by the Social Contract. Far from constituting bland support for the *status quo*,[16] Rawls' submission in this regard is actually that men in the original position would weigh the competing risks attendant upon their choice, against the reassuring realisation that if they emerged worse off, the inequalities would be arranged "to the greatest benefit of the least advantaged" (ie his 'maximin concept').

Although Rawls' work has not been without substantial subsequent criticism, the brilliance and insight of his treatise have earned the respect of even his most ardent opponents - Crick for instance in New Statesman[17] contends "Rawls is profoundly wrong but almost perfectly relevant". Although that criticism is not adopted here, there are however many issues in Rawls' writing which remain unanswered. What exactly are the "equal basic liberties" he postulates in his first principle and how "extensive" are they to be? Presumably they correspond to a system of the Rule of Law, but should a *lacuna* of so central a nature find a place in a work of the stature of A Theory of Justice? Furthermore, does the psychology of men correspond to the model that Rawls constructs, that liberty and the primary social goods are valued so highly above equality? Although it is submitted that Rawls' interpretation is correct here, it is conceded that if this cornerstone is incorrect, so commensurately and even to an amplified degree will the structure that rests upon this foundation be shaky. Moreover, it has been questioned whether men in the original position would actually choose Rawls' two principles,

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[16] Cf the writings of Nozick et al, discussed in Appendix A.2 hereto.

[17] Vide Daniels op cit p xvi. Cf: Footnote 4 supra.

or whether instead they might elect an average utilitarianism - in this regard however the balance of support lies in favour of Rawls by reason of the fact that his principles are a logical postulate of reason based upon what appears to be a correct view of the psychology of men. Provided that it can be assumed that men would act rationally (which assumption appears both reasonable and necessary), it seems that Rawls' conclusions are valid.

Marxian critics (inter alia Miller)[18] have suggested that Rawls' postulates, and in particular the "difference principle", apply only in a non-egalitarian society practising a capitalist ideology - whether they may be correct is not an essential consideration for purposes of this exposition under a South African jurisprudential enquiry, since it is assumed herein that the contracting participants in any Western society would have adopted the capitalist norms. Lloyd[19] directs two principal criticisms against Rawls: firstly that his underlying hypothesis is wholly artificial and unrealistic; and secondly, that neither reason nor experience compels us to accept the risk profile that Rawls paints for men in the original position. In doing so, Lloyd perhaps loses sight of the fact that Rawls' treatise is not a theorem but a theory - neither the absence of final and conclusive proof nor the presence of assumptions detracts from its unquestionable merit as a rationale for the nature of (Western) society.

Perhaps the most significant criticism is voiced however by Dworkin who submits that the mere fact that a person would have consented to certain principles if asked, doesn't prove that he is bound by those principles if he hasn't been asked:[20]

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[18] Cf: Miller Social Justice (1976) Ch 8.

[19] Cf: Lloyd Introduction to Jurisprudence (1979) p 98.

[20] Dworkin op cit p 151.

> *"If for example I am playing a game, it may be that I would have agreed to any number of ground rules if I had been asked in advance of play. It does not follow that these rules may be enforced against me if I have not, in fact, agreed to them".*

Rawls' answer would be that it remains fundamentally important to consider the original position (albeit a hypothetical or postulated state) because the conditions it embodies are [21]

> *"ones that we do in fact accept. Or if we do not, then perhaps we can be persuaded to do so by philosophical reflection. Each aspect of the contractual situation can be given supporting grounds ... we collect into one conception a number of conditions or principles that we are ready upon due consideration to recognise as reasonable. These constraints express what we are prepared to regard as limits on fair terms of social co-operation. One way to look at the idea of the original position, therefore is to see it as an expository device which sums up the meaning of these conditions and helps us to extract their consequences. On the other hand, this conception is also an intuitive notion that suggests its own elaboration, so that led on by it, we are drawn to define more clearly the standpoint from which we can best interpret moral relationships. We need a conception that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us".*

Rawls' interpretation of the Social Contract in terms of his postulate of the Original Position, remains the leading modern treatise in the jurisprudence of the Social Contract - in the words of The New York Review of Books,[22] his Theory is lauded as being "the most substantial and interesting contribution to moral philosophy since the war", being "a critical and liberal philosophy ... argued with an assurance and breadth of mind that puts the

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[21] Rawls op cit p 21-2.

[22] Referred to in jacket of Rawls' A Theory of Justice.

book in the tradition of Adam Smith and Mill and Sidgwick". The two considerations that necessarily arise accordingly are:

(i) *Firstly,* what is the relevance of A Theory of Justice to South African society in general?

(ii) *Secondly,* what is its relevance to South African expropriation law?

As regards the *first* aspect, if it is true (as Rawls contends and as is supported here), that men in the original position would have agreed to the two fundamental principles that are to regulate their social co-operation, then it is submitted that South African society is structured on or from a basis that does not comply with the Rawlsian hypothesis (viz:that men in the original position were shrouded by a veil of ignorance from an awareness of what the future position is that they would occupy in the society that would be regulated by these agreed foundation principles). Although it seems that the deviation that South Africa displays from Rawls' two principles may legitimately be criticised on this ground (in that South Africa is not (as Rawls would call it) 'a just or nearly just society'- rather, by his standards it is palpably unjust), it appears however that a logical difficulty is perhaps presented in directing criticism at the South African society itself, if such is based purely upon its failure to conform to the hypothesis of the Original Position. Until this hypothesis is conclusively confirmed, objection upon this latter regard cannot in logic be final.

Given accordingly then that certain reservations are capable of being voiced only provisionally or tentatively (being contingent upon the validity of the Original Position postulate), it is noted that they are nevertheless not

irrelevant. It seems in the South African society, if Rawls' hypothesis applies, that the only men that are postulated as being in the original position are those men that know (or assume) that they are white. If this is so, then they are excluded from having purely authentic judgments as inputs into the process of reflective equilibrium, since their prior knowledge (or assumption) that they are white, and their contract (or contractual clause) *inter se* that a greater share of the social primary goods will be accorded to whites, will have as its effect, that their pursuit of rational self-interest will fall short of "the most extensive total system of equal basic liberties compatible with a similar system of liberty for all", as Rawls advocates in his first principle. That the "social and economic inequalities" that Rawls anticipates in his second principle, do in fact arise in South African society, and that equality is subordinated in South Africa under a spurious "separate but equal" (which is really an unequal and non-liberal) doctrine,[23] certainly do not indicate that there is partial compliance with Rawls' theory. In fact, they serve rather to affirm that Rawls' two fundamental principles are largely (perhaps totally) ignored by the South African legislature, primarily since those postulated inequalities are not "arranged so that they are both to the greatest benefit of the least advantaged ... and attached to offices and positions open to all under conditions of fair equality and opportunity".

As regards the *second* aspect supra (the relevance of Rawls' A Theory of Justice to South African expropriation law), it is submitted that it is both significant and tragic that the Expropriation Act 63 of 1975, enacted three short years after the publication of Rawls' work, contains virtually no adherence to the

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[23] Cf Section 1.3.8 supra. Vide also main text in Section 2.7 infra at (8).

guidelines that Rawls set out, and that 'justice as fairness' finds little (if any) expression in South Africa. The statutory formulae, for instance, for compensation laid down in Section 12 of the Expropriation Act (read inter alia with Sections 9(1), 13 and 22), promulgate a framework for compensability that has no sight of Rawls' "equal right" nor of his "equal basic liberties compatible with a similar system of liberty for all". The expropriatee's right (if it exists) to compensation rests upon the whim of the legislature and all the attendant deficiencies in the questionable formulation and expression of its intention - some classes of expropriated unregistered rightholders are compensated, others are not; some real rightholders are expropriated separately, others are not; sometimes compensation is awarded, and sometimes it is not considered necessary, and worse still, not even considered desirable. (Cf Appendix to Section 3.7).

Expropriations under the Community Development Act[24] read with the Group Areas Act[25] contain a critical fatality for any proponent of a view that Rawlsian justice as fairness operates in South African society in the forum inter alia of expropriation. It would seem illegitimate that expropriation for the establishment and/or consolidation of Homelands and Group Areas, could be held to be a lawful purpose justifying public action and being in accordance with the fundamental principles of justice under the Social Contract: where firstly, many (most) of the prejudiced expropriatees are members of racial groups that were not parties to the aberrated 'Social Contract' postulated in South Africa and embodied in the legislation; where secondly, the absence of a meaningful veil of ignorance on the question of race has

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[24] Act 3 of 1966.

[25] Act 36 of 1966.

precluded the authentic judgment of those who might be postulated to be in the original position; where thirdly, both of Rawls' principles are fundamentally violated; and where finally, social and economic inequalities are arranged, not to the greatest benefit of the *least* advantaged, but actually to the greatest benefit of the *most advantaged*.

The 1975 Expropriation Act (as is much of South Africa's legislation) is an extreme exercise in positivism, and given the political continuity of a party-based government and the *de facto* sovereignty of the White Parliament, as prevail in South Africa, the opportunity and likelihood for the success of the necessary remedial changes, is often so remote that the advocate of their implementation is frequently disheartened at the prospect of undertaking such an exercise. If a system based on the American principles of 'just compensation' had application in South African law, or if the Fifth and Fourteenth Amendments to the United States Constitution had a statutory parallel in South Africa, the likelihood that the Rawlsian principles would not only be recognised, but above all practised, in our legal system, would be promoted.

That there is not an adherence to Rawls' Theory, that the traditions of naturalism and historicity have been abandoned, and that reliance upon Roman Dutch insight and guidance in expropriation matters has been blighted by Joyce and McGregor v Cape Provincial Administration,[26] does not deny the merit or necessity of remaining aware of the principles to which we ought to adhere. Ultimately, John Rawls has been to the Social Contract what Gustav Radbruch[27] was to naturalism - a revival and a rejuvenation,

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[26] 1946 AD 658. Vide discussion supra at Sections 1.2.3 and 1.6.

[27] Cf Section 1.3.8 supra.

a clarion voice against the sterile positivist acceptance of law and justice as it is enacted, and a herald call to recognise justice as the fairness it ought to be. His principles are accordingly a powerful reminder of the form and structure that our legal and social systems ought to assume.[28]

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[28] Vide Appendix to 3.7 : Recommendations for Statutory Reform.

2.7 THE SOCIAL CONTRACT IN ITS OPERATION IN SOUTH AFRICAN LAW AT PRESENT - A CONCLUDING PERSPECTIVE WITH REFERENCE TO DOMINIUM EMINENS

The Social Contract theory is too powerful a movement in the natural law, both as regards its tradition and evolution, and as regards its substance and expression, to be ignored or rejected by South African society. Contractarianism motivates and actuates an understanding of the nature of the State and the origin of its powers (in particular that of dominium eminens), and articulates a recurrent consistent and cogent theme that is not only a statement of legal history but is also a guideline which ought to be of considerable value and force in legislative and social planning at present and in the future.

The reconciliation of the different emphases and inflexions within the development of Social Contract theory, is not without attendant difficulty, but in overview four distinct phases broadly emerge. As a prelude, the first contractarian melodies came intermittently over two millenia,(1) from the time of the Greeks to the sixteenth century, during which period natural law and divine law were enjoined. In the second phase,(2) the rationalist school in the seventeenth and eighteenth centuries, orchestrated the emergence of Social Contract theory proper - although retaining a deep Scriptural commitment on a personal level, they postulated law and society as man-made and as being without direct metaphysical origin - tenets of natural law remained however superior and binding upon State and Citizen alike. The third phase(3)

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(1) Vide Section 2.2 supra.

(2) Vide Section 2.4 supra.

(3) Vide Section 2.5 supra.

of the movement - transcendental idealism - introduced a fundamentally philosophic perspective and postulated the unfolding of world history as being in accordance with a cohesive continuum regulated by a dominating 'Idea'. In the final phase[4] in modern times, refinement and culmination came to the historical symphony in the theory of justice as fairness, as expressed by Rawls, and gave the cue to the prominent position that contractarianism must and will assume in jurisprudence and political philosophy in the future.

What however is the application that Social Contract theory has in South African society? In the first place, it voices the warning that South African law (in regard to expropriation and also other matters), is assuming the features of a positivist frenzy by a questionably sovereign white legislature, to the extent that fundamental naturalist and contractarian principles are ravaged violated or abandoned. In the second place, it suggests that the draconian excesses of an apartheid-centred system (in Group Areas expropriations), and the positivist heyday (in the statutory denials or exclusions of compensation under the Expropriation Act),[5] ought to be eliminated from our legal framework. Finally, it is noted with deep regret and censure, that in South African law as it exists (or in the mind of the legislature as it exists), contractarian tenets have nowhere near the degree of prominence their theoretical foundation and substance demand - rather it would seem that South African society has been framed by the White Parliament of this and preceding generations, in a way almost devoid of recognition of contractarian theory.

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(4) Vide Section 2.6 supra.

(5) Act 63 of 1975, as amended, eg: Section 9(1), 13 and 22.

When the application in South Africa of contractarianism is viewed from the perspective of Social Contract theory proper,[6] it would seem in the first place that there has been no *pactum unionis* of all the Citizens into one body - to the contrary, our new Constitution purports (illegitimately it is submitted) to validate racial separation by a 'pact' of disunity unilaterally imposed on the non-represented (Black) Citizens. In the second place, it would seem that although there has undeniably been a subjection of the people by the State (in some instances of a gross degree), there has been no antecedent or subsequent *pactum* in this regard by all the Citizens legitimising this, and nor is there a legislative recognition of the naturalist limitations imposed on subjection by Locke and Rousseau. Not only is such a *pactum subjectionis* absent on the level of historical fact, but also as a postulate of reason in the sense that not all the people, nor a majority thereof, would have consented had they been so consulted - to the contrary, the *Volonte Generale* stands strongly opposed, it would seem, to the machinations of our present government.

When viewed further from the Rawlsian perspective,[7] these conclusions extended from the writings of the Social Contract theorists proper, are confirmed and compounded. Not only does Rawls' first principle (of liberty) lack expression in our country but so does his second principle (of equality). The first ideal of an "equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all", is in South Africa aberrated to become a separate but unequal 'right' (denied on occasion) under a positivist system in which liberty exists only to the

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(6) Vide Section 2.4 supra.

(7) Vide Section 2.6 supra.

extent that it is statutorily recognised. The warp imposed on Rawls' second principle is that although "social and economic inequalities" of an extreme form exist, these are not legitimised by being arranged firstly "to the greatest benefit of the least advantaged", and secondly by operating "under conditions of fair equality of opportunity"- in contrast, the separate but unequal dogma in practice confers the greatest prejudice upon the least advantaged, and denies them their rightful access to lawful instruments for political and social change.(8) We are led by Rawls by extension accordingly to the conclusion that 'justice as fairness' does not exist in South Africa at present (by reason inter alia of our social structure and our political oppression of the Blacks), and further to the ultimate realisation that under contractarian theory, our society is not just.

In final analysis, it seems that a political sovereign is legitimate if it has a mandate from the People - and this would mean all the people or a majority thereof. If a people is united by *pactum,* and agrees further by compact to submit to the State (subject to the qualification that their best interests as a body be upheld and promoted), and if Rawlsian Liberty and Equality are manifested, then it would seem that the relation between State and Citizen, and the derivative relation between Citizens and their Property, is just from a liberal standpoint - if not, it would seem that the authority and legitimacy of the *de facto* oppressor sovereign is severely to be questioned. Finally, it would seem that if such a sovereign (as in the latter case) exercised its powers, inter alia

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(8) Vide Section 1.3.8 supra.

dominium eminens,in compliance with naturalist principles, such exercise could be condoned in that there is a correspondence with the *Volonte Generale*; but if naturalism is thereby transgressed, the consequent positivist abuses are indefensible.

The relation between Citizens and their Property in South African law remains of fundamental importance and worthy of further consideration.(9)

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(9) Vide Chapter 3 infra.

CHAPTER 3

AN ASSESSMENT OF THE CHANGING NATURE OF PRIVATE OWNERSHIP, THE RELATED DEVELOPMENT OF DOMINIUM EMINENS, AND THE POSITION IN SOUTH AFRICAN LAW AT PRESENT

CHAPTER 3

THE RELATION BETWEEN CITIZENS AND THEIR PROPERTY : AN ASSESSMENT OF THE CHANGING NATURE OF PRIVATE OWNERSHIP, THE RELATED DEVELOPMENT OF DOMINIUM EMINENS, AND THE POSITION IN SOUTH AFRICAN LAW AT PRESENT

3.1 INTRODUCTION : AN HEGELIAN LIBERTARIAN AND NATURALIST PERSPECTIVE

In the continuum of history, the relation between Citizens and their Property has not been static or fixed - rather history has revealed it as being evolving and shifting. The prevailing conception of the state, a host of political economic and sociological factors, and the degree of recognition of private rights within the society in question, inter alia, have a bearing upon it.

In the property law forum however, this relation is assessed on two levels. In the first place, the public law proprietary powers of the State, being superior to private dominium, have a significant influence - this aspect is discussed in Section 1.3 supra. In the second place, on the private law level, the changing nature of private ownership and the related development of dominium eminens, reveal themselves as the central determinants of this relation. It is the second field of enquiry that is undertaken herein, and the elucidation it affords, is directed towards an assessment of the relation between Citizens and their Property in South African law at present.

The standpoint presented herein is Hegelian, libertarian and naturalist. On one level, it is submitted that the vision of ownership, like history itself, is experiencing the synthesis that Hegel postulated.(1) On another level, the writer has not addressed this exposition to a positivist analysis of expropriation legislation as it stands - instead, the naturalist tenor has been adopted, in that the emphasis is upon what *ought* to regulate our expropriation law and our conception of private ownership; and inter alia in the advocacy that it is the Rule of Law that should be upheld, the liberal orientation is apparent.

True to the Hegelian visions of a dominating World Spirit and of the Idea of History, a subscription to a cohesive historical evolution supplants the alternative view of "a confused whirl of senseless deeds", and substitutes the realisation that "the history of mankind ... (is) ... the process of development of humanity itself".(2) Current events and historical backdrop weld together to form present practice, which, it is submitted, ought to reflect a recognition of the continuous historical unfolding in which we are witnessing participants. The words of Professor Hugh Trevor-Roper are noted as a basis for the expository method adopted:

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(1) Vide Section 2.5.4 supra.

(2) Cf: Engels and Marx: eg in commenting on the Hegelian philosophy which they developed, they stated in Herrn Eugen Dühring's Umwälzung der Wissenschaft (1878) (transl. by Burns New York 1935 at p 30):

> *"From this standpoint (of Hegel's philosophy) the history of mankind no longer appeared as a confused whirl of senseless deeds of violence, all equally condemnable before the judgment seat of the now matured philosophic reason ... but as the process of development of humanity itself".*

> *"The great questions of histor(y) ..... admit no simple and perhaps no single solution. Historical change is indivisible, and its processes cannot usefully be studied in isolation ..... All we can do is study the facts in relation to each other, keeping a sense of proportion by making comparisons ... both in time and space ..... as we go along. Universal history obliges us to omit much. It can never give a complete picture. It squeezes out some of the drama, some of the richness of ... history. It forces us to compress, sometimes to desiccate. On the other hand ..... if it is ... (carefully) ... presented, we need not lose the drama, the richness, after all ... (We thereby) can restore to history that colour, that sense of pace, that extra dimension of social life...."* (3)

It was in man's transition from his natural condition into the societal collective, that the Social Contract theorists postulated that the institution of private ownership came into being.(4) Dominium in the private law originated accordingly at the time of the inception and formation of the State, and co-existed from then with the State's public law power of dominium eminens.(5) Prior to that time, although property was capable of possession by individuals in the natural state, it was suggested that *dominium plenum* was not then conceivable, since the universal recognition of the real right of private ownership and the coercive collective reaction against any infringement thereof, required the prior existence of the State itself.

It is submitted that the presocial phase, with on the one hand its sovereignty of each individual and on the other its "*Continuall Fears*", constitutes an

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(3) Professor H Trevor-Roper: Foreword to Larousse Encyclopaedia of Modern History from 1500 to the Present Day 3 ed Hamlyn Middlesex (1973).

(4) Vide Section 2.4 supra.

(5) As discussed in Chapter 1 supra.

embodiment of the first two Hegelian phrases.[6] Societalisation under the Social Contract and the inception of the State would accordingly represent (consistently with Hegel's thought) the synthesised consequence of the opposing forces dominating man in the natural condition - in turn they illustrate perhaps the first instance of the operation of the model of sublimation Hegel contemplated.

Locke[7] and the theorists that adopted his property-based emphasis, submitted that the State was conceived for the function and purpose of preserving private property,[8] and recognised that the violation of the sanctity of private ownership was to exist only in the most extreme of circumstances - the exercise of dominium eminens (as Grotius noted)[9] was such a *caveat* to this general principle. The theory that the jurisprudents evolved, was not only the consequence of the unfolding of social history and of the changing nature of property ownership that had preceded its statement, but also the catalyst that was to accelerate further changes in the interpretation of the relationship between Citizens and their Property, it emerging that the competing antithetical precursors of private interest and public need, found a synthetic culmination and sublimation in the State's power of expropriation. The prevailing nature of private ownership has a substantial effect upon the nature and exercise of the State's power of dominium eminens, and on the amplified (synthesised) view[10] thereof that has emerged.

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(6) Cf Sabine op cit quoted in Section 2.5.4 at footnote 7.

(7) Vide Section 2.4.4 supra.

(8) Cf: Entick v Carrington Common Pleas(1765)19 State Trials 1029; in Section 2.4.4 supra at footnote 32.

(9) Cf Section 1.1 supra at footnotes 2 and 3.

(10) Vide Section 3.5.2 infra.

The historical and natural law background to the jurisprudential enquiry concerning the origins of private ownership, assumes significance and relevance in the context of expropriation, as do the modern jurisprudential contributions,[11] in that they together assist in portraying the way in which the relationship between State and Citizen has developed. Not only is the nature of the real right of private ownership delineated by that relationship, but clarity arises also thereby regarding the circumstances in which State interference with this private right (by dominium eminens) is justified in the pursuit of public purposes.

Central to the vision of law under the naturalist school (in its classic formulation), is the relationship Man bears to the rationally-regulated (or alternatively Divinely-inspired)[12] cosmos and universal order that surrounds him, without regard to the tenets of the actual or positivist law that dominates his secular existence. Although the relative emphasis in the naturalist development has vacillated through the centuries, the broad movement that has been evidenced this millenium has been twofold. *Firstly* it has been from a mediaeval metaphysical view of Man's universal inter-relationship, based upon a Higher and Divinely-ordained law from which no positivist excursion was to be permitted, to a less deistic and more tangible conception based upon reason and the rationality of men, which latter conception

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(11) Naturalism has found a significant restatement in John Finnis' Natural Law and Natural Rights (1980) discussed infra. It is considered expedient however for expository purposes to defer the analysis of his writing to a later stage herein.

(12) The *ius divinum* emphasis is articulated in the earlier conceptions as discussed in Section 2.2 supra.

required that the movements of positive law ought to be directed towards the expressions that naturalism rationally predicated. *Secondly*, as regards property, the movement commenced this millenium with the theocratic dogma that private property ownership was innately sinful; moderated in the Thomist and Reformist acceptance and even glorification of private property as an institution; and emerged in the modern era in the opposing individualistically-based Western and socially-based Marxian philosophies of property ownership. It is noted however that since Marx's dialectic(13) has exercised little direct influence on the South African property law development, it lies beyond the perimeters of an assessment of expropriation in South African jurisprudence - for this reason, the writings of Marx(14) are mentioned herein only in passing.

The broad movement in any millenium is however capable of a more detailed analysis in terms of the Hegelian model of history.(15) The overview of

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(13) It is noted that this exclusion stands in contrast to the relevance the dialecticism of Hegel contains for South African jurisprudence. Whereas Hegel remained largely within the philosophic forum, Marx's views had definite political economic and proprietary overtones. As Sabine notes in A History of Political Theory (3 ed at p 779):

> *"Hegel's metaphysical logic, therefore was an assumed major premise in the whole Marxian argument, (but) with this difference ... that Marx and Engels substituted a materialistic for an idealistic metaphysics".*

(14) A wealth of literature abounds in which the writings of Marx are assessed, and it is to such further sources that the reader is referred. Vide inter alia the select bibliography included in Sabine A History of Political Theory 3 ed p 804.

(15) Cf: Section 2.5.4 supra at footnote (4) in the main text thereat, where Hegel's words are recorded:

> *"What matters is to perceive in the appearance of the temporal and the transitory, the substance which is immanent, and the eternal, which is actual ...".*

the evolution of private ownership, indicates that the phases of thesis antithesis and synthesis do exist, and are appropriately analysed accordingly. The contractarian perspective reveals that this tripartite pattern has manifested itself in the prevailing conception of property ownership since the earliest times;[16] presocial man, classical civilisations and the Dark Ages, perhaps represent respectively also an early such unfolding.[17] Subsequently, as is elaborated infra, a similar development has been repeated cyclically - it is noted however that the instances of synthesis recorded herein are merely illustrative and are not exhaustive.

Whereas the naturalist-positivist debate has alternated, possibly with an emphasis on the former school, the property debate today would appear to be experiencing periodically (or yet to experience finally) the synthesis[18] that Hegel advocated. This assessment, the consideration of the evolving institution of private ownership, and the analysis of the roles that expropriation has played, will play and ought to play in the relation between Citizens and their Property, are best determined (in accordance with Hegelian thought) by tracing the property debate from its font.

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[16] As discussed in main text supra at footnote (6).

[17] It is submitted further that although the above example does not correspond exactly to the description of the three phases as expressed by Sabine (in Section 2.5.4 supra at footnote 7 in the main text thereat), it would seem that this illustration (and the subsequent examples infra) correspond nevertheless with the model Hegel postulated. Thesis and antithesis appear more to connote a situation of contraposition or opposing interpretation, than the 'happy' and 'painful' qualities with which they are imbued by Sabine.

[18] Vide Section 3.6 infra.

3.2 GREECE AND ROME - THE DAWN OF THE PROPERTY DEBATE

It is in Greece and Rome that the dawn of the property (and expropriation) debates came,[1] since on the one hand it is there that the first developed concepts of private ownership arose, and on the other hand, it is from these foundations that the modern Western conceptions are derivative.

Characteristically, the interpretation placed by the ancient Greeks upon Man and upon the institution of property was philosophical, and although, in Aristotle, a transition took place from the Sophist's separation of an ordered nature and an individualistic Man, to their fusion under the Stoics with Man being embraced within the totality of nature, property remained consistently a servient instrument to be directed in its enjoyment, justification and limitation towards those higher naturalist principles, to which it was subordinate, but through which Man's fulfilment was permitted.[2] The dominant distinction then between men and things lay in Man's capacity of and facility for reason, although both men and things were acknowledged as creations of a (pagan) divinity. The ownership right that was accorded by the Greeks to men over their subject property was inalienable to the extent recorded by J Walter Jones in his treatise The Law and Legal Theory of the Greeks,[3] when he stated that expropriation without compensation "was

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(1) It has been submitted by some (inter alia, the French jurist Merlin de Douai, circa 1800, and more recently by Davies Law of Compulsory Purchase and Compensation (3 ed (1978) at title page) that one of the earliest recorded references to expropriation came in the Bible in 1 Kings XXI regarding King Ahab's acquisition of Naboth's vineyard. Expropriation would seem accordingly to have found an exercise earlier, but it is from the time of the Greeks that its development is sound and traceable.

(2) Cf 12 Encyc.Soc.Sci. at p 533.

(3) 1956; at p 198.

regarded as inconsistent with the nature of the institution of property".[4]

Whereas the contribution of the Greeks in the evolving concept of property lay in the philosophy of their abstract assessment, Rome endowed the broad development with an empiricism and with a practical and operating reality, but fell short perhaps of the quality of the Greek thought and principles. Although Roman law included a possibly uncompromising and unwavering absolutism in its early unfolding in the XII Tables, Justinian's codification released it from the austerity of its earlier rigid formulation , and brought into the law in general and into that of property in particular, an admirable clarity and directness. Roman property law however retained (even in a theoretical sense), as Jolowicz points out in Historical Introduction to Roman Law,[5] a marked division between the *jus gentium* and the *jus naturale,* slavery being a material point for distinction. Gierke in Deutsches Privatrecht[6] criticised the fact that Roman law conferred 'limitless' rights upon the owner, but this latter submission has been disputed and convincingly refuted by inter alia Mann Outlines of a History of Expropriation[7] and by Schulz in his Principles of Roman Law.[8]

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(4) Cf: McNulty op cit p 555 at 556; Gildenhuys op cit p 22. Vide also II Encyclopaedia Britannica (1952)(Caput: Aristotle):

> *"If any of the seceding party (ie discontented Athenians) wished to take a house in Eleusis, the people would help them obtain the consent of the owner; but if they could not come to terms, they should appoint three valuers on either side, and the owner should receive whatever price they should appoint."*

(5) P 103 et seq

(6) Vol II (1905) at p 348 and at footnote 2 p 360.

(7) 1959 (75) LQR 188 at 189.

(8) 1936; at p 151.

Although Gierke's interpretation may have been too extreme, private ownership did possess certain qualities in Roman law that caused Schulz later to retract the severity of his former renunciation and to conclude (perhaps now in overstatement in Classical Roman Law[9] that Roman ownership was "sancrosanct". What is clear however is that Roman law, although not manifesting the elevatedness of the Greek schools, was inspired with individualism in its conception of ownership, to the extent that a vested right *(jus quaesita)* was accorded a more substantial protection and respect than exists in South African law.

The legal writers and historians,[10] although at pains to furnish any

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(9) 1951; p 355.

(10) In this regard, vide inter alia : Kaser, Das Römische Privatrecht I (1955) 343; Schulz Principles of Roman Law (1936) p 161; Gildenhuys op cit p 23 at footnote 15; Mann Outlines of a History of Expropriation 1959 (75) LQR p 188 at p 193; Bruns Fontes Iuris Romani 7 ed p 193; J W Jones Expropriation in Roman Law 1929 (45)LQR p 512 at 525; Buckland and McNair Roman Law and Common Law (2 ed) (Revised by Lawson) (1965) at p 95-6 where (for instance) it is stated:

> *"There has been much discussion in recent times of the question whether Roman law allowed expropriation for public utilities. Here it is important to draw a distinction which has been somewhat disregarded. In historical times, there was no restriction on the powers of the supreme legislature. It could expropriate for any purpose. But in fact, 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* possessores *holding, in practice permanently, but technically at the will of the State. Augustus hesitated to expropriate ... (and) ... (e)ven the later Emperors expropriated sparingly. Moreover there is a difference between the Supreme legislature and an executive department, and it does not appear that any magistrate or official had the compulsory powers which are vested in so many subordinate authorities in our law. On the other hand, necessity and utility are different things, and there is no doubt that officials of various classes had large powers of destruction of property for religious military or police purposes.... But these and similar cases are all of overriding necessity".*

considerable classical authority, appear in unison that expropriation, while being extremely rare in Rome, did take place[11] (and indicate further that there was an acknowledgement of the distinctions that exist between the various public law proprietary powers of the State,[12] although this analysis there was not extensive and was not upon a formal[13] basis).

Notwithstanding the paucity of its appearance, frequently cited examples in substantiation of the existence of dominium eminens in Roman law, include the roads and aqueducts[14] extending across the breadth of the Empire, the straightness of which presupposes that expropriations occurred where they passed through regions under a recognised private ownership.[15] Perspective is provided in Encyclopaedia of the Social Sciences in the words:[16]

> *"Nor was a sancrosanct control over lands and chattels immune to the conspiracy of circumstance and logomachy. As early as the Twelve Tables, a* public interest in private possessions[17] *was recognised; the city owner could not build to the line; the pathway across the field was to be kept open; access to water from private wells was not to be denied. The growth of commerce brought in contract, introduced usages of trade and transformed (property from) a customary into a pecuniary institution. As time passed, a most pretentious absolute was resolved into separate rights".*

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[11] Vide eg Annals of Tacitus Book I p 75; cited in North Little Rock v Pulaski County Circuit Court, Arkansas 393 SW 2d 268.

[12] As is set out in detail in Section 1.3 supra.

[13] As is illustrated in the last portion of the extract supra at footnote (10) from Buckland and McNair op cit.

[14] Bruns op cit p 193; criticised however by Buckland and McNair op cit at p 96.

[15] Cf: Bijnkershoek Quaestiones Juris Publici II regarding Marcus Licinius Crassus' objection to the construction of an aqueduct through his farm.

[16] 12 Encyc.Soc.Sci p 533.

[17] Emphasis added.

While the confines of this exposition preclude any further detailed synopsis of the jurisprudential and historical evolution of property and its ownership in the Roman law, suffice it here to consider a single remaining issue pertinent to the deeper understanding of dominium eminens. In the words of Mann:[18]

> *"(a)lthough drawing a clear distinction between public and private law, and not concerning themselves with the former, classical lawyers did not include in the discussion of dominium such limitations as public law imposed".*

It was in their endorsement and adoption of this Romanist stance, that the subsequent critics of contractarianism (such as Sir Henry Maine),[19] were to find substance for their rejection of the Social Contract - this accounts too in part for the common failure to consider this theory[20] as a jurisprudential foundation for dominium eminens, and for the frequently overlooked or omitted restrictions and limitations the State's public law powers[21] place upon private dominium.

The Roman institution of property (and its ownership) was highly individualistic and accordingly was largely confined to and considered within the parameters of the private law framework. It was for this reason that the conflict between the private real right of ownership and the State's public law dominium eminens did not find the soil for its fruition in depth in the

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[18] Outlines of a History of Expropriation 1959 (75) LQR 188 at 190.

[19] Cf discussion under Section 2.1 supra.

[20] Cf Section 1.2.5 supra at footnote (1).

[21] Cf Section 1.3 supra.

Roman law. To a large extent, the Roman conceptions of property generally were transmitted into the South African law by the Roman Dutch jurists, and today correspond to some considerable degree with their South African counterparts. In the context of eminent domain, the Roman law affords sparse authority, the reason for this perhaps being that it has been as a result of the progressive acceleration and growth of our modern societies that a concomitant present frequency of expropriations has arisen, and that the inviolability or otherwise of private ownership now assumes a vital importance in modern jurisprudence[22] in South Africa and elsewhere. Rome remains however a formative stage in the Hegelian model.

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[22] Cf Section 1.2 supra.

3.3 THE CHRISTIAN VIEW OF PROPERTY IN MEDIAEVAL EUROPE - THE TRANSITION FROM DARKNESS TO THEOLOGICAL ENLIGHTENMENT, AND FROM A THEOCRATIC TO A NATURALIST IDEOLOGY

3.3.1 THE DARK AGES AND THE EARLY MEDIAEVAL PERIOD

Relief crept in during the philosophical spiritual and cultural darkness following the fall of Rome (476 AD), in the form of an emergent Church-dominated mediaeval order, in which the earlier pinnacles of individualistic assertion permitted under the natural law were at the outset immersed in the Eucharistic chalice, and the former prominence of the secular *respublica* was enyoked under the hegemony ecclesiastical.

True however to the traditions of the continuum of history, it was that the foundations of the mediaeval philosophies were laid in Rome's twilight years. Inter alia, St. Augustine's (354-430 AD) outline of eternal law in Reply to Faustus the Manichean[1] as:

> "... *the divine order or will of God which requires the preservation of natural order, and forbids the breach of it...*",

was in the centuries the followed interpreted (inter alia in the Decretum Gratianum c 1140) in such a way that: identified the law of nature with the law of God; founded a metaphysical subordination of the State under the paramountcy of the Church; stressed that it was the Fall of Man from Grace through the doctrine of Original Sin that gave rise to the need for institutions such as the State; posited Man in the Divinely-inspired cosmos as being

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(1) XXII 27.

without significant independent or individualistic aspect and as being merely an expression within the Divine Creation; and property, as expressed by Carlyle in Mediaeval Political Theory in the West[2] came to be seen as the "result of the vicious desires and impulses of men", and its regulation was "the means by which these vicious impulses might be restrained or limited". In the view of the Christian Fathers, property was accordingly both a result of sin and a Divine remedy for sin - a metaphysical dilemma, resolved for mortal sinning man through his unqualified devotion to the tenets of Church dogma, and rationalised for such man (as for example in respect of slavery) (in the words of Dias Jurisprudence)[3] as "a form of collective retribution for original sin".

The individualistic conception of property ownership as had existed in the Roman law, came accordingly in the early Middle Ages to know a crucial restatement in theocracy. When Rudolf van Ihering later attacked the Romanist view in his Der Zweck im Recht[4] as expressing "the insatiability, the greed of egoism", the early mediaeval interpretative transformation (or antithesis) was not what he would have proposed. His emphasis was upon the 'social idea' of property, to which expropriation afforded a consistent solution to

> *"the task to reconcile the interests of society with those of the owner; it (expropriation) renders property a practically viable institution; without it, property would become a curse upon society".*

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(2) Vol 5 p 10.

(3) P 566.

(4) 2 ed (1884) Vol I p 527 - 34; as translated by Husik Law as Means to an End New York (1924) p 391 - 397.

3.3.2 THE FEUDAL AND THE ALLODIAL FORMS OF OWNERSHIP

Instead of the movement Von Ihering would have directed had he held the power to orchestrate the historical unfolding, in its place and as an accompaniment to the ecclesiastically-based mediaeval philosophies, the nature of immovable property ownership underwent a significant change from an allodial form to that form prevailing during the feudal period in Europe. In modern times, history has turned full circle again to the allodial form of property ownership in which the private rights of *dominium plenum* are inviolable and indefeasible (save for the overriding public powers (inter alia of dominium eminens) vesting in the State and exercisable in the public interest). In the words of Ring in Valuation of Real Estate, modern land ownership is allodial:

> *"(the) rights to the control and enjoyment of property under allodial ownership are inviolate and exclusive, except for superior and sovereign rights of government exercised for the mutual welfare of the community, state or nation".* (5)

In Dissertations on Early Law and Custom,(6) Sir Henry Maine, having first considered the nature of tribal ownership in ancient societies, analysed in depth the distinction between allodial and feudal land. The allod in his view was "equivalent to or directly descended from the share which each man took in the appropriated portion of the domain of the group to which he belonged ... this share was not at first a definite area but what we should now call a fraction or *aliquot* share of the divisible land ... and each share

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(5) Ring, Valuation of Real Estate p 330.

(6) (1891) p 338 et seq.

very slowly became appropriated to particular families". Since, on the other hand, feudal tenure was tenure in the strict sense - that of holding land rather than owning it, with a *dominium directum* vesting in the Sovereign and merely a *dominium utile* vesting in the feudal land grantee[7] - Maine was led to the conclusion that:

> *"(n)othing can be more singularly unlike than ... the Roman (which is the developed allodial) view of land as essentially divisible, ... (and) the feudal view of land as essentially impartible...."*[8]

What Maine had in mind was that under allodial ownership, there is (in his words) a "long succession of partial ownerships, making up together one complete ownership"- in these references to the 'divisibility' of Roman ownership, he impliedly lends his support to the 'bundle of sticks' analogy later enunciated.[9] On the other hand, under feudal tenure, all land vested in the Sovereign or Crown, and private persons acquired the right to hold (as opposed to own) only such land as had been the subject of a grant to them from the Crown. Accordingly it would appear that under an allodial system of ownership, expropriation would entail an exercise by the State of its power of dominium eminens, whereas under the feudal form, since the private right was less than full ownership, the State's interference therewith would be of a lesser degree also - assuming the form more of a revocation of the original grant[10] than of the inroad upon the sanctity and inviolability of private ownership that expropriation in its modern context may appear to constitute.

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(7) Cf Mann 1959 LQR 188 at 191.

(8) Maine op cit p 340.

(9) Vide Section 3.6 infra.

(10) Cf original proprietary theory discussed at S 1.2.2 supra.

3.3.3 THE LATER MEDIAEVAL PERIOD AND THOMAS AQUINAS

A significant departure from the traditions of the early Christian Fathers - a transition from theocratic harshness to cosmological benevolence, from darkness to theological enlightenment, and from Scriptural authority to naturalist ideology - emerged in the writings of St Thomas Aquinas (1225 - 1274) in his view of private property and the State.

Aquinas envisaged an interactive and hierarchial system[11] comprising eternal law, natural law, divine law (Biblically revealed), and human law. In Summa Theologica[12] all four branches of the Thomist system were embraced in his statement that law is:

> *"nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated".*

In so stating, Aquinas afforded a cue for both the major trends that were to arise in the centuries that followed - firstly the transformation of the formerly exclusively higher law basis of the natural law, into a less deistic system based upon the reason and rationality of individualistic men; and secondly, in his words "by him who has the care of the community", he presaged the custodianship or trusteeship aspect (vesting in the State) that was explored by the Social Contract theorists.[13] In respect of property law, the writings of Friedman[14] afford a perspective:

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[11] As Dias comments in Jurisprudence p 569.

[12] I 2 Q 90 Art 4.

[13] Cf inter alia Lucas de Penna et al discussed supra at Section 2.2

[14] Legal Theory p 59 and 60.

> *"On the right of property, St Thomas' teaching stands between the unconditional rejection of private property by the Fathers of the Church and the later elevation of private property into a natural God-given right".* (15)

In the proprietary rejuvenation under Aquinas, came a synthesised incorporation of the former Roman and early mediaeval visions of property. No longer were these institutions seen as being innately sinful (as in the early mediaeval period) and their reconciliation with and acceptance within the Christian philosophy constituted a core upon which extensive embellishment has subsequently(16) and to the present day(17) been made within the Western societies.

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(15) Furthermore, as Laski notes in Introduction to Politics p 19:

> *"For Thomas Aquinas, law is a mirror wherein is reflected the divine reason which planned and governs the universe. In obeying it, as men ought to obey it, they are clearly bringing their conduct into accord with the plan upon which the good order of the world depends".*

(16) Cf: inter alia, the writings of John Calvin, discussed under Section 2.2 supra in main text at footnotes 15 to 18.

(17) Cf: the writings of John Finnis, discussed infra at Section 3.3.4.

3.3.4 THE SUBSEQUENT INFLUENCE OF THOMAS AQUINAS AND THE NATURALIST WRITINGS OF JOHN FINNIS

St Thomas Aquinas' writings have exercised a profound influence upon naturalist thinking in the West this millenium. In recent times, Finnis' Natural Law and Natural Rights[18] owes a great deal to the Thomist texts as a foundation, although as Finnis states:[19]

> *"... my prior concern is to give my own response to (the) problems (of human good and practical reasonableness) ... in this book, nothing is asserted or defended by appeal to the authority of any person or body. I do quite frequently refer to Thomas Aquinas, because on any view he occupies a uniquely strategic place in the history of natural law.... But, while there is place for appeal to, and deference to, authority ... (m)y arguments ... stand or fall by their own reasonableness or otherwise".*

Finnis' contribution to modern naturalist thinking parallels that of Aquinas in his time. As Wacks notes in Judges and Injustice :[20]

> *"(n)o account of the natural law tradition can now afford to ignore John Finnis".* (21)

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[18] Oxford Clarendon 1980.

[19] Ibid Preface pp v - vi.

[20] Inaugural lecture University of Natal 1983 p 20 footnote 8.

[21] It is for this reason that the naturalist stance adopted herein, is not taken to the extreme of denying of the lawfulness of the decision in Joyce and McGregor v Cape Provincial Administration 1946 AD 658, discussed in Sections 1.2.3 and 1.6 supra. Finnis observes in this regard (op cit p 357):

> *"It is not conducive to clear thought or to any good practical purpose, to smudge the positivity of law by denying the legal obligatoriness* in the legal or intra-systemic sense *of a rule recently affirmed as legally valid and obligatory by the highest institution of the legal system".*

Finnis analyses on two levels his central proposition that the conflict between positivism and naturalism is more apparent than real, in that natural law provides a support (rather than a contradiction)[22] for its positivist counterpart.[23]

In the first place, although he concedes that the naturalists (inter alia of the Catholic school) may have fallen into the trap that Hume[24] highlighted (that of deriving an 'ought' from an 'is', by way of a defective syllogism), he contends (as is supported herein), that this error was not committed by Aquinas or Aristotle. Aquinas for instance held the view that

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[22] Contra Sir John Wessels in History of the Roman Dutch Law:

> *"... the whole theory of the Law of Nature is now so thoroughly exploded that it is difficult for the modern student to imagine how the jurists of former years ever came to attach such importance to the abstraction - Natural law".*

[23] It is noted that Finnis' writings have a bearing upon the themes developed by Lon Fuller in The Morality of Law (especially Chapter 3 and pp 96 and 181) and by Professor H L A Hart in The Concept of Law (in particular Chapter 9: 'Law and Morals'). Fuller's submission is that the validity or otherwise of a law is to be assessed in accordance with its 'internal' or 'inner' morality, regardless apparently of the justness or otherwise of the system that created it. In terms of his eight principles of the inner morality of law (viz: generality, promulgation, prospectiveness, clarity, consistency, possibility, stability and congruence), a 'partial' lawfulness is possible. Hart, on the other hand, sets forward a theory of the 'minimum content' of natural law. The Hart-Fuller debate lies however beyond the confines of this exposition, and is accordingly not assessed herein - it appears however that Finnis makes a valuable extension and complement thereto. Vide: Hart Positivism and the Separation of Law and Morals 71 (1958-59) Harvard Law Review 593; contra Fuller Positivism and Fidelity to the Law: A Reply to Professor Hart Ibid 630 (inter alia at 659). Vide also: Dyzenhaus Positivism and Validity (1983)(Part 3) 100 SALJ 454.

[24] Vide Sections 2.4.5 at footnote 1 and 2.5.1 at footnote 2.

fundamental forms of good and evil are self-evident, and are accordingly never derived. Hume's noncognitivist observation (that no rational process in philosophy permits objectively the knowing of right from wrong, or the derivation of 'ought' from 'is'), loses weight accordingly as a ground for the relegation of naturalist thinking.[25]

In the second place, Finnis submits that the principle *'lex injusta non est lex'*,[26] (notwithstanding frequent criticism by positivists on this basis), is not a principle of natural law in its accurate conception. The distinguishing criterion between just and unjust laws lies in whether they have power morally, ie whether they bind the conscience. In Finnis' view, if the system itself on the whole is just, then the Citizen would have a moral duty (in the interests of peace, order, stability and security), to observe even an unjust law, since non-observance thereof would undermine the State. In short, his submission seems that whereas the unjust laws of an unjust regime remain unjust, the unjust laws of a just government may be just (in the sense that they may still be morally binding). [27]

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[25] Cf Finnis op cit at inter alia Sections II.4 and II.5.

[26] Cf Finnis op cit Chapter XII ('Unjust Laws') in particular XII.4 (entitled 'Lex Injusta Non Est Lex').

[27] Cf Finnis op cit p 352 where he states:

> *"... since authority is derived solely from the needs of the common good, a ruler's use of authority is radically defective if he exploits his opportunities by making stipulations intended by him not for the common good, but for his own or his friends' or party's or faction's advantage, or out of malice against some person or group.... On the other hand, it is quite possible that an improperly motivated law may happen to be in its contents compatible with justice and even promote the common good".*

In overview of the relationship between State and Citizen, Finnis submits:

> *"All my analyses of authority and obligation can be summed up in the following theorem: the ruler has, very strictly speaking, no right to be obeyed; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good.... Therefore if he uses his authority to make stipulations against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have* by virtue of being his. *More precisely, stipulations made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done, simply fail, of themselves, to create any moral obligation whatever.*
>
> *This conclusion should (however) be read with precision...."*[28]

This 'theorem' contains considerable relevance for South Africa at present. Under his view, our Parliament would have "the authority to ... make laws ... for the sake of the common good", but no authority *(by virtue merely of having enacted legislation)* [29] "to make stipulations against the common good".

It appears accordingly that the statutory basis for apartheid and Group Areas' expropriations for instance, does not in itself justify or rationalise moral adherence thereto, since firstly South Africa lacks a just liberalist and contractarian foundation, and since secondly, our system is from that perspective accordingly unjust. Alternatively expressed, (provided that the contractarian argument is approved), even if it is accepted that *lex injusta* may nevertheless be *lex* (even under a naturalist orientation), then still it would seem that no moral validity or bindingness will flow from South Africa's apartheid laws, unless the system itself is justly based.

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(28) Finnis op cit p 359-60. Cf: the discussion of "public purposes"in Section 1.3.8 supra at footnote 26.

(29) Cf emphasised section supra in extract from Finnis pp 359-60.

This writer records however that he cannot concede without some reservation, Finnis' submission that naturalist and positivist law are not necessarily in conflict. Admittedly, the derivation of 'ought' from 'is' is contrary to logic, and it appears true that this was not undertaken by Aquinas and certain other great naturalists. However, a vast chasm remains yawning between 'is' and 'ought', and between just and unjust laws; and it is submitted that they appear incapable of the degree of reconciliation that Finnis attempts. Although the stance of this writer is accordingly of a greater naturalist extreme than that of Finnis, it is relevant to note that even Finnis' more moderate naturalism does not extend to clothing the unjust dictates of an unjust system with a cloak of 'lawfulness'.

In the final analysis, it appears that Finnis' view represents the synthesised culmination of the opposing strands that Aquinas and Hume respectively wove into the tapestry of jurisprudence, and in turn will prove to be the commencement of jurisprudential movements to come. Hegel's model[30] accordingly finds an expression even in the naturalist-positivist interplay.

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[30] Cf Sections 2.5.4 and 3.1 supra.

3.3.5 THE MEDIAEVAL PERIOD IN OVERVIEW WITHIN HISTORY'S CONTINUUM

From "the comfortable dialectic which had diluted the communism of the early church into a doctrine of stewardship and the very imminence of the mediaeval deity which had enabled responsibility for inequalities in wealth to be placed upon divine shoulders",[31] a proprietary order symbolised in the emergent middle class had been born. The former curious and convoluted theocratic rationalisations of the *status quo*, of Man as a component of a universal macrocosm, yielded synthetically now both in the spiritual and in the political field, to the Individualism and Reason that were in the making. The conflict between Man's private rights to property and his public law subjection to the Sovereign power, along with his liability to render up his property for the public good, were to come to know the scrutiny of contractarian philosophers to come - Grotius, Hobbes, Locke, Rousseau and others[32] - and their attempts to justify the conflict between individual rights and duties to the State. As was later to be seen, it was by the very growth of states and more recently by the industrialisation of the State's municipal activities, that the prominence of expropriation was to be accelerated.

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[31] 12 Encyc.Soc.Sci. p 534.

[32] The principal contractarian writings are considered in Section 2.4 supra. Regarding the early formative period, vide inter alia the writings of Machiavelli (Prince and Discourses) (1513), discussed in Section 2.2 supra at footnote (19). Cf also Dias Jurisprudence p 572.

3.4 THE INTERPRETATION OF THE CONCEPTS OF PRIVATE OWNERSHIP AND DOMINIUM EMINENS IN ENGLISH LAW, AND THE INFLUENCE THEREBY EXERCISED ON THEIR DEVELOPMENT IN SOUTH AFRICA

No tracing of the Hegelian historical synthesis[1] in respect of property ownership and expropriation in South Africa, would be satisfactory without a consideration of the antecedent development of that institution and that instrument in English law; since, notwithstanding that the South African interpretation of private ownership itself is linked to Roman and Roman-Dutch foundations,[2] and notwithstanding that it is the compulsory purchase postulate[3] that is adopted in England, much of our expropriation legislation nevertheless derives in a modified and jurisprudentially re-oriented form from its statutory precursors in the English system[4] - in particular, the 1845 Lands Clauses Consolidation Act.[5] In this regard, Dr Gildenhuys observes:[6]

> *"Die bepalings van die 1845 'Land Clauses Act' het as model gedien vir die onteieningswetgewing in meeste gemenebeslande en ook in Suid Afrika".*

It is significant to observe that this Act was introduced in a century impregnated with positivism, and following upon a century flavoured with

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(1) Cf Sections 2.5.4 and 3.1 supra.

(2) Cf Section 3.2 supra.

(3) Cf Section 1.2.4 supra.

(4) Gildenhuys op cit p 4 states: "Die onteieningswette in Suid Afrika stam uit Britse wetgewing".

(5) 6 Statutes 9:Vide Davies Law of Compulsory Purchase and Compensation p xxi. Cf footnote 31 infra and main text thereat et seq.

(6) Gildenhuys Ibid p 26. This submission is developed herein, infra.

utilitarianism.[7] The 1845 Act however, in its extensive recognition of the expropriatee's compensation entitlement,[8] finds a concord with the naturalist principle expressed by Grotius,[9] that compensation is *"wherever possible"* to be paid. Although in its wide reach and influence, its structure and broad provisions have been transmitted to the Western world, what has not survived (even in English law, as evidenced by the Acquisition of Land (Assessment of Compensation) Act (1919)), is the in-depth embodiment of naturalist principles of compensation. The supplanting positivist stance in South Africa (and elsewhere) at present has eroded much of the naturalist merit the 1845 Act contained.

It was centuries earlier however that the proprietary relations and rights of Citizens on the one hand, and on the other the State's expropriation power and the limits thereupon, had found their first major expression in English law in the Magna Carta of 1215. Chapter 29 thereof foreshadowed the liberal

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(7) The works of Austin Hume and Bentham (Cf: Sections 2.5.1 and 2.4.5 at (1)) tended to reduce the significance attached in England at the time to the earlier writings of John Locke (Section 2.4.4 supra). Recent philosophers such as Rawls (Section 2.6 supra) and Finnis (Natural Law and Natural Rights - discussed infra) have taken issue respectively with the utilitarian and positivist standpoints. Their incisive (and in the submission of this writer, their convincing) attacks have lessened substantially the anti-naturalist and anti-contractarian stance of former eras, and have contributed accordingly to the anticipation of a return to equity in expropriations.

(8) Cf Section 68 of the 1845 Act.

(9) Vide Sections 1.1 (at footnote 10) and 1.6 supra.

spirit of Locke[10] in providing:[11]

> *"... no freeman shall be ... disseized of his freeholds or liberties or free customs ... but ... by the law of the land".* (12)

The origin in English law of the State's 'compulsory purchase' (or expropriation) power, casts a light upon the contribution English law has made to the development of dominium eminens. In early times, since the distinction between the various public law powers of the State was blurred (having not yet experienced the refinement and delineation that modern analysis has introduced),[13] and further since the agrarian economy that prevailed, generally required expropriations only for purposes of the defence of the realm[14] or for averting natural disasters,[15] the acquisition of private property by the State was then conducted largely by way of the exercise of

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[10] Cf Section 2.4.4 supra.

[11] Cf Gildenhuys op cit p 25; Mann Outlines of a History of Expropriation (1959) 75 LQR 188.

[12] Relevant also in this regard are Chapters 19 21 and 28. Vide also: Erasmus, text of Lectures on Expropriation at the University of Natal 1983.

[13] Vide Section 1.3 supra.

[14] In Case of the King's Prerogative in Saltpetre (1606) 12 Co Rep 12, it was held:

> *"And therefore by the common law, every man may come upon my land for the defence of the realm ... for this is for the public, and everyone hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance ...* Princeps et respublica ex justa causa possunt rem meam auferre."

Davies op cit p 10 at footnote 2 comments succinctly on this case that: *"Nowadays, of course, the danger is never over".*

[15] Vide Case of the Isle of Ely 10 Co Rep 141; and Attorney-General v Tomline 12 Ch D 214.

the Sovereign's prerogative powers,[16] and if thereby, frequently without compensation.[17]

On a procedural level, Nichols notes that eminent domain originated in English law in the 'inquest of office',[18] an ancient proceeding[19] requiring as a precursor to expropriation, "an inquiry by jurors concerning any matter that entitled the king to the possession of lands, tenements, goods and chattels".[20] The procedure adopted in respect of the determination of compensation required

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(16) The Sovereign's prerogative extended beyond the defence of the realm, to include, as Nichols notes (op cit p 1 - 68), the power of purveyance and pre-emption:

> *"... (A) ... prerogative of the crown which strongly resembled the power of eminent domain as it is now understood, was that of purveyance and pre-emption, by which the king had the right to seize provisions for the use of the royal household, without the consent of the owner, and to pay for them at a fair valuation made by appraisers. This ancient prerogative was recognised and regulated by Section 28 of the Magna Carta and was finally abolished by statute in the time of Charles II".*

The resemblance of these powers has been discussed in Little Rock Junction Railroad Company v Woodruff 49 Ark 381 5 SW 792. Vide also Chitty Prerogatives of the Crown 213.

(17) Cf 1 Blackstone Commentaries 265 and 287. Contra however in modern English law Attorney-General v De Keyser's Royal Hotel 1920 AC 508 (HL), discussed in Section 1.3.4 supra at footnote (13) and in main text thereat et seq.

(18) Op cit S 1.2.1(1).

(19) Cf: 2 Blackstone Commentaries 259

> *"It is part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon and seize any man's possession upon bare surmises, and without the intervention of a jury".*

(20) Ibid.

the issue of a writ *ad quod damnum*[21] - a fairly extensive use of this writ is found in expropriation cases in early English and American law.[22]

By the late eighteenth century however, the writ *ad quod damnum* had fallen into disuse, since the alternative statutory procedure of 'inclosure'[23] was available. It is accordingly that it was held in Davison v Gill:[24]

> *"... (the) mode of proceeding chalked out in the 19th section (of 13 Geo II c 78), was substituted in lieu of the old writ of* ad quod damnum, *which had become inconvenient from the expense and difficulty with which it was attended. A more compendious and easy method was thereby given; but still the substance of the old proceeding was to be preserved in all essential points".*

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(21) A writ *ad quod damnum* was issued by the chancery, and directed the sheriff of the area in which the property was situate, to "... inquire by a jury what damage it would be to the king, or to any other person, to grant a liberty, fair, market, highway or the like..." (Vide Nichols op cit S 1 - 21 and references cited thereat). It is noted further that the proceeding was *ex parte* and that the *audi alteram partem* principle did not have application.

(22) Vide eg: King v Warde Cro Car 226 (1663); Ex parte Armitage Ambler 293 (1756); Sir Edward Coke in Case of the Isle of Ely 10 Co Rep 141; Robert Callis' Reading upon the Statute of Sewers (1622) (23 Henry VIII c5); 2 Kent's Commentaries 340; Chesapeake Canal Company v Union Bank 4 Cranch CC 75, Fed Case No 2653.

(23) Davies in the Law of Compulsory Purchase and Compensation sets out the nature of 'inclosures' (at pp 10 - 13; 1978 ed):

> *"Perhaps the best established form of compulsory purchase in the days of Blackstone, (leaving aside the prerogative right, and indeed duty, of the Crown to take land for the defence of the realm in an emergency, was the inclosure movement. The essence of inclosures was the extinction of various rights in land, under compulsory powers, in order to make possible the reallocation of that land with a view to applying more efficient methods of farming. The rights to be extinguished included separate holdings and rights of common; in other words, not only the full possession of land, but lesser rights super-imposed on such possession...."*

Cf: Gildenhuys op cit p 26 referring to Davies op cit p 8.

(24) 1 East 64 (USA).

Characteristic of the early period[25] in English law, was a vision of expropriation that was co-existent with and complementary to the prevailing naturalist (and later contractarian, or more precisely, Lockesian)[26] subscription to the inviolability (wherever possible) of private ownership. Blackstone's celebrated dicta (in the eighteenth century) are indicative of this spirit, which under the compulsory purchase postulate, has extended in English law even to the present day - as evidenced inter alia in Attorney-General v De Keyser's Royal Hotel.[27] Blackstone stated:

> *"So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of a power, which the legislature indulges with caution, and which nothing but the legislature can perform".* (28)
>
> (i) (ii) (iii) (v)(vi) (iv) (vii) (v) (vi)

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(25) Cf: Gough Fundamental Law in English Constitutional History Chapter 4 at 48 - 65, in particular his discussion of M A Judson's views on the rights of property. Vide also Judson The Crisis of the Constitution Rutgers (1949).

(26) Vide Section 2.4.4 supra.

(27) 1920 AC 508, discussed in Section 1.3.4 supra. It was held here that the exercise of the sovereign prerogative to expropriate without compensation, although still existing, yields to the Sovereign's power to expropriate subject to compensation, where the latter is statutorily stipulated.

(28) I Blackstone Commentaries 139. The Roman numerals in the margin of the extract above, have been inserted to link the text with the observations that follow.

Blackstone's words record the distinguishing[29] imprints of the early English interpretation - the essential propositions he makes are that:

(i) the sanctity of private ownership is reverently to be respected;

(ii) the transgression of private ownership rights is to be undertaken only with the consent of the owner (albeit deemed);

(iii) public wellbeing and the law itself are promoted by a focus upon and paramountcy of private rights;

(iv) true to naturalist principles, full compensation is to attend any expropriation;

(v) deprivation or dispossession under dominium eminens is necessarily to be accompanied by a "full indemnification and equivalent", an alienation that is necessarily "for a reasonable price";

(vi) expropriation is not to be exercised "absolutely" or in an "arbitrary manner"; and impliedly, sovereign excess or abuse is to be avoided "with caution"; and

(vii) finally, the State's power to expropriate is to be construed in a way that "(t)he public is now considered as an individual" and is "treating with an individual for an exchange". Herein lies the determinative feature of English expropriation law - the compulsory purchase postulate[30] - and it is upon this final basis principally, that a divergence from the Continental and American systems at the time, was apparent.

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(29) The word 'distinguishing' is here used in a dual sense - firstly to suggest that these features are identifiably attributable to and indicative of English expropriation law, and secondly to connote that they in a measure imbue English law in this regard with a significant merit under naturalist criteria.

(30) Cf Section 1.2.4 supra.

The 1845 Land Clauses Consolidation Act[31] was the synthetic culmination of the movement from the Magna Carta to the time of Blackstone, but at the same time, it heralded the mass of expropriation legislation that was to come. It streamlined the English common law in regulating a standard procedure and basis for compensation, although as Gildenhuys notes,[32]

> *"(h)ierdie wet het nie weggedoen met die noodsaaklikheid van 'n privaat wet vir elke skema nie...",* (33)

and further that "(d)it was nie verpligtend dat alle prosedures volgens die 1845 'Land Clauses Act' moes plaasvind nie...."[34]

The procedures embodied in the 1845 Act (England) foreshadow closely those in later South African (and other)[35] law.[36] Firstly, in Section 18 for instance, the *notice to treat* anticipates the *notice of expropriation* in Section 7 of the Expropriation Act[37] (South Africa), although a substantial

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(31) (England). Vide footnote 5 supra.

(32) Op cit p 26.

(33) Gildenhuys, ibid, observes further in this regard:

> *"... So 'n privaat wet was nog steeds nodig vir die magtiging van die skema self, en vir die bepaling van watter grond onteien moes word...."*

(34) It seems however that alternative procedures were uncommon.

(35) An analysis of non-South African expropriation procedure lies however beyond the confines of this thesis - for this reason it is not undertaken herein. Cf however footnote (42) infra.

(36) Cf footnote 6 supra.

(37) Act 63 of 1975 (SA).

difference is contained in the effect thereof - under the former, ownership remained vested in the private owner, whereas under the latter, ownership passes by operation of law on the date stipulated in the notice.(38) Secondly, in Section 22 of the 1845 Act, jurisdiction was determined on the basis of the quantum of the claim (whether it was less than £50 or not) - a similar provision exists in Section 14 of the South African Act (although here, the 'cutoff point'is R100 000,00). Thirdly, the English statute in Section 68 distinguished between land claims and financial loss claims(39) - this distinction is carried over into South African law in Sections 12(1)(a)(i) and 12(1)(a)(ii) of the 1975 Act. Although differences(40) exist between the two Acts, inter alia the comparisons supra indicate the strong formative influence the 1845 Act has exercised in our expropriation law,(41) and the extent to which the present South African statute is modelled on its English antecedents.(42)

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(38) Cf Act 63 of 1975, Section 8.

(39) Cf Gildenhuys op cit p 27.

(40) There are certain significant distinctions between the 1845 Act and South Africa's Act 63 of 1975, inter alia: firstly, the former recognised a *'pretium affectionis'* while the latter is based on the *'verum pretium'* (under a market value test : cf Section 12(1)); secondly, the latter substitutes a solatium entitlement for this shortfall (cf Section 12(2)); thirdly, the former in Section 68 recognises directly 'severance damages' and 'injurious affection', while the latter includes no reference thereto (and perhaps excludes such claims under Section 12(5)).

(41) A detailed discussion of the present administrative procedure under Act 63 of 1975 (as amended), is contained in the Appendix following this subsectio

(42) It is noted that there have been subsequent legislative developments in English law, inter alia : the Acquisition of Land (Assessment of Compensation) Act (1919) (which attempted to constrain the extensive compensation awards permissible under the 1845 Act); the Acquisition of Land (Authorisation Procedure) Act (1946) (6 Statutes 154); the Land Compensation Act (1961) (6 Statutes 238); the Compulsory Purchase Act (1965) (6 Statutes 281); the Town and Country Planning Act (1971) (41 Statutes 1571); the Community Land Act (1975) (45 Statutes 2134); and the Development Land Tax Act (1976). From the Hegelian and historical standpoint, and in the evolution of our present legislation, it remains however the 1845 Land Clauses Consolidation Act that has had the most significant influence on the South African development.

South African property and expropriation law is not by any means however a consequence only of the English interpretation. In adopting the Western capitalist spirit and the ethic of individualism, the relation between Citizens and their Property in South Africa has been influenced to a considerable extent also by the developments in France and America at the time. It is to this assessment that the focus now turns.[43].

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[43] Vide Section 3.5 hereafter.

3.5 BRIDGING THE GULF TO THE MODERN ERA AND A NEW VISION OF PROPERTY

3.5.1 INDIVIDUALISM AND THE INDEFEASIBILITY OF PRIVATE PROPERTY RIGHTS

It was within the legal heritage, and in the teachings of Thomas Aquinas[1] in particular, that the foundations of a new vision of property were laid. In the period that followed, the Social Contract movement[2] took place under Grotius, Hobbes, Locke and Rousseau, and culminated in the French Revolution[3] and in the Bills of Rights,[4] and in the American Declaration

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(1) Vide Section 3.3 supra.

(2) Vide Section 2.4 supra.

(3) 1789.

(4) In France, liberalism, contractarianism and egalitarianism were manifested in the Declaration des Droits de l'homme et da Citoyen of 26 August 1789, which guaranteed the following rights (set out herein in outline) in order that "... (the) demands of the citizens, by being founded henceforward on simple and incontestable principles, may always redound to the maintenance of the constitution and the general welfare" (ex Preamble).

The following extract is adapted from an Appendix in G Lefebvre The Coming of the French Revolution 1789 (Transl. by R R Palmer) Vintage Books New York 1960:

> *"...The Assembly consequently recognises and declares, in the presence and under the auspices of the Supreme Being, the following rights of man and the citizen.*
>
> *1. Men are born and remain free and equal in rights....*
>
> *2. The aim of all political association is to preserve the natural and (inalienable) rights of man. These rights are liberty, property, security and resistance to oppression.*
>
> *3. ... all sovereignty rests essentially in the nation (people)....*
>
> *4. Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man has no limits except those which assure to other members of society the enjoyment of the same rights. These limits can only be determined by law.*

/ Continued

(Footnote 4 continued)

5. *Law may rightfully prohibit only those actions which are injurious to society....*

6. *Law is the expression of the general will; all citizens have the right to take part ... in its formation. It must be the same for all whether it protects or penalises. All citizens being equal in its eyes are equally admissible to all public dignities offices and employments, according to their capacity, with no other distinction than that of their virtues and talents.*

7. *.... (arrest and detention) ....*

8. *.... (punishments) ....*

9. *.... (presumption of innocence) ....*

10. *.... (freedom of opinion and religion) ....*

11. *.... (freedom of thought speech and expression) ....*

12. *Preservation of the rights of man and the citizen requires the existence of public forces. These forces are therefore instituted for the advantage of all, not for the private benefit of those to whom they are entrusted.*

13. *For maintenance of public forces and for expenses of administration, common taxation is necessary ....*

14. *.... (the right to have demonstrated the necessity of public taxes) ....*

15. *.... (accountability of public officials) ....*

16. *Any society in which the guarantee of rights is not assured or the separation of powers not determined, has no constitution.*

17. *Property being an inviolable and sacred right, no-one may be deprived of it except for an obvious requirement of public necessity, certified by law, and then on condition of a just compensation in advance".*

From these texts, it is apparent that the French Bill of Rights embodies and expresses certain fundamental principles of contractarianism - Rousseau's influence is significant (cf articles 1 3 6 and 12), as is that of Locke (cf articles 2 4 5 17), and to a lesser extent Montesquieu (article 16). The Declaration foreshadows also the writings of Kant (cf article 4) and Rawls (his first principle in article 4 and his second principle in article 6). In addition, by extension, apartheid contradicts these fundamental rights of man (cf articles 1 2 3 4 and 5), and particularly articles 6 and 16.

Regarding article 17, vide footnote 7 infra.

Text Continued/

(Text continued)

of Independence[5] and in the United States Constitution.[6] Liberalism

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(5) The Preamble to the American Declaration of Independence (1776) states:

"We hold these truths to be self-evident:

THAT all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life liberty and the pursuit of happiness;

THAT to secure these rights, givernments are instituted among men, deriving their just powers from the consent of the governed;

THAT whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organising its powers in such form, as to them shall seem most likely to affect their safety and happiness".

Although the proprietary emphasis is here less than that contained in the French Bill of Rights or in the Fifth and Fourteenth Amendments to the United States' Constitution, the contractarian spirit and emphasis are still apparent, particularly in the second declaration supra.

It is noted further that:

firstly, although "life liberty and the pursuit of happiness"are endowed by God, the institution of private ownership by contrast is created by men (cf: first declaration supra);

secondly, that it is the ancilliary Social Contract issue of civil disobedience (not considered in depth in this exposition) that is contemplated in the third declaration supra; and

thirdly, that common to all three declarations supra, is the liberalist egalitarian and contractarian ethic of Locke,Rousseau and Madison.

Vide also: Marshall CJ in Ogden v Saunders 12 Wheat (US) 213,6 LEd 606 and Shaw C J in Wellington Petitioner 16 Pick (Mass) 87 at 102,27 Am Dec 631.

(6) The American Bill of Rights of 15 December 1791 is embodied in the first ten amendments to the United States' Constitution. In total, twenty-five Amendments have been made (the most recent being on 23 February 1967), but those of primary proprietary significance are the Fifth and Fourteenth Amendments (the latter being dated 28 July 1868).

Cf: Section 1.4 at footnote (28).

(Text Continued)

and contractarianism, individualism and egalitarianism, became there enshrined and in property jurisprudence at the time, a similar spirit was manifested.(7)

The complexity of the Hegelian synthesis, and the dominating 'World Spirit' that regulates the unfolding of secular affairs, are perhaps the most acutely prominent and apparent in the late eighteenth century.(8) At a

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(7) The prevalent liberalist, contractarian, individualistic and egalitarian approach was apparent in Article 17 of the French Declaration of 1789 (cf footnote 4 supra):

> *"Property being an unviolable and sacred right, no-one may be deprived of it except for an obvious requirement of public necessity, certified by law, and then on condition of a just compensation in advance".*

It is apparent then that although expropriation was recognised, it was acknowledged to be subject to the requirements of public need, of due process (to borrow the American nomenclature), and of just compensation in advance. Regarding the condition that advance payment of compensation be made: this has fallen away in modern usage in many jurisdictions, and has been substituted by the requirement that an interest entitlement on arrear amounts arises (cf Section 12(3) of the Expropriation Act 63 of 1975). There are still however current instances of the retention of this requirement (eg Louisiana USA) (in consequence of the French influence) (Vide Nichols op cit p 1 - 68).

This principle has been embodied in various modern Continental constitutions also - eg: French Code Civile Art 545:

> *"... no-one is obliged to transfer his property, unless it be for public utility, and in consideration of a just and previous indemnity".*

Vide also: Constitution of Belguim, Art 2; German *Grundrechte* Articles 14 and 15; Fundamental Law of Holland, Art 147. Cf: Peaslee Constitutions of Nations (1956).

(8) In this regard it is significant to note that Hegel's writings came in the wake of the popular revolutionary movement. His works then are doubly significant - both on a deep philosophical level, and historically as a justified consequence of, and an expression prompted by, his times.

rate of change that left its participants possibly breathless, Western history, jurisprudence and politics were channelled, propelled and accelerated by the overmastering 'Idea', through the narrow pass that the popular revolutions presented in the historical divide between past and future. The diversity of the multi-dimensional strands from preceding eras found all at once a culmination in the triumph of individualism: inter alia, the conflict between the enlightenment and innovation of Aquinas, and the mediaeval yearning of the feudal period,[9] was resolved; the antithetical standpoints of the Social Contract theorists proper, and of the proponents of the Divine Right of Kings,[10] found a sublimation also;[11] and reconciliation came too for the contradictions between the classical conceptions[12] of ownership and the opposing feudal interpretations. Man's liberation from the shackles of absolutism constituted accordingly a focal point of historical synthesis, but at the same time, marked the commencement of the movement to come, since it was here that the preparatory foundations of much of modern Western social structure, culture, belief and proprietary views, were laid. In that the relation between Sovereign and Subject found a crucial restatement, so accordingly did the derivative relation between Citizens and their Property know modification.

The effect of the new movement was principally that the Western conception of private property and its ownership, came accordingly to be regulated

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[9] Vide Section 3.3.2 supra.

[10] Cf: Section 2.1 supra at footnote 1.

[11] Cf: Section 2.4.5 supra at footnote 7.

[12] Cf: Section 3.2 supra.

and governed by a subscription to individualism, and by the tenets of the inalienability of private property and the indefeasibility and inviolability of the real right of ownership within the private law forum. True to the Grotian foundation however, private property remained nevertheless an institution subject to the State's overriding public law power of dominium eminens.

In the context of expropriation, modern societies were faced with the dilemma of reconciling the apparently antithetical private law real right of ownership, and the inroad thereupon which seemed to be presented by dominium eminens.(13) Alternatively stated, the indefeasibility and inviolability of private ownership may *prima facie* appear violated and ravaged by the State's power to divest the Citizen of his property where the public need so required. Whereas Blackstone in his Commentaries(14) depicted ownership as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of any other individual in the universe", Vinding Kruse(15) was to take issue with the unlimitedness and absoluteness with which inter alia Blackstone had clothed the vision of *dominium plenum*, stating that:

> *"the unconditional inviolable nature of the right of property remains but one of those magnificent phrases which it is so easy to shout from the housetops in the enthusiasm of a revolution and in the dawn of constitutions, but which in the more sober aftermath, it is impossible to live up to".* (16)

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(13) Vide Section 3.6 infra.

(14) Commentaries on the Laws of England II 2.

(15) Vide Kruse The Right of Property (Translation by Federspiel)(1939).

(16) Ibid p 7.

Against the backdrop of the popular revolutions and their spirit of individialism, modern Western jurisprudence has developed its view of private property and expropriation. A state of flux has emerged in the assessment of the nature of property and its ownership, in consequence of the debates that attend this enquiry - inter alia, the indefeasibility or otherwise of private ownership; the capitalist - Marxian conflict; the individualistic or social property conception; the nature in its origin, foundation and operation, and the extent in its application, of the power of eminent domain; the positivist - naturalist interplay in regard to the principles of just compensation upon expropriation that on the one hand do, and on the other ought to, regulate expropriatee compensability; to name perhaps but a few.

Such diversity cannot however adequately be encompassed in a thesis of this nature - the focus in this subsection is accordingly confined to the changing nature of private ownership in modern law in relation to the amplified (or synthesised) view of expropriation that has emerged.[17]

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[17] As is developed in Section 3.5.2 hereafter.

3.5.2 THE CHANGING NATURE OF PRIVATE OWNERSHIP IN MODERN LAW AND THE AMPLIFIED (OR SYNTHESISED) VIEW OF EXPROPRIATION

Private ownership has in modern times surfaced as an evolving and extending institution, the changes in the understanding of which, have given rise to an amplified view of expropriation in South Africa and elsewhere, and have had a concomitant effect upon the relation between Citizens and their Property. In that the contemporary 'enlargement' of the concept of expropriation constitutes a sublimation of the opposing forces of public needs and vested private rights, it is submitted that the Hegelian postulates here again are finding an expression. Furthermore, in that the natural unfolding of this proprietary power will *ex hypothesi* be in accordance with the regulation the 'Idea' of history will bring, it would seem that its ultimate synthesis in the future will reflect the broad justice (from a liberal perspective) that the individualistic spirit of its foundation appears to anticipate.

The prevailing vision of property ownership and of man's relation to the physical thing, influences and even determines the adopted social, economic and political order, and the very nature of the society itself.(1) Commons, in The Legal Foundations of Capitalism,(2) notes that the legal concept of property ownership has evolved from an original view in which property was equated with tangible objects of wealth, to the broader modern view that embraces the land itself, the legal rights in the land, and the opportunities

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(1) Cf Umeh: Compulsory Acquisition of Land and Compensation in Nigeria p 1.

(2) New York 1924 p 50.

of income that the land presents.[3]

Whereas the classical description of property ownership contemplated the right (in respect of a thing) to 'possess, use, enjoy, alter, alienate and destroy',[4] this interpretation has been criticised inter alia by Paton in Jurisprudence [5] as failing to identify the real functional basis of

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(3) The concept of valuation for expropriation has undergone similar extension. Whereas property valuation was traditionally constrained by the "notion of physical dimensions and attributes" (Rams Eminent Domain p 37 50 and 51), contemporary valuation and appraisal practice reflects the recent developments that have found expression in financial accounting - there has been a realisation that assets derive their value not from considerations of original cost and the past history of the asset, but rather (and even exclusively) from their ability to generate future income. Accordingly value is no longer statically bound down by the past, but is instead dynamically linked to the asset's realistic future income expectancies. (Cf: Gordon's growth model in financial accounting). Modern appraisal practice tends accordingly to quantify in pecuniary terms the worth or exchange value of the owner's rights in the thing (discounting their income expectancies), rather than to focus on the substance of the physical thing itself.

The scope and theory of judicial valuation has been influenced to a considerable extent by the changing nature of the property ownership as conceived by the South African courts. The effects in practice of the modern approach are that new occasions for judicial valuations have been created; that, with the increased recognition being afforded to intangible assets as a form of property, problems arise in respect of their valuation; and that there has been a shift in valuation theory from tangible to intangible assets as the subject of valuation - business enterprises for example are now distinguished from the sum of their physical assets. (Cf: Bonbright, The Concept of Property as Affecting the Concept of Value 1937 Valuation of Property (USA) 98 - 109).

(4) Van der Linden, Koopmans Handboek 1.7.1.

(5) 2 ed Chapter 12. Paton points out further that the ultimate effect of ownership is that the controller of property has also the ability to control the people who relate to it - work hours, wage conditions, nature and circumstances of life - in this regard, the depth of his insight has considerable relevance for social planning in the future.

ownership - the broad control that its exercise enables. In modern usage in the context of expropriation, it has been more expedient to see ownership as consisting not in the physical thing itself,[6] but in a congeries[7] of incorporeal or intangible rights that attach to the physical thing.

The modern trend towards an economic view of property and its ownership was enunciated by Roscoe Pound in his Introduction to the Philosophy of Law:[8]

> *"In civilised society, men must be able to assume that they may have control, for purposes beneficial to themselves, of what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order".*[9]

This wider conception of property and its ownership found a similar expression in the jurisprudence of Renner and Kahn-Freud,[10] in terms of which "property was not confined to the control of 'things', but extended to the whole field of legitimate economic interests and expectations".[11] Renner's analysis of

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[6] This development is evidenced in American jurisprudence in HFH Ltd v Superior Court (116 California Reporter 436) in which it was held:

> *"The term 'real property' means only those intangible interests in land which the owner possesses, and probably the most important of those is the use to which the property can be put. The owner cannot hold a parcel of real property in his hands".*

Cf also inter alia: Candlestick Properties Inc v San Francisco Bay Conservation Commission 11 Cal App 3d 557, 89 California Reporter 897; and People v Associated Oil Company 211 Cal 93, 294 P 717.

[7] Vide the 'bundle of sticks' analogy discussed in Section 3.6 infra. Cf inter alia Matheny Condemnation Appraisal Practice Vol I p 398.

[8] At p 192.

[9] Cf: Locke's view : Section 2.4.4 supra at footnote 10.

[10] Vide: Kahn-Freud Introduction to Renner : The Institutions of Private Law and their Social Functions (1949) p 19. (Renner's work was first published in 1905 and revised in 1928). Cf: discussion in this regard in Friedman, Law in a Changing Society p 88.

[11] Friedman op cit p 88.

the nature and function of capitalist ownership highlights the distinction[12] between legal ownership and the real control of a thing, and points out that in these dual aspects of property, the *'Konnexinstitut'* or 'complimentary institution' of control, elucidates and enables a fuller understanding of private dominium and of the relationship between Citizens and their property. In short, in its modern conception:[13]

> *"property is not an exclusive relation of dominance, exercised by one person, physical or corporate, over the thing or even a number of 'quasi-things', but ... is rather a collective description for a complex of powers, functions, expectations and liabilities, which may be apportioned between different parties to a legal transaction".*

In the modern age, the 'social idea' of property - as enunciated by inter alia Rudolph von Ihering[14] - has assumed a growing significance in both the Western[15] and the competing Marxian[16] interpretations. The words of Friedman in Law in a Changing Society[17] afford a perspective:

> *"That property and its distribution occupies a central - and in the view of many, a decisive - position in modern industrial society is a view shared by legal and political philosophers from the extreme right to the extreme left. The right to*

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(12) This division between ownership and control in the case of large corporate ownership in particular was further developed in depth by Berle and Means in their locus classicus of business administration The Modern Corporation and Private Property (1932). Divided shareholdings and the hierarchial pyramid-structuring of companies has widened the division between ownership and control.

(13) Friedman Ibid p 68.

(14) Vide discussion of Von Ihering's views under Section 3.3 supra.

(15) Vide People v Byers 153 California Reporter 249, in which the social idea of property is emphasised:

> *"... it is clearly established that the property ownership rights reserved to the individual ... must be subordinated to the rights of society. It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment...."*

Cf also: Miller v Board of Public Works (1925) 195 Cal 477 at 488, 234 P 381.

(16) Vide Section 3.1 supra at footnote (13).

(17) Friedman op cit p 65 - 66.

> *property as an inalienable, 'natural' right of the citizen, immune from interference by government or other individuals, becomes a central element in the legal philosophy of Locke, of the Founding Fathers, of the 'Declaration des Droits de l'Homme', while it permeates the interpretation of the United States Constitution, and the Neo-Scholastic political and legal philosophy of the Catholic Church.....*
>
> *At the other end of the scale, Marxist analysis clearly regards property as the key to the control of modern industrial society. The capitalist, by virtue of his ownership of the means of production, effectively controls society. He exercises the powers of command which ought to be vested in the community. Hence, Marxist theory demands a transfer of the ownership and the means of production to the community..... This key function of property and the establishment of a social order remains, almost without qualification, part of modern Soviet philosophy... (W)ith the transfer of ownership in substantially all means of industrial and agricultural production to the community, the problem of social justice has been substantially solved in Soviet society. Ideologically and politically, the property philosophy of the American Constitution and the Catholic Church is bitterly opposed to that of modern Communism, and of all forms of Marxist interpretation of history. But they share the heritage of modern Western political philosophy: the controlling significance of property in the social order. In that, they differ from earlier phases of occidental civilisation as well as from other civilisations".*

Whereas traditionally the concept of expropriation was structured by our legislature within narrow parameters, both the development of jurisprudential thought in modern South African law in relation to the meaning of property, with its concomitant effect on legislative enactments, and the more liberal recent interpretations being accorded to such statutory provisions by the South African judiciary,[18] have had the effect of extending compensability

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[18] Vide inter alia: Broadway Mansions (Pty) Ltd v Pretoria City Council 1955 (1) SA 517 (A) at 522; Wellworths Bazaars Limited v Chandlers Limited 1947 (2) SA 37 (A) at 43; Krause v SAR & H 1948 (4) SA 554 (O) at 562-3; Africa v Boothan 1958 (2) SA 459 (A) at 462; Slabbert v Minister van Lande 1963 (3) SA 620(T)at 621 D; Fourie v Minister van Lande en 'n Ander 1970 (4) SA 165 (O) at 170 B; Belinco v Bellville Municipality 1970 (4) SA 589 (A) at 597 D.

to previously unprotected holders of rights in respect of property,[19] and of reducing to an extent the somewhat harsh effects of expropriation on private individuals.[20]

Statutory enactments in South Africa have given expression to an abstract conception of property. In S 12(1) of the Expropriation Act[21] for instance, the wording 'property other than a right' is used, suggesting that a distinction exists between rights and property other than a right. This connotes that rights themselves are merely one form of property but do not, for statutory purposes, cover all types of property contemplated. The definition of 'property' given in Section 1 of the Act embraces both immovable and movable property, and 'immovable property' includes a real right in or over immovable property. Judicial interpretation in the cases Badenhorst v Minister van Landbou[22] and the unreported judgment in Vinkrivier Klipbrekery v SAS en Nesenberend,[23] has extended the ordinary meaning of 'property' to include 'intangible property' and rights, both real and personal. Although a *caveat* is voiced by Dr Gildenhuys[24] in respect of the statutory provisions being

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(19) Vide inter alia Interland Bemarkings (Edms) Bpk v Suid Afrikaanse Spoorweë en Hawens 1981 (1) SA 1199 (D) at 1200 H, in relation to Section 13 of Act 63 of 1975.

(20) Rams in Eminent Domain (p 52) comments on the position in the United States:

> *"The Courts have enlarged the meaning of a 'taking of property' so as to give a private owner compensation for certain losses for which he could not formerly have recovered, since they were not obviously identified with the value of those tangible things to which the condemner takes title...."*

(21) Act 63 of 1975.

(22) 1974 (1) PH K7.

(23) CPD 7 May 1975 which concerned the expropriation of personal rights in terms of a contract.

(24) Op cit p 56 - 57.

construed too widely, it is submitted that increased recognition of unregistered rights promotes greaty equity, alleviates the incidence of harsh localised effects on the particular expropriatee and provides a basis for consistency with the natural law.

That private ownership is however subject to certain recognised restrictions imposed by law is recognised by Spoelstra AJ in Gien v Gien 1979 (2):[25]

> *"Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê ... (maar) ... (d)ie absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas. Daardie beperkings kan òf uit die objektiewe reg voortvloei òf dit kan bestaan in beperkings wat deur die regte van ander persone daarop geplaas word. Geen eienaar het dus altyd 'n onbeperkte bevoegdheid om na vrye welbehae en goeddunke sy eiendomsbevoegdhede ten aansien van sy eiendom uit te oefen nie.... Ons reg gaan ook uit van die sogenaamde absoluutheid van eiendomsreg, maar terselfdertyd met erkenning van die beperking daarvan".* [26]

In final analysis then, on the one hand ownership and on the other expropriation, have in modern times generally, and in South Africa in recent years in specific, incorporated a recognition of the 'social idea' of property. It seems accordingly that Hegelian historical synthesis has manifested its imprint upon the patterns of proprietary evolution, by way of generating an

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[25] 1979 (2) SA 1113 (T) at 1120 C - H.

[26] Similar views have been expressed in the United States. Cf Cities Service Oil Company v City of New York 5 NY 2d 110, 154 NE 2d 814:

> *"... we deem it fundamental that ... what is best for the body politic in the long run, must prevail over the interests of particular parties...."*

In Mugler v Kansas 132 US 688 at 689, it was held:

> *"... individual owners ... (should not be) ... permitted, by a noxious use of their property, to inflict injury upon the community".*

extended[27] interpretation and meaning of these two concepts. In the words of Trollip J in Beckenstrater v Sand River Irrigation Board:[28]

> *"The ordinary meaning of expropriate is 'to dispossess of ownership, to deprive of property'... but ... it is (now) generally used in a wider sense as meaning not only dispossession or deprivation, but also appropriation by the expropriator of the particular right, and abatement or extinction as the case may be, of any other existing right held by another which is inconsistent with the appropriated right".* [29]

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[27] Cf: Stellenbosch Divisional Council v Shapiro 1953 (3) SA 418 (C) at 422-3 and 424; SAR & H v Registrar of Deeds 1919 NPD 66; Kent NO v SAR & H 1946 AD 398 at 405-6; Minister van Waterwese v Mostert and Others 1964 (2) SA 656 (A) at 666 - 7.

[28] 1964 (4) SA 510 (T) at 515 A - B.

[29] A similar trend has taken place in the United States. Cf inter alia Cooley Constitutional Limitations 254; Gold Hill Mining Company v Ish 5 Ore 104.

3.5.3 THE MODERN VISION OF PRIVATE OWNERSHIP - A CONCLUDING PERSPECTIVE AND ORIENTATION

Since the relation between Citizens and their Property is regulated by the value judgments and the Social Contract that precede the society instituted, by the notion of the 'thing' in the private law and the conception of expropriation in the public arena, it is appropriate and necessary that specific attention be directed to that relation within the particular society in question. It is relevant then to turn to consider the nature of the real right of private ownership in the context of present South African society.(1)

(1) Vide Section 3.6 infra.

3.6 THE NATURE OF THE REAL RIGHT OF PRIVATE OWNERSHIP IN SOUTH AFRICAN LAW AND ITS APPARENTLY ANTITHETICAL CORRELATION WITH THE STATE'S POWER OF DOMINIUM EMINENS

3.6.1 INTRODUCTION

Whereas the spirit of individualism[1] that has permeated Western thinking, upholds the inviolability of private interests, the sovereignty theory[2] on the other hand asserts the paramountcy of the public need and draws support from the 'social idea' of property.[3] This dichotomy generates the impression that a (perhaps unresolved) conflict exists in our law. It is submitted however that the tripartite Hegelian pattern suggests that these competing antecedents have been sublimated in the synthetic culmination that expropriation (as dominium eminens) constitutes.[4]

It appears further that whereas the real right of private ownership finds a consistency with the *'thesis'* supra (viz: individualism and liberalism), the (synthesised) instrument of expropriation [5] leans in favour of reflecting a greater congruence with the *'antithesis'* supra (viz: the public need and

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(1) Cf Section 3.5.1 supra.

(2) Cf Section 1.2.3 supra.

(3) Cf Section 3.5.2 supra.

(4) It is stressed however that the 'synthetic culmination' here envisaged, approximates to the naturalist and common law conception of dominium eminens, and not necessarily to the specific (possibly positivist) interpretation that may from time to time be attached to 'expropriation' by a particular legislature within history's continuum. Cf Introduction to Appendix to Section 3.4.

(5) As it exists at present in most modern legal systems, including South Africa (or perhaps, especially South Africa).

the 'social idea' of property). The question which arises accordingly is whether the real right of private ownership is (antithetically) contraposed against the State's power of expropriation as it exists in our law - alternatively stated, whether the conventionally-alleged indefeasibility and inviolability of private ownership is ravaged by the inroad thereupon that expropriation appears to constitute.(6)

It is accordingly necessary to analyse the nature of the real right of private ownership in South African law, and its apparently antithetical correlation with the State's power of dominium eminens. Since the conventional view of real rights in our property law is based upon two fundamental premises

firstly, that rights and duties are correlatives, and

secondly, that real rights (*jura in rem*) differ conceptually from personal rights (*jura in personam*),

the discussion herein is structured broadly upon this basis.(7)

From the consideration of the conventional definition of real rights in South African law, it will emerge whether a need for the restatement thereof exists in view of dominium eminens.

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(6) The writer's standpoint in this regard is disclosed in the concluding paragraph of Section 3.6.3 infra.

(7) The *first* aspect is considered in Section 3.6.2 infra and the *second* aspect is discussed in Section 3.6.3 infra. In the former subsection, the writings of Dworkin and Hohfeld are mentioned; and in the latter, the conventional definition of real rights is discussed. The latter is extended in Section 3.6.4 in relation to the models or images suggested by various writers as encapsulating the relation between Citizens and their Property.

3.6.2 THE FIRST PREMISE : *THAT RIGHTS AND DUTIES ARE CORRELATIVES*

3.6.2.1 INTRODUCTION

The *first* distinction set out in Section 3.6.1 supra (viz: that rights and duties are correlatives), predicates on one level that the Citizen's assertion of his private law real right of ownership, has as its correlative the private law duty upon others that such right of ownership is universally to be observed. On another level, it voices the possible conceptual conflict that exists between a Citizen's private law rights to property and his public law duties to the state, *ie* since the institution of private ownership (under contractarian thinking) owes its origin to the prior existence of the State, the real rights thereby conceived have as their reciprocal accompaniment the obligations that the *pactum subjectionis* creates.(1) The interrelationship between rights and duties is discussed in Section 3.6.2.2 infra.

The *first* distinction has a further relevance also - as is discussed in Section 3.6.2.3 infra. Under Hohfeld's system of jural correlatives,(2) the concept of a 'right' has a shifting meaning. In the public law forum, the *power* of eminent domain has as its correlative the *liability* of the Citizen to surrender up his ownership rights when such compete with the public interest : in the hands of the State, this *power* (once exercised) is transformed into a *right*; in the hands of the Citizen, the *liability* he suffers becomes thereby a *duty*. In the private law forum, once the said *power* is exercised, the *right* the Citizen formerly had, is altered thereby to become a *claim* for compensation : in the hands of the State, the existence of the said

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(1) Vide Section 2.3 supra.

(2) Vide Section 3.6.2.3 infra.

power connotes the co-existence in the state of its *immunity* in general against the *claim* (or suit) of its Citizen; in the hands of the Citizen accordingly, the *claim* is only as sound and as extensive as the legislation upon which it is grounded.

This structure rationalises accordingly the positivist view in Joyce and McGregor v Cape Provincial Administration,[3] that unless compensation is based directly upon statute, the entitlement thereto of the expropriatee, lacks legal substance. It is submitted however that although Hohfeld's analysis is a valuable expository device for illustrating the nature of law in its existing interpretation, his structure is not 'original' law in itself, *ie* an explanatory model analytically derived from an existing system, cannot in logic be utilised retroactively to justify the validity of that system itself. His model accordingly has merit only in so far as it crystallises the nature of the prevailing legal structure, but it cannot validly be employed to rationalise the standpoints adopted within that structure itself. The divergence of law (in South Africa and elsewhere) from naturalist principles of compensability, remains accordingly a criticism to be levelled against the underlying law, and is not capable of being directed against Hohfeld's elucidating encapsulation thereof.

It is appropriate to turn to consider in greater detail the interrelationship between rights and duties,[4] and the shifting meaning of rights themselves.[5]

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[3] 1946 AD 658: discussed in various sections supra.

[4] Vide Section 3.6.2.2 infra.

[5] Vide Section 3.6.2.3 infra.

3.6.2.2 THE INTERRELATIONSHIP BETWEEN RIGHTS AND DUTIES

By extension from the jurisprudence of the command theorists such as Austin,[1] who framed duties as "imperatives or notional oughts",[2] and as amplified and modified by inter alia the Scandinavian realist Olivecrona,[3] the concept of 'duty' has been seen as being fundamental in jurisprudence and as being co-existent in thought with, and even prior to, that of 'right'. Austin, for example, in Lectures in Jurisprudence[4] notes that the expression *'in rem'* does not denote a right over a thing in as much as a relative duty between a thing and persons generally and universally.

Dworkin in his definitive treatise Taking Rights Seriously argues that the rights of Citizens against the State must be recognised and given a practical efficacy, since:[5]

> *"(i)f the government does not take rights seriously, then it does not take law seriously either".*

Since in a democracy, a Citizen's general duties to his fellow Citizens are not absolute,[6] there being certain fundamental duties upon the Citizen

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(1) Jurisprudence I pp 89 - 91.

(2) Cf Dias op cit p 211-2.

(3) Law as Fact pp 36 - 37.

(4) Op cit p 382.

(5) Dworkin op cit p 205.

(6) Ibid p 186.

other than his duties to the State, it follows[7] that "this general duty is almost incoherent in a society that recognises rights". In short:

> *"Anyone who professes to take rights seriously ... must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea ... supposes that there are ways of treating a man that are inconsistent with recognising him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality ... (which)... supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom".*[8]

In his first proposition, Dworkin's view corresponds with that of Kant,[9] and in his second proposition, he is close to the views of Rawls;[10] but in advocating the need for State restraint and the serious recognition of private rights, he goes further in submitting that "we must treat violations of dignity and equality as special moral crimes".[11] To Dworkin, there are only three grounds[12] that can justifiably and consistently be used to limit any particular private right - firstly, where the values protected by that right are not affected; secondly, where some competing (superior) right would

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(7) Dworkin op cit p 192.

(8) Ibid p 198 - 199.

(9) Cf Section 2.5.2 supra.

(10) Cf Section 2.6 supra.

(11) Dworkin op cit in a footnote at p 199.

(12) Ibid p 200.

otherwise be abridged; and thirdly, where the cost to society of upholding the particular right would substantially exceed the cost or sacrifice in violating the dignity and/or equality in question.

Since expropriation (where it appears in an extreme and 'unnatural' form)[13] may constitute a violation of dignity (in that property under the German Social Contract theory is a projection of human personality),[14] and a violation of equality (in circumstances in which just compensation is not awarded), this inroad into the sanctity of the private right of ownership is jurisprudentially acceptable to Dworkin only if one of the three justifications supra applies. Clearly, the first justification cannot be used, but in the context of expropriation, both Dworkin's second and third points would appear to have operation as a rationale for the exercise of the State's dominium eminens. As regards compensation upon expropriation, Dworkin's principles would predicate strongly against expropriation without compensation, since the inroad constituted by the 'taking' of the property would seem perhaps already to be sufficiently extensive without being compounded by the denial of just compensation; or at least, if not indicating an entitlement to compensation as 'of right', Dworkin's principles suggest a strong presumption of 'no expropriation without compensation'.[15]

This interpretation finds a consistency with the proposition that rights and duties are correlatives - the <u>right</u> to expropriate (once the <u>power</u> of dominium eminens has been exercised) connotes under naturalism the correlative duty to

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[13] Cf eg Section 1.3.8 supra.

[14] Cf Section 2.5 supra.

[15] Cf Section 1.6 supra.

compensate - but it emerges in Dworkin's thesis of rights as being fundamental and requiring serious regard, that some revision of the command theorists' view of duties as being imperatives, is necessary to reflect the jurisprudential developments that Dworkin introduced. It emerges again that theoretical jurisprudence in this regard remains in a state of flux, requiring still the synthesis that the Hegelian philosophers would anticipate.(16)

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(16)Cf Section 2.5.4 supra.

3.6.2.3 THE NATURE OF 'RIGHTS' IN THE CONTEXT OF EMINENT DOMAIN UNDER HOHFELD'S SYSTEM OF JURAL CORRELATIVES

The concept of 'rights' finds an elucidation relevant to dominium eminens in Hohfeld's Fundamental Legal Conceptions[1] (extending Salmond's theories in Jurisprudence),[2] in his classification of jural correlatives and opposites, from which the shifts in the meaning of 'rights' in the context of the jural relations created, are apparent. Hohfeld's classification sets out:[3]

(i)	the Jural Correlatives	Right ("You must")	Privilege ("I may")	Power ("I can")	Immunity ("You cannot")
		Duty	No-Right	Liability	Disability
(ii)	the Jural Opposites	Right	Privilege	Power	Immunity
		No-Right	Duty	Disability	Liability

Although some familiarity on the part of the reader with Hohfeld's theory must in the interests of brevity be assumed, it is appropriate to consider here the relevance of his classification to eminent domain and in South African jurisprudence. By way of a first illustration, it is apparent in terms of Hohfeld that sovereign *immunity* (under positivism) creates as its correlative the *disability* of the Citizen to require compensation as 'of right', and that unless a statutory (or constitutional, as in the United States) authority for compensation exists, sovereign *power* has as its jural opposite the Citizen's corresponding *disability* and possible theoretical noncompensability.

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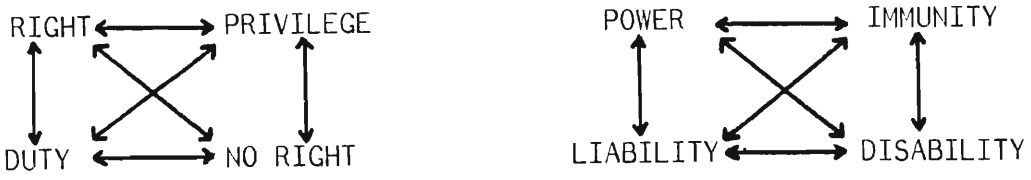
(1) Chapter 1.

(2) London (1937).

(3) Dias op cit p 249.

The assessment of Hohfeld's correlatives is perhaps best understood by the interpretation adapted from Williams in Essays in Legal Philosophy: The Concept of Legal Liberty:[4]



in which the *vertical* arrows denote the jural correlatives (... in one person x, implies the presence of its correlative ..., in another person, y); the *diagonal* arrows denote the jural opposites or negations (... in one person x, implies the absence of its opposite ..., in himself); and the *horizontal* arrows denote what Williams terms the jural contradictories (... in one person x, implies the absence of its contradictory ... in another person y).

Although detailed analysis of this structure falls beyond the scope of this exposition, a commendable assessment exists in Dias Jurisprudence.[5] Suffice it here to consider one illustration : the *power* of eminent domain which vests in the State, implies firstly the presence in the Citizen of its correlative, the *liability* to render up private property required for public purposes; secondly, such *power* in the State implies the absence in the State of its jural opposite or negation viz: any alleged *disability* of the State to expropriate; and thirdly such power in the State implies the absence in the

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[4] Oxford (1968).

[5] Ibid Ch 9.

Citizen of its jural contradictory, namely *immunity* from the effect of the exercise of such power. The first proposition then establishes that by its very existence, dominium eminens affords the State a power which overrides all private rights of ownership; the second proposition confirms that this power (under positivism) is subject to no negation and knows no limitation in the scope and extent of its potential application; and the third proposition motivates the realisation that in the absence of the statutory (or constitutional) provision of a compensation formula, the Citizen cannot 'of right' claim full compensation or immunity, and perhaps even has no *claim* 'of right' to compensation at all.

Lloyd in The Idea of Law,[6] although framing his observations in the English law context, provides a valuable overview regarding the operation of Hohfeld's system in practice:

> "... *an authority, prior to the service of the proper notice, has a* 'power' *of compulsory purchase in relation to the particular piece of land, and the owner is under a* 'liability', *as being exposed to the possible exercise of this power. If then the power is actually exercised and is followed by the other formalities, ... the authority will then obtain a* 'right' *to the transfer of the land and the owner will be under a* 'duty' *to proceed with the transfer...."*[7]

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[6] P 317.

[7] The extract supra from Lloyd op cit, continues with the following observation regarding immunity and disability - it is noted however that by virtue of the *in personam* approach under the compulsory purchase postulate in English law (as discussed in Section 1.2.4 supra), the following observation would in general not have application in South African law (where immunity and disability are best viewed, as discussed in the main text supra, from the sovereign's standpoint):

> "... *On the other hand, if the owner can establish that the authority's legal powers do not extend to this particular land, then the owner can be said to enjoy* 'immunity' *from this procedure, and the authority is under a correlative* 'disability' *in regard to this transaction*".

It emerges then from Hohfeld's analysis that it is the *exercise* of the *power* of dominium eminens which confers upon the State, the *right* to acquire private property from its Citizens. Under the naturalist conception, this *right* would have as its correlative the *duty* to pay compensation (or prior to the exercise of the *power,* the *liability* to pay compensation); whereas under the positivist orientation, such compensation entitlement would arise only where authorised by, and to the extent determined by, legislative enactment.(8)

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(8) As is noted in Section 3.6.2.1: in accordance with Joyce and McGregor v Cape Provincial Administration 1946 AD 658, it is the positivist interpretation that regulates our law. The submission of this writer remains however that greater recognition of the naturalist view *ought* to prevail.

3.6.2.4 RIGHTS AND DUTIES IN OVERVIEW

An elucidating clarity is cast upon dominium eminens by the assessment of the interrelationship between rights and duties, and of the different inflexions that are possible within the category of rights - the respective contributions of Dworkin and Hohfeld are valuable in these regards. Attention is now directed to the analysis of the second premise[1] in Section 3.6.1.

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[1] Vide Section 3.6.3 infra.

3.6.3 THE SECOND PREMISE : *REAL AND PERSONAL RIGHTS*

THE CONVENTIONAL DEFINITION OF REAL RIGHTS IN SOUTH AFRICAN LAW, AND THE QUESTION AS TO WHETHER THE RESTATEMENT THEREOF IS NECESSARY IN VIEW OF DOMINIUM EMINENS

The second premise set out in Section 3.6.1 supra (viz: that real rights *(jura in rem)* differ conceptually from personal rights *(jurà in personam)*), is relevant in the understanding of the nature of private ownership in South African law (and thereby to the relation between Citizens and their Property), since it is by the method of antithetical contrast with personal rights that South African jurisprudence has characteristically and traditionally evolved its definition of a real right. It is appropriate accordingly to turn to a consideration of the conventional definition of a real right as it exists in South African law, in order to assess whether there is a need for the restatement thereof in view of dominium eminens.

Under Grotius' interpretation,[1] the transcending power vesting in the State entitling it to deprive its Citizens of their real right of ownership, appears to disrupt the conventionally-stated real right definitional consequences of indefeasibility and inviolability, in that the State would appear in such circumstances not bound by the *'duty'* to observe its Citizen's property *'right'*. In turn, this exposes possibly a somewhat tenuous and conditional character and substance in the flesh of these definitional inferences, in that the private real right of ownership yields to the public power of eminent domain.

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[1] Vide Section 1.1 supra.

If it is, as is often voiced, that real rights are available against the whole world generally, and that other persons individually and collectively are bound to forbear in their infringement of these rights, then perhaps, in terms of this view, it would appear that the State itself, being merely an aggregation of individuals into a collective under the Social Contract, would equally be bound to observe such rights. Since Grotius' *dicta* indicate to the contrary, is it then to be concluded that the conventional definition of real rights must know a crucial restatement to reflect the existence of the State's power of eminent domain,and the according defeasibility and violability of private interests in the context of a competing property interest of the public or the State? As is elaborated infra,(2) this would seem not to be the case.

From its origins in procedural Roman law in the distinction between real actions (for the recovery of property itself) and personal actions (for the recovery of the value of the property from the person concerned), the distinction between real and personal rights was introduced into the substantive law by the Post-Glossators; in Roman-Dutch law and South African law, the distinction has remained substantive. From the classical conception of ownership as a right to "possess, use, enjoy, alter, alienate and destroy",(3) the conventional view of a real right in South African law has emerged as a right in property entitling the owner to deal with the property in a particular

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(2) Vide footnote (17) infra.

(3) Vide Van der Linden Koopmans Handboek 1.7.1; referred to in Section 3.5.2 supra at footnote (4).

way, which right is available against all persons generally. Accordingly under the conventional view, a real right is attached to a thing which becomes the object of that right, and the rightholder is entitled to enforce that right against people generally and universally.

The South African case law serves to elucidate the nature of real rights. In Ex parte Geldenhuys[4] the former view that real rights are conventionally negative in character (in contrast to personal rights, which usually involve positive duties), was modified, and the real right registered in Geldenhuys' case was positive. In Schwedhelm v Hauman,[5] the positive-negative distinction was applied in the assessment that personal rights impose obligations on an individual and are not closely connected to the land - accordingly they are not automatically transmissible. Although a contrary view has been adopted on similar facts in Van der Merwe v Wiese,[6] the latter decision has been effectively criticised by Hahlo in the 1948 Annual Survey.[7] It appears that controversy will remain in this regard until the Appellate Division pronounces upon this point, but it is submitted that until such time, Schwedhelm's case correctly presents the law.

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[4] 1926 OPD 155.

[5] 1947 (1) SA 127 (E).

[6] 1958 (4) SA 8 (c)

[7] Hahlo 1948 Annual Survey p 93- 5.

From these cases inter alia, the conventional view emerged[8] that a number of definable characteristics of real rights exist : firstly, that a real right must confer a right in property, or in the American dictum, that the right must 'touch and concern the land'; secondly, that they must be available generally (although there was a gradual recognition that this element was perhaps more a consequence of the existence of the real right rather than a definitional requirement); thirdly, that real rights are usually negative in character (although Geldenhuys' case dispensed with this element as an absolute criterion); fourthly, contrary to the Roman origins, and although perhaps generally limited in number, there is no *numerus clausus* to real rights in our law (Ex parte Pierce);[9] and finally, that a real right could not arise without an intention to bind the land, although such intention was not in itself sufficient to give rise to the formation of a real right.

These five definitional elements and characteristics were subject to further judicial consideration in the period that followed. Odendaalsrus Gold Mining Company v Registrar of Deeds[10] was decided on similar principles to Pierce's case, and it was held that a half-share in State digging and licensing revenue constituted a limited real right, and was accordingly capable of registration. In Nel NO v Commissioner for Inland Revenue,[11] it was held on the facts that

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(8) In respect of certain of the interpretations in this subsection, the writer acknowledges the guidance received from lectures given by Professor A S Mathews at the University of Natal in 1981.

(9) 1950 (3) SA 628 (O).

(10) 1953 (1) SA 600 (O).

(11) 1960 (1) SA 227 (A).

an annuity granting an interest in land was not a real right - since it did not touch and concern the land; since the intention of the grantor was to bind someone personally; and since the connection between the right and the land was accordingly not sufficiently close. It was held further in Lorentz v Melle[12] that the mere intention to bind land is insufficient if a real right is to be constituted, and although on the facts an obligation existed, such obligation attached to the civil fruits of the property, to which civil fruits the ratio of Pierce's case did not extend.

A measure of jurisprudential controversy arises in regard to reconciling this line of decisions. Von Warmelo in 1959 Acta Juridica,[13] argued that the real or sole test in the formation of a real right was one of intention, but it is respectfully submitted that this view conflicts with that of the Appellate Division in Nel's case. Van der Merwe in Sakereg[14] advances an exhaustive analysis, but concludes that referral of the matter to the legislature would be appropriate. It is difficult however to accept this view in that such a referral could retard the dynamic and cohesive evolution of the South African law.

It is however noted that although the resolution and determination of this issue in relation to the judicial guidelines is not without its attendant

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[12] 1978 (3) SA 1044 (T).

[13] Von Warmelo, The Nature of Legal Argument , 1959 Acta Juridica 278 et seq.

[14] Butterworths Durban (1979).

difficulties, the courts have evolved certain clear tests - the fundamentals of the conventional definition of real rights emerge as the first element supra (viz: that the real right must confer a right in property, ie be *in rem*), and the fifth element supra (viz: that a real right cannot arise without an intention to bind the land). If these elements are present, it appears conventionally in broad perspective that their effect will be that the real right will be available and enforceable generally (the second element); and that in general in the private law forum, the real right constituted may be said to be inviolable or indefeasible. It appears furthermore that the third and fourth elements of the conventional definition of real rights (viz: 'negative in character' and 'limited in number') do not necessarily have operation, nor necessarily are they required or demanded by exponents of the evolved conventional definition.

Paton in Jurisprudence[15] notes that the analysis of the nature of real rights on this basis still has attendant theoretical difficulties and certain key issues remain unresolved. He points out further the criticism many writers direct against the notion that real rights are available generally, but it is respectfully submitted as unfortunate that his final analysis leaves the reconciliation unanswered. It would seem, without here pronouncing upon the validity of, or reiterating, the two definitional elements conventionally stipulated (viz: the first and fifth elements supra), that if the effect they appear to generate (viz: element two supra) finds a deficiency when viewed in the eminent domain arena, that the root of this deficiency might not be the inadequacy of its foundation,

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[15] 4 ed p 298.

but rather certain departures from logic that attend the nature of the inductive leap from fact to interpretation. In short, it is conceivable and probable that the conventional theorists on this point have not erred in the two foundations upon which they base their assessment, but instead censure will arise for any interpreter who fails to acknowledge the limitations they impliedly place upon, and the parameters within which they impliedly pronounce upon, the effect (element two) of the first and fifth elements they stipulate.(16)

Although the assessment of real rights in the context of dominium eminens is not a customary viewpoint, it could be argued that the above interpretation , permitting recognition of the merit in the conventional definition of real rights, constitutes too liberal (or *laissez-faire*) an acceptance of the conventional standpoint and definition. A jurisprudent with such a view could find cogent motivation and substantiation for his conclusion that the concept of eminent domain qualifies critically (and even fatally) the conventional definition of real rights - in his view, a reformulation would be essential based upon the subordinancy of private property rights under the transcending public power of eminent domain, and based upon the fact that whereas private ownership would appear indefeasible if purportedly disrupted by any individual or by any individual social sub-group, the continuity of private ownership cannot withstand, and is unquestionably subordinate to, the superiority of a competing social or public proprietary interest, or such an interest of those individuals and individual social sub-groups in an inclusive aggregate or collective. The more moderate

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(16)Cf description of these five elements supra.

jurisprudent would however temper such reactionism with the submission that it is merely the interpretation of the effect of the real right (rather than its definitional elements) that requires restatement.

What emerges[17] in the submission of this writer is that the solidity and acceptability of the two foundation definitional elements of the conventional theorists, are not disrupted or shaken by the eminent domain onslaught of any radical exponent. Notwithstanding the State's dominium eminens, a real right must necessarily be a right *in rem*, and cannot be constituted without an intention to bind the thing. The conventional legal theorists are correct in their assessment of the effect of a real right inasfar as the private law forum is concerned. It is only if that right is to find analysis in a public law context that a measure of qualification becomes appropriate, and here only in respect of the effect of that right. The duty upon 'the world generally' to observe private ownership (and by correlative, the private real right of ownership) remains rooted exclusively within the private law. The liability to surrender up his property is imposed upon the Citizen in consequence of the State's public law power; inter alia, Hohfeld's vision of state immunity and paramount authority relative to its disabled Citizen, and the possible jurisprudential criticisms voiced supra, do not, it is submitted in final analysis, constitute sufficient basis within the private law to require an entire restatement of the conventional definition of real rights.[18]

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[17] Cf footnote (2) supra.

[18] Based then on the underlying premise that the conventional definition of real rights is satisfactory, an assessment of two models illustrating this standpoint, is undertaken in Section 3.6.4 infra.

3.6.4 AN ASSESSMENT OF TWO JURISPRUDENTIAL MODELS SETTING OUT THE NATURE OF THE RELATION BETWEEN CITIZENS AND THEIR PROPERTY

3.6.4.1 INTRODUCTION

Attempts have been made by various writers to crystallise into an image or model, the nature of the real right of private ownership (and in turn, the nature of the relation between Citizens and their Property). Principal among these models are:

firstly, the 'bundle of sticks or rights' vision of property ownership;[1] and *secondly*, the 'subtraction from dominium' theory.[2]

These aspects are considered infra, with a view to assessing their significance in relation to expropriation and the proprietary rights of Citizens, and in order to move the analysis from the level of abstract jurisprudential theory to the plane of operating reality.

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(1) Vide Section 3.6.4.2 infra.

(2) Vide Section 3.6.4.3 infra.

3.6.4.2 THE 'BUNDLE OF STICKS' (OR 'CONGERIES OF RIGHTS') VISION OF PROPERTY OWNERSHIP

Seneca in De Beneficiis[1] has by analogy cast light upon the reconciliation of the apparently diametrically-contraposed claims to private property, found on the one hand in the State's power of eminent domain, and on the other hand in the individual's right of private ownership. He suggested that a thing is capable of a divided ownership vesting in various persons at the same time although not in the same sense (qualifying his submission by pointing out that he was not considering co-ownership, which would entail joint ownership at the same time and in the same sense), and giving by way of illustration the landlord-tenant example: the right of use conferred upon the tenant would entitle him during the currency of the lease to exclude even the *dominus*, leaving the latter with only a reversionary interest and a right to receive rent.

Jones in Expropriation in Roman Law,[2] in commenting on Seneca's proposition, observed that:

> *"to the Roman lawyers at the time, ... (Seneca's proposition) ... must have sounded like loose talk; their theoretical difficulties with the* emphyteusis *show how slow they were to admit that there might be divided ownership which was not co-ownership. In any case, the State, or the* Princeps, *as such, could not be an owner in the private (Roman) law..."*

If recalcitrance and reluctance were characteristic of the response of Roman jurists to Seneca's guideline, the converse is true of the American

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(1) 7.5.6.

(2) 1909 LQR 512 at 527.

jurisprudents. A host of sources expound Seneca's principle in what has popularly become known as the 'bundle of sticks' theory of property ownership. In the words of Matheny:[3]

> *"The one basic principle in Eminent Domain cases is that a tract of ground is looked upon as a bundle of rights or sticks, and each interest in the tract is one of the rights or sticks. Thus the leasehold interest (for example) ... is one of the rights in this whole bundle that makes up a piece of real estate".*

In the Roman private law forum, Seneca's submission was that the bundle (or congeries) of rights constituting private ownership was divisible, and that a divided ownership was accordingly possible (as in the context of lease). By extension, in the public law forum, the congeries of rights attaching to a particular thing, is such that ownership is divided between the State and the private owner, and those rights over the thing that are held by the State *(res publicae)*, are incapable of private ownership. This then rationalises and justifies the interpretation supra of Hohfeld,[4] in that the State's power of eminent domain (being one of the implied or hidden sticks in the full bundle of rights attaching to any property or thing), remains at all times vested in the State, and is incapable of transfer to the private sector - in addition, such power exists (under a broad divided ownership) contemporaneously with and notwithstanding the real right of private ownership that vests in the owner.

The *'dominum plenum'* that private law knows, is *'plenum'* accordingly only to the boundaries and extents of the private law, and cannot be considered to

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(3) Condemnation Appraisal Practice Vol II p 398

(4) Vide Section 3.6.2.3 supra.

include or subsume the public law power of eminent domain. The conventional definition of real rights, and by inference the nature of full private ownership, will accordingly generate no paradox or contradiction[5] if assessed within, and in terms of, the parameters of its necessary forum - the private law.

Since conceptual difficulty attaches to the postulate of a direct physical relation between a Citizen and his Property by reason of the abstract nature of ownership and the (perhaps) separate identity that things bear, the 'bundle of sticks' analogy is a convenient image for encapsulating this relation. Ownership is seen in South African law (in consequence of our Roman heritage) not as a direct power over the thing or property, but as a vesting in the owner thereof of a right to the ownership of that thing, from which right his power over that thing is axiomatic - it remains however subject to the constraints or qualifications that its contractarian origin connotes. Property ownership is accordingly an indirect and abstract relationship in which the rights of ownership stand mediate between the owner and the property owned. The right of ownership over the thing is then the instrument or medium that permits the owner's relation to his property and the expression and fulfilment of his ownership rights. Since the exercise of ownership would not be possible in the absence of the existence of such rights, the connecting right of ownership[6] constitutes the essence of property ownership in South African law.

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(5) Cf Section 3.6.3 supra.

(6) Vide Section 3.6.4.3 infra at footnote (4).

Although the 'bundle of sticks' analogy finds mention in South African property jurisprudence,(7) it is not emphasised there as a central core of the interpretation accorded to the nature of the relation between Citizens and their Property. Its adoption as a valuable illustrative model in the context of eminent domain and of property law in general, is here advocated as being both consistent with the foundations of our legal heritage and as being appropriately indicative of the relation between the owner and the object of his ownership right.

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(7) Inter alia in Maasdorp Institutes of South African Law Vol II p 25; Wille Principles of South African Law pp 166, 198; Hahlo and Kahn South Africa, The Development of its Laws and Constitution p 578; Silberberg The Law of Property 1975 ed p 37; Friedman Law in a Changing Society p 66 - 67.

3.6.4.3 SILBERBERG AND SCHOEMAN'S 'SUBTRACTION FROM DOMINIUM' THEORY

Relevant as a model within the private law in presenting the nature of the relation between Citizens and their Property, is the 'subtraction from dominium' theory incorporated by Silberberg and Schoeman in their 1983 edition of The Law of Property.[1] They state:

> *"...(the) subtraction from the dominium test ... is based upon the reasoning that a limited real right diminishes the owner's dominium over his thing, in the sense that it either*
>
> *(a) confers on its holder certain powers inherent in the universal right of ownership; or*
>
> *(b) to some extent prevents the owner from exercising his right of ownership.*
>
> *This means that a limited real right must amount to a 'diminution' of or a 'subtraction' from the owner's dominium over the thing to which the limited real right relates".*[2]

Private ownership as *dominium plenum* would appear accordingly as the aggregate, composite or conglomerate of all the alienable private rights *in rem* and over the particular thing. The divisible or partible nature of allodial[3] Roman ownership accordingly finds its extension herein into South African law. Lease would, for instance, illustrate the first circumstance Silberberg and Schoeman envisage, and servitude would be an example of the second situation they contemplate. Furthermore, the interpretation that ownership does not necessarily correspond

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(1) This theory was formulated by Silberberg in the first edition thereof (at p 43 et seq).

(2) Silberberg and Schoeman op cit 1983 ed p 47 et seq.

(3) Cf Section 3.3.2 supra.

with full control over the physical thing,[4] is reinforced by this model, in view of the limited real rights *(jura in re aliena)* that can be formed by their 'subtraction' from the *dominium plenum* of the owner.

A fairly extensive authority[5] for the model can be found in the South African case law - the theory assumes a significance accordingly in our private law in eludicating the relation between Citizens and their Property. However it appears that the 'subtraction from dominium' approach, consistently with the Romanist conception, seems to be framed within the forum of private rights only, and does not amplify or consider the qualifications upon unrestricted private ownership that are imposed by the public law. Since dominium eminens is a public law power of the State, operating over property and being incapable of inclusion within private ownership, it follows that its existence in the hands of, or its exercise by, the State, cannot constitute a subtraction from (private) *dominium plenum*. For this reason, although this model has a relevance in general to the relation between Citizens and their Property, its relevance to that relation from the standpoint of dominium eminens, is limited.

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(4) Vide the writings of Renner and Kahn-Freud (at footnotes 10 and 11) and Berle and Means op cit (at footnote 12) in Section 3.5.2 supra.

(5) Inter alia in Hollins v Registrar of Deeds 1904 TS 603 at 605; Ex parte Geldenhuys 1926 OPD 155 at 162 and 164; Schwedhelm v Hauman 1947(1)SA 127 (E) at 135; Ex parte Pierce 1950 (3) SA 628 (O) at 636 D; Fine Wool Products of South Africa Ltd v Director of Valuations 1950 (4) SA 490 (E) at 499 A; Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds 1953 (1) SA 600 (O) at 605 D - E,606 C - D and 610 G; Hotel De Aar v Jonordan Investments (Edms) Bpk 1972 (2) SA 400 (A) at 405 D; Lorentz v Melle 1978 (3) SA 1044 (T) at 1050 E.

It is necessary to consider also the further possible grounds that exist for avoiding reliance (in the context of eminent domain) upon the 'subtraction from dominium' theory. The model is directed mainly towards explaining the creation of *jura in re aliena*, and does not contemplate an alienation or transfer of *dominium* itself.(6) It is based upon the standpoint that if an owner is to part with one of his private ownership rights in such a way as to divide his ownership or to give rise to a diminution of, or subtraction from, his dominium, then such partition, equitably viewed, and consistently with the interpretation of the Social Contract theorists, could presumably take place only with the consent or participation, or by the conduct of, the *dominus* - this stands in contrast to the fact that expropriation takes place "without regard to the wishes of the owner".(7) Furthermore, the model involves accordingly a division or partition of the rights of ownership and the acquisition of some of these in a derivative manner by the proposed holder of the *jura in re aliena*. Since the exercise of the power of dominium eminens in its operation in an expropriation, in point of distinction, is an original mode of acquisition of ownership, and a proceeding *in rem* (not requiring necessarily the participation of the expropriatee),(8) that has the effect of transferring full ownership of the expropriated thing to the expropriator as at the date of expropriation,(9) it follows that the 'subtraction from dominium' model is inappropriate in an expropriation analysis.

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(6) Contra Section 8 of the Expropriation Act 63 of 1975.

(7) Vide criticisms of Nichols' definition of expropriation in Section 1.4 supra.

(8) Cf concluding paragraph in Section 1.4 supra.

(9) Cf Section 8 of the Expropriation Act 63 of 1975.

3.6.4.4 *DOMINIUM EMINENS* AND *DOMINIUM PLENUM* IN OVERVIEW

The fuller understanding of both *dominium eminens* and *dominium plenum* requires that these two concepts be assessed in conjunction in order that their interrelationship can be determined. From this assessment it becomes clear that *dominium eminens* is a public law power that is distinct from but complimentary to *dominium plenum* in the private law. For the reason that the Romanist 'subtraction from dominium' theory[1] does not contemplate directly (if at all) the public law arena, it becomes apparent further that in the context of eminent domain and expropriation, the American 'bundle of sticks' approach[2] is a preferable model for presenting the nature of the relation between Citizens and their Property, in that it can extend to include and to rationalise both public and private rights in and over property.

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(1) Vide Section 3.6.4.3 supra.

(2) Vide Section 3.6.4.2 supra.

3.7 DOMINIUM EMINENS, PRIVATE OWNERSHIP, AND THE RELATION BETWEEN CITIZENS AND THEIR PROPERTY : A CONCLUDING PERSPECTIVE

The synthetic and continuous historical evolution that Hegel postulated, when viewed in relation inter alia to the institution of private ownership and the instrument of expropriation, indicates that the interpretation in these regards by a given society at a specified point in time's continuum, is cohesively connected both to the past movement and to the future to unfold. The same, it is submitted, is true in South Africa property law at present. It is accordingly also that the proprietary developments in the modern era have imbued the concepts of 'ownership' and 'expropriation' with a changing and an amplified (or synthesised) substance, but that it is in turn from these present foundations that further evolution and synthesis will take place.

Dominium eminens emerges in our law as a fundamental feature inherent in, and not opposed to, the accurate conception of ownership in its broad sense.(1) Provided that the exercise of this power recognises naturalist principles of restraint, it is accordingly not the major inroad(2) upon private freedom and rights to property that some commentaries paint it to be(3) - since its

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(1) A similar view is expressed by J Walter Jones in Expropriation in Roman Law 1909 LQR 512 at 526. Cf also Van Schalkwyk Onteiening in die Suid Afrikaanse Reg : 'n Privaatregtelike Ondersoek UOFS (1977).

(2) Vide following paragraph.

(3) Cf eg Report of the Judicial Council of Michigan on Condemnation Procedure (1932), quoted in Section 1.3.1 supra at footnote 13; Jacobs op cit p 4; and sources cited in Gildenhuys op cit p 1 at footnote 2, and p 19 at footnote 135.

existence is justified in terms of the Social Contract, and its use is predicated by both the necessity and the desirability (from time to time) of adjustments to the balance of State and private lands.

Although the countenance of such an inroad may appear when the otherwise-apparent sanctity, inviolability and indefeasibility of private ownership is considered, and although the substance of such an inroad may exist if a positivist interpretation of dominium eminens is applied and if excesses and abuses (from a naturalist and liberalist perspective) arise thereby, it is however emphasised that the view that expropriation constitutes such an inroad, is based upon two principal factors. The first is the Romanist vision of ownership, which confines the assessment of this institution strictly to the private law. The second is the realisation that the legislative treatment of expropriation in South African law exhibits certain significant *lacunae*, which are not capable of the same rationalisation as is possible in respect of dominium eminens itself - the reform of our existing legislation [4] is accordingly appropriate and even imperative.

The jurisprudential inquiry into the nature of property ownership as a determinant of the relation between Citizens and their property, reveals that the power of dominium eminens amplifies, rather then detracts from, a true understanding of this relation. Instead of contradicting the nature of private ownership as may *prima facie* appear, the exercise by the State of its power of expropriation in accordance with naturalist and common law

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(4) Vide Appendix to Section 3.7 : Recommendations for Statutory Reform in South Africa.

principles, supplies a deep rationale for the institution of property itself. As Rudolph von Ihering notes, "there is no such thing as absolute ownership, *ie* ownership which is unaffected by social considerations"(5) - rather "only through the existence of expropriation as a legal institution can property become a practical conception in touch with the needs of life ... without it, property reveals itself as the bane of society".(6)

The power of dominium eminens in its naturalist and liberalist conception, is then in overview a necessary social instrument - which finds its origin in the Social Contract; which permits and promotes collective wellbeing and the attainment of social goals and objectives; and which regulates the relation between Citizens and their Property in a way that reconciles, balances, sublimates and synthesises the opposing natures of the public need and the private interest.

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(5) Geist I,7.

(6) Cf Der Zweck im Recht I, 411.

CHAPTER 4

CONCLUSION : DOMINIUM EMINENS, THE SOCIAL CONTRACT, AND THE RELATION BETWEEN CITIZENS AND THEIR PROPERTY

CHAPTER 4

CONCLUSION : DOMINIUM EMINENS, THE SOCIAL CONTRACT, AND THE RELATION BETWEEN CITIZENS AND THEIR PROPERTY

4.1 AN OVERVIEW

Dominium eminens, as enunciated first by Grotius in De Iure Belli ac Pacis, emerges in our common law as one of the State's public law proprietary powers, that, as an offspring of political necessity, is an inherent attribute of sovereignty created and conferred by the Social Contract. In as far as the public interest and wellbeing so require, dominium eminens permits the State's expropriation of private property for public purposes without regard to the wishes of the owner, and enables through proceedings *in rem*, the acquisition in an original mode by the State of the title and interest therein that was formerly vested in its expropriated Citizen.

Under contractarian thinking, it is the Social Contract that creates the State; that gives rise to the institution of private ownership and the instrument of expropriation; and that regulates the derivative relation between Citizens and their Property. A cohesive connection is thereby introduced and established between the public law power of dominium eminens and private law rights to property. If this power is restrained by the naturalist and common law principles, then dominium eminens will reflect, rather than repudiate, the liberalist and contractarian spirit, and will lead to the translation into practice of just compensation upon expropriation.

If however the positivist orientation continues to prevail unchecked, then excesses, abuses, and departures from the just and equitable treatment of Citizens by the State, can find the soil for their expression in our law.

Where interference with the rights and interests of expropriatees assumes a proportion which crucially prejudices the foundations of a Citizen's relation to his Property, or where expropriation legislation fails to reflect the patterns of Hegelian evolution and synthesis present in our history, then, although the 'social idea' of property has substance, the proprietary disturbance that expropriation represents, ought not to be dismissed out of hand on this basis as being consistent therewith, and accordingly as being a 'necessary' social sacrifice. Rather, the preserving and the upholding of the sanctity, indefeasibility and inviolability of private proprietary rights ought to be cherished, nurtured and promoted, since not only is property a cornerstone of Western society and the capitalist ethic, but also its safeguarding is both a quest, and even a mission, for social justice that the proponent of such philosophy should espouse and pursue.

Whereas ultimately, the capacity and the ability to introduce the necessary reform (as regards inter alia the clarity, the consolidation, and the fairness (under naturalism) of our statutes), lies with the legislature, academic research and exposition affords an interim avenue, allows an advocacy of amendment, and generates in advance certain of the substance and motivation that fuels the reformist petition. The central significance of private ownership rights to Western ideology, and in particular to the contractarian approach, predicates that the sanctity of property ought reverently to be

respected by State and Citizen alike, and that its infringement and the inroads upon it by the sovereign (where there is an extreme and non-contractarian exercise of its expropriation powers), must know the restriction and reservation that the Grotian formula of dominium eminens imparts.

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4.2 THE HYPOTHETICAL BASIS OF THE INQUIRY AND THE CONCLUSIONS THAT EMERGE

In the main text supra, certain hypotheses and submissions are researched and developed with the objective of investigating their validity - they lead inter alia to the following principal conclusions. The expository device of a point-form analysis is adopted herein to facilitate the statement thereof, and to highlight the individual (yet interdependent) nature of the observations made and the inferences drawn.

In the analysis of the State's power of *dominium eminens* in the writings of Grotius and its place in modern South African jurisprudence, it emerges:

(i) that *dominium eminens* is the common law foundation of the State's expropriation power;

(ii) that notwithstanding the decision in Joyce and McGregor v Cape Provincial Administration (1946 AD 658), a naturalist investigation of *dominium eminens* (as undertaken herein) remains relevant and necessary;

(iii) that the preferable jurisprudential orientation (in matters of expropriation) is a Social Contract theory as extending the conventional sovereignty interpretation, rather than the alternative original proprietary or compulsory purchase standpoints;

(iv) that the nature of *dominium eminens* is enhanced by its comparative analytical assessment in relation to the other public law proprietary powers of the state;

(v) that significant among these other powers are the following: taxation, the police power, the war power, destruction by necessity, forfeiture, *dominium* over *bona vacantia* (or escheat), the Group Areas power (*sui generis* in South Africa), and the power to construct public improvements.

(vi) that the meaning of *dominium eminens* is best understood by prior reference to these foundations;

(vii) that the conventional positivist and non-contractarian interpretation of existing expropriation legislation is misguided, and leads to violations and denials of fundamental naturalist 'oughts'; and

(viii) that reform of the positivist spirit of our present legislation is accordingly both desirable and necessary.

The consideration of the theory of Social Contract as a foundation for *dominium eminens* reveals:

(i) that an awareness of the background and development of the Social Contract permits an assessment of its effect on *dominium eminens*;

(ii) that the Social Contract provides a rationale (under the early views) for the *origin* of the State, and (under later views) for its *nature*, and derivatively by extension, a rationale for the institution of private ownership;

(iii) that the contractarian writings of Locke, Rousseau, Hegel and Rawls contribute valuably to understanding, and are accorded a high level of significance by this writer; and

(iv) that the contractarian philosophy would indicate that South African society is unjust in both its structure and its operation.

In the assessment of the changing nature of property ownership, the attendant development of *dominium eminens*, and the relation between Citizens and their Property in South African law at present, it appears:

(i) that the changing nature of the property ownership is revealingly analysed using an adapted Hegelian-inspired model of history - in essence:

that history is a continuous, rational and synthetic process, and that the phase at which any instituted society stands, is at the same time the conclusion of the past movement and the commencement of the movement to come:

(a) that phases of thesis, antithesis and synthesis came respectively in the formation of societies themselves:

in the sovereignty of men in the natural state, in their exposure to the depredations of others, and in the synthesised sublimation of these forces in the creation of the State;

(b) that these phases came respectively again in regard to private ownership (inter alia) in the following patterns:

: in presocial man, classical civilisations, and in the Dark Ages;

: in Rome, the early mediaeval period, and later mediaeval times (under Aquinas);

(c) that the synthetic climax in Aquinas was in turn sublimated as the commencement of the movement thereafter; respectively these phases appear

: in Aquinas, feudalism, and the liberalism of the French and American revolutions;

: in the writings of Aquinas, of Hume in later times, and of Finnis in the modern era;

(d) that South African expropriation law reconciles on the one hand the Roman concept of property ownership and the Lockesian interpretation thereof, with on the other hand the English statutory history;

(e) that Western liberalism and Marxian Socialism constitute a current thesis and antithesis that are presently undergoing, or are yet to be sublimated by, synthesis;

(f) that a similar tripartite pattern is represented in the competing precursors of private interests and public need, and in the synthetic culmination thereof that expropriation constitutes.

(ii) that naturalism affords cogent guidelines as regards the relationship between State and Citizen, and as regards the State's power to disentitle its members in respect of their property;

(iii) that property ownership derives from a contractarian foundation and that this ought to be recognised by our legislature;

(iv) that private ownership in South African law consists principally not in the ownership of the physical thing itself, but rather in the holding of the congeries of incorporeal and intangible rights that attach to the physical thing;

(v) that *dominium eminens* vests under the Social Contract inalienably and inseparably in the State, subject however to inter alia the following conditions:

(a) that:

(1) *dominium eminens* is legitimately capable of exercise only by a state that is justly instituted and constituted (under contractarianism); (if not so created as historical fact, then as a postulate of reason, in the sense that its Citizens would have so consented had they been so consulted);

(2) that South African society complies with neither the Social Contract theory proper nor the Rawlsian model, both under its Constitution of 1961 and that of 1983;

(3) that the White *de facto* Parliament in South Africa lacks (under contractarianism) *de iure* sovereignty by reason of the fact that its mandate does not derive from all its Citizens nor from a majority thereof;

(4) that the Homelands policy and the exclusion of South African Blacks from the State of their true citizenship, constitutes an indefensible denial of Social Contract theory in that:

: from a Lockesian standpoint, such defeats the 'great ends' for which men aggregated into communities;

: under Rousseau, such would seem to indicate the suffocation of the *'Volonte Generale'*;

: in Hegelian thought, such is an antithesis to liberalism rather than a synthetic climax; and

: under Rawls, such is not what men in the Original Position would have chosen if they had made an authentic and antecedent judgment from behind a 'veil of ignorance'; and/or that such violates Rawls' two principles;

(b) that *dominium eminens* ought to be exercised:

(1) *intra vires* the (Lockesian) functions for which the State has been created;

(2) *intra vires* the (Rawlsian) principles which regulate the nature of any just Western society;

(3) *intra vires* the naturalist tenets which impose limitations upon State excesses and abuses; and

(4) *intra vires* and in accordance with the libertarian 'Rule of Law' ethic;

(c) that the State's powers ought accordingly to know such restriction;

(d) that the entitlement to compensation ought to arise (to use the Grotian dictum in its broadest sense) *"wherever possible"*;

(vi) that, although expropriation (in its just operation) may appear still to constitute a significant inroad upon the inviolability and indefeasibility of private ownership, the conventional definition of real rights in South African law would appear not thereby to have been ravaged - instead, the analysis of the instrument of *dominium eminens* permits a deeper understanding of the institution of *dominium plenum* itself; and

(vii) that finally it is only

(a) where the State exercising the expropriation power, is itself unjust; or

(b) where that power is exercised in an unjust manner;

that the expropriation will itself (notwithstanding the positivist statutory authorisation) be unjust when viewed from a naturalist, liberalist and contractarian standpoint.

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4.3 AN EPILOGUE

THE RELEVANCE OF RESEARCH IN EXPROPRIATION LAW IN SOUTH AFRICA AT PRESENT AND THE RECOMMENDATION THAT FURTHER RESEARCH BE UNDERTAKEN

The law of expropriation is a field of considerable relevance to South Africa at present, and will escalate in significance in the future, for a number of reasons:

(i) In September 1982, the Government announced that during the next five years, private property valued in the region of one thousand million rand would be expropriated for the consolidation of the Homelands. In addition, it seems that major Group Areas' expropriations will take place.

(ii) There will be substantial further expropriation for state development projects such as roads, airports and dams.

(iii) The Government's economic decentralisation programme, the projected economic growth of the Republic, and the establishment of border industries, promote the need for expropriation also.

(iv) The need in South Africa's political future for land stabilisation and an equitable land distribution, is a political and planning reality and objective.

(v) In short, whenever a society is in a state of political or economic flux, adjustment to the balance of State and private lands is undertaken - in South Africa, it would appear that this is extended to include adjusting the balance and composition of White and Non-White lands. Furthermore, whether a society moves in one direction towards socialism, or reacts in the reverse direction, the expropriation of lands (and on occasion the nationalisation of industries) is the consequence.

In order to ensure that justice and fairness to both expropriator and expropriatee finds expression in and attends this expropriation, detailed academic study and research is essential to pave the way in advance and to promote a clearer understanding of the statutory enactments.

The Expropriation Act 63 of 1975 as amended, has had effect in South African law since only 1 January 1977, and in spite of elucidating construction by the judiciary and most valuable (positivist) contributions in legal publications, many of the major issues that the Act encompasses, have not had the opportunity yet for full academic analysis and exposition. The uncertainty that the governmental agencies face in respect of the interpretation and implementation of the enacted provisions, will be compounded in the future unless further research is conducted. Such would appear to be the most appropriate in the forum of compensation upon expropriation, and in respect of recommendations for statutory reform.

By reason of the pressing relevance expropriation does have and will assume in South Africa, and in light of the injustice that can flow from an inadequate awareness of its substance and effect, it is curious that the curricula and syllabi of the LL.B courses do not include a more detailed study of expropriation law. The developments at the University of the Witwatersrand in this regard are commendable.

In final analysis, expropriation is the instrument which gives effect to the State's land reforms, and depending on the understanding its implementers have of its nature and operation, and the equity of its application, the outcome politically (both domestically and internationally) and economically, will be either just or harsh. The problem is real and earnest efforts must be made within the law to generate meaningful solutions. Research cannot guarantee a blueprint for resolving South Africa's land reform, but it is submitted that it can bring us greater understanding and can bring us closer to finding the answers.

APPENDICES

APPENDIX A.1

EXCURSUS

APPENDIX TO SECTION 1.3.6 : IN ELABORATION OF FOOTNOTE 13 THEREOF :

The writer has during 1983 made representations to the Commissioner of Customs and Excise on behalf of a client on whom penalties and forfeitures in excess of one hundred thousand rand, were imposed under Sections 88 and 89 of the Customs and Excise Act 91 of 1964, as amended. It was alleged that the client had underpaid duties and cleared Persian carpets and other goods under the incorrect tariff headings. Under the provisions of this Act, not only is the forfeiture of all goods in an affected consignment empowered (regardless of how small the financial advantage may have been to the person who (negligently) committed the offence), but also the recovery of duty underpaid and the imposition of substantial additional penalties is permitted. That the owner may have been innocent under general principles of criminal law (in that *mens rea* was absent), does not remove him from the strict statutory liability created - in addition he bears a strict vicarious liability for the acts of his forwarding and clearing agents. Reference to the circumstances of this case is however relevant in order to outline the motivation submitted and in that a partial remission of penalties and forfeitures was achieved by negotiation, since the Commissioner in his discretion was satisfied upon receipt of representations, that some recognition ought to be accorded to the fact that the defective goods clearance and declaration for duty purposes, was in consequence of oversight and was without moral (albeit not without legal) culpability of the client in question.

Extracts from a memorandum submitted by the writer on behalf of the client in this matter (hereinafter referred to as XXX), to the Commissioner of Customs and Excise, are included infra in elaboration of the nature of the representations made in this matter.

M E M O R A N D U M

TO : THE COMMISSIONER OF CUSTOMS AND EXCISE
DEPARTMENT OF FINANCE
C/O CONTROLLER OF CUSTOMS AND EXCISE, DURBAN
PRIVATE BAG X54305
DURBAN 4000

FROM : XXX

IN RE: YOUR REFERENCE .....

ALLEGED CONTRAVENTION BY XXX OF SECTION 38(1)
READ WITH SECTIONS 40(1), 83 AND/OR 84, OF THE
CUSTOMS AND EXCISE ACT, NO 91 OF 1964, AS AMENDED.

: APPLICATION IN TERMS OF SECTION 93 OF ACT 91 of 1964 AS
AMENDED FOR REMISSION OR MITIGATION OF PENALTIES AND
FORFEITURES, AND APPEAL AGAINST THE RULING OF THE
COMMISSIONER IN THIS MATTER IN A LETTER DATED .....
ON THE GROUNDS HEREIN CONTAINED.

1.

We respectfully refer the Commissioner of Customs and Excise to the following documents .....

2.

2.1 As will appear from the above documents, ...

2.2 .....

2.3 .....

2.4 XXX applies herein in terms of Section 93 of the Customs and Excise Act No. 91 of 1964, as amended, for remission or mitigation of penalties and forfeitures, and appeals against the ruling of the Commissioner in this matter in the letter dated ....., on the grounds herein contained.

3.

The Commissioner is respectfully requested, for the reasons set out under Sections 4.5 and 6 hereof:

3.1 to set aside his former ruling;

3.2 to find in favour of XXX on the basis set out in paragraph 7.3 infra;

3.3 to mitigate the penalties and forfeitures imposed, and to remit under Section 93 of the Act, in his discretion, after due consideration of paragraph 7.3 infra, the whole or any portion he considers appropriate, of the penalties and forfeitures imposed, subject to any conditions he may consider appropriate and necessary.

4.

THE INTENTION OF THE LEGISLATURE WAS THAT LENIENCY SHOULD ATTACH IN CIRCUMSTANCES SUCH AS THOSE OF THE PRESENT CASE:

4.1 It is respectfully submitted that the intention of the legislature in making provision for the discretionary imposition of customs penalties and forfeitures, was to permit a distinction to be drawn (where appropriate) between:

4.1.1 instances where the nonpayment of duty was intentional and deliberate; and

4.1.2 instances where the nonpayment of duty was in consequence of some other factor (such as oversight or negligence).

4.2 It is respectfully submitted further that our client's circumstances and the nature of his contravention (as is elaborated more fully infra), would appear to fall clearly within the latter category (4.1.2).

4.3 We respectfully note that this principle has impliedly found the approval of the Supreme Court inter alia in State v Henning 1973(3) SA 108(N) at 109, where the Court in a customs matter cited with approval the maxim "in poenalibus causis, benignius interpretandum est" (In (considering) matters of punishment, (the Court) is required to be more lenient.).

4.4 We accordingly respectfully contend that the imposition of the severest possible penalty statutorily permitted (as has been ruled) constitutes an excess hardship and a disproportionately harsh operation of law on our client, and that leniency should attach in circumstances such as those of the present case.

5.

A CONSIDERATION OF BROAD JUDICIAL PRINCIPLES OF SENTENCING AND PUNISHMENT

5.1 *In the determination of what constitutes an appropriate and just punishment for the contravention of a law, the judicial officer (or the person or body to whom the judicial task of sentencing is delegated - in this case the Commissioner) must be guided by certain principles of sentencing and punishment that have been laid down by the Courts.*

5.2 *Certain fundamental principles of sentencing and punishment are the following*

5.2.1 *Chief Justice Rumpff, in State v Roux 1975(3) SA 190(A) held that in determining an appropriate sentence, the judge must consider:*

(a) the circumstances of the accused;
(b) the nature of the offence;
(c) the interests of society.

It was held further that, if on considering these elements, a lenient sentence was appropriate, the judge should accordingly impose a lenient punishment.

5.2.2 *These principles were reaffirmed in State v Dualvani 1978(2) PH H176(0), where the Court held that the most important factors in determining sentence are:*

(a) the person
(b) the character and circumstances of the crime.

5.2.3 *In State v Sparks 1972(3) SA 396 (A) at 410H, Justice Holmes held:*

> *"Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy. The convicted person should not be visited with punishment to the point of being broken.*

5.2.4 *In State v V 1972(3) SA 611 (A) at 614, Justice Holmes went further to say:*

> *"The element of mercy, a hallmark of an enlightened administration, should not be overlooked, lest the Court be in danger of reducing itself to the plane of the criminal.... True mercy has nothing in common with soft weakness, or maudlin sympathy with the criminal, or permissive tolerance. It is an element of justice itself."*

5.2.5 *Professors Rabie and Strauss, in their book Punishment : an Introduction to Principles 3 ed (1981) state at page 223:*

> *"The determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blame-worthiness of the offender."*

5.2.6 *Reference may also be had to the Viljoen Report (Report of the Commission of Inquiry into the Penal System of the Republic of South Africa RP 78/1976 : Sections 5.1.4.6 and 5.1.3.1 - 34), in which principles of sentencing punishment and forfeiture are dealt with at some length. Brevitatis causa, extracts are not included here, but the principles established in the Viljoen Report stand in broad support of the recommendations herein.*

5.2.7 *It is respectfully submitted that in the circumstances of the present case, lenient punishment is appropriate after due consideration of the submissions herein.*

6.

RELEVANT FACTORS AND CONSIDERATIONS IN MITIGATION (UNDER SECTION 93 OF ACT 91 OF 1964 AS AMENDED) OF PENALTIES AND FORFEITURES IMPOSED, WITH REFERENCE TO THE CIRCUMSTANCES OF XXX'S CASE

In order to establish the broad applicability of principles of mitigation of sentence and punishment, and the wide extent of their acceptance and implementation, reference is made infra to decisions of both the South African Courts and those of a foreign jurisdiction selected (here : Canada). It is respectfully submitted that these principles are of direct relevance in the matter of XXX, and necessarily operate to mitigate substantially the appropriate punishment (by way of remission or reduction of penalties and forfeitures imposed).

6.1 THE ACCESSORY ROLE OF XXX IN THE OFFENCE MITIGATES THE PENALTIES AND FORFEITURES IMPOSED

6.1.1 Although XXX acknowledges that in terms of the Act, it bears responsibility for the acts of its agents as regards the question of its guilt, it is respectfully submitted that as regards the question of sentence, the fact that the contraventions were not intentional or deliberate, the reliance placed by XXX on its agents, and the inexperience of XXX in matters of customs clearing, operate to mitigate the penalties and forfeitures that are applicable....

6.1.2 The following cases, by analogy, extend to mitigate the penalties and forfeitures imposed on XXX:

(A) SOUTH AFRICA:

In State v Motor 1969 (1) PH H36 (E), it was held that a person who had merely eaten stolen food was not to be treated as severely as the person who had physically stolen it.

(B) CANADA:

In R v Southam Press (1976) 31 C.C.C. 2d 205 (Ont. Canada) the vicarious liability of an editor and publisher led the Court to hold that their role in the offence was not a "deliberate" one, and as such although guilty, the Court set aside their sentence.

6.2 THE CONDUCT OF XXX AFTER THE OFFENCE MITIGATES THE PENALTIES AND FORFEITURES IMPOSED:

6.2.1 It is respectfully noted that XXX, upon realising that an offence had been constituted, willingly paid immediately and in full all amounts required by the Commissioner and co-operated in full with officials of the Department of Customs and Excise.... It is respectfully submitted that such conduct of XXX ex post facto operates to mitigate the penalties and forfeitures imposed.

6.2.2 As authority for the above submission, the Controller is respectfully referred to the following decisions:

(A) SOUTH AFRICA:

R v Ndhlovu 1954 (1) SA 455 (A) et al.

(B) CANADA:

In R v Bartlett and Cameron (1961) 131 C.C.C. 119 at 125 (Man. Canada) the Court held:
(The accused had surrendered to the police and co-operated fully).

> "This circumstance in no way excused the offences that preceded their surrender, but it does indicate a recognition of their wrongdoing and therefore it is a mitigating circumstance."

also: R v James and Sharman (1913)9CR App R 142 (Can)
R v Green : (1918) 13 CR App R. 200 (Can)
R v Syres : (1908) 1 CR App R. 172 (Can)
R v Hatfield : (1937) OWN 559 (CA) (Can)

in which cases it was established that co-operation with the authorities can mitigate sentence.

6.3 THE GOOD CHARACTER OF THE ACCUSED MITIGATES AGAINST THE IMPOSITION OF SEVERE PENALTIES AND FORFEITURES:

6.3.1 It is respectfully submitted that the good character of the accused and the high standing of the Directors of XXX in the community (please refer Sunday Tribune Property Supplement dated .....), stand against the imposition of the severest possible penalty statutorily permitted.

6.3.2 Judicial recognition of this principle may be found in the following cases:

(A) SOUTH AFRICA:

R v Ndhlovu 1954(1) SA 455 (A) et al.

(B) CANADA

In R v Gunnell (1951) 14 CR 120 (Canada), the Court of Appeal held:

> "It is no exaggerated clemency or abuse of discretion for the trial judge to give the prisoner the benefit of his stainless antecedents and of his good character."

In R v Clarke (1959) 124 CCC 284 at 287 (Man., Canada), the Court held:

> "The personal character of the offender and the desirability of giving him an opportunity of redeeming himself ... are matters which require consideration."

6.4 SENTENCE AND PUNISHMENT ARE MITIGATED WHERE THE ACCUSED IS A FIRST OFFENDER:

6.4.1 XXX has on no previous occasion been required to make payment of any such penalty or been liable to any such forfeiture.... It is respectfully submitted that the fact that they are a first offender, must be taken into account in the determination of an appropriate punishment.

6.4.2 Considerable authority exists for this proposition in South African law, inter alia:

State v D'Este	*1971 (3) SA 107 (E)*
State v Fitswana	*1974 (1) SA 479 (T)*
State v Floyd	*1975 (1) SA 653 (E)*
State v Maleka	*1976 (1) SA 374 (O) at 375*

in which cases it was held that where the accused is a first offender, this is a "redelik gewigtige" mitigating factor.

6.5 THE MOTIVE OF THE OFFENDER MAY OPERATE IN MITIGATION OF SENTENCE IN AN EXTREMELY FORCEFUL WAY

6.5.1 Although the motive of the offender is inapplicable in law regarding the question of guilt, it may nevertheless operate in an extremely forceful way in mitigation of sentence. The motive of XXX in the importation of the goods in question, was one of service to the consumer. Quoting from paragraph 2 of the previous Memorandum dated .....:

> *"In an effort to control price inflation resulting from escalations in the supply prices of domestic manufacturers and thereby to avoid price increases being passed on to the customers of XXX, and in an effort to serve the retail sector (and indirectly the consumer) by providing both a high quality and a wide range of products at low prices, the Company resolved in 1981 to enter the international market and to import certain items to satisfy domestic consumer demand."*

(Please refer also to Memorandum dated ..... paragraph 7, Schedules B and E, in which it is noted that the profit markup on the goods in question was very low, and in certain cases, they were sold at a loss).

It is respectfully submitted that the motive of XXX mitigates the penalties and forfeitures imposed.

6.5.2 Authority for the above proposition may be found in the following precedents:

(A) SOUTH AFRICA:

In State v Moyo 1979 (4) SA 61 (RZA), the Court held that one of the most important considerations in sentencing an offender is his moral guilt, and thereby his motive in committing the offence.

(B) *In State v Cloete 1971 (2) PH H74 (A), it was held that altruistic motives of service are mitigating circumstances of "significant effect."*

(B) *CANADA*

In R v Wesley (1975) 9 OR (2d) 524 (D.C.)(Can.) in respect of the violation of gaming laws, the fact that the hunting was to give food to a needy family was taken into account in mitigation of sentence.

6.6 *THE CUMULATIVE EFFECT OF ALL PENALTIES IS TO BE TAKEN INTO ACCOUNT IN MITIGATION OF SENTENCE*

6.6.1 *As is contended under paragraph 4.4 supra, when the additional duties, the penalties and forfeitures are considered cumulatively, it is respectfully submitted that they together constitute an excess hardship and a disproportionately harsh operation of law on our client. As is submitted in the Memorandum dated ....., paragraph 6B(d), it would be inequitable, contrary to the intention of the legislature, and contrary to public policy, for XXX to suffer severe prejudice in circumstances where their contravention was not intentional or deliberate, and in consequence of bona fide reliance upon the recommendations of their clearing agents....*

6.6.2 *Authority for the above submission exists in the following cases:*

(A) *SOUTH AFRICA*

In State v Whitehead 1970 (4) SA 424 (A), it was held that the cumulative effect of the other sentences can be taken into consideration in order that sentence be reduced.

(B) *CANADA*

In R v Poynton (1972) 9 CCC (2d) 32 (Ont., Canada) the Court refrained from imposing a fine since a penalty of $4 200 had already been imposed on the accused in consequence of the same offence under Income Tax laws.

In R v Hogan and Tompkins (1960) 44 CR App R255 (Canada) it was held that the trial judge, in deciding upon sentence, would have to take into consideration administrative penalties already imposed.

In R v Smith 1978 2 CR 3d S-35 (Nfld. Canada) it emerged from obiter that if an order for the forfeiture of an accused's motor car was sought, the Court must take into consideration the sentence already imposed.

6.7 *UNDUE HARDSHIP TO THE OFFENDER CAN BE CONSIDERED IN MITIGATION OF SENTENCE*

6.7.1 *The submissions under paragraph 6.6.1 supra are brevitatis causa included here. It is respectfully submitted that in relation to the circumstances of the contravention by XXX, the hardship they will experience in the event that the severest permissible penalty is upheld will be undue disproportionate and unjust, and that such hardship must be taken into account in mitigating the penalties and forfeitures in terms of Section 93 of the Act.*

6.7.2 *As authority for the above submission, the Commissioner is respectfully referred to the following authorities in South African law:*

In Ex Parte Minister van Justisie : in re Berger 1936 AD 334, which decision was approved by the Rhodesian Appellate Division in R v Lennox 1973 (1) SA 515 (RA), it was held that undue further hardship to the accused can be taken into account in mitigation of sentence. From three Rhodesian cases in 1969, the principle emerged that forfeiture or confiscation orders must not be imposed in addition to the punishment, but should be imposed:

(a) only as part of the punishment; and
(b) only if the circumstances render such an order or ruling appropriate; and
(c) only if the blameworthiness of the accused justifies such a forfeiture or confiscation.

The precedents referred to are:

R v Poswell 1969 (4) SA 194 (R)
R v Barclay 1969 (4) SA 195 (RA)
R v Pretorius 1969 (4) SA 198 (R)

6.8 *XXX'S WILLING ACKNOWLEDGEMENT OF ITS CONTRAVENTION, AND ITS SUBMITTING TO THE DISCRETION OF THE COMMISSIONER UNDER SECTION 91, AS REINFORCED BY ITS WILLINGNESS TO CO-OPERATE AND ITS PENITENCE AND CONTRITION, CONSTITUTE A BASIS FOR MITIGATION OF PENALTIES AND FORFEITURES.*

6.8.1 *The Commissioner is respectfully referred to the Memorandum dated ....., preamble to paragraph 6, paragraph 6C(a), 6C(b), 6C(c) and paragraph 8. It is respectfully submitted, in relation to the following authorities that such conduct constitutes a ground for the mitigation of penalties and forfeitures.*

6.8.2 *The following precedents inter alia exist in support of the above submission:*

(A) SOUTH AFRICA

In R v Mvelase 1958 (3) SA 126(N) and in R v Mtataung 1959 (1) SA 799(T),

it was held that the guilty plea and evidence of penitence, have a mitigating effect on sentence.

In State v Muvangua (1975) (2) SA 83 (SWA), mitigation of sentence is justified on grounds of a guilty plea if there is remorse and if it is likely that the offence will not be repeated. (The opportunity should be given for the accused to redeem himself where such redemption is likely).

(B) CANADA

In R v Carriere (1952) 14 CR 391 (Que. Canada) the Court held that the plea of guilty should be taken into consideration to mitigate sentence.

In R v Johnstone and Tremayne (1970) 4 C.C.C. 64 at 67 the Court noted that the plea of guilty saves the community a great deal of expense and streamlines the administration of justice considerably. It should accordingly be taken into account in mitigation.

6.9 THE INEXPERIENCE AND IGNORANCE OF XXX OF THE CUSTOMS LEGISLATION, ALTHOUGH NOT AFFECTING THEIR GUILT IN CONSEQUENCE OF CONTRAVENTION, DOES HAVE A SIGNIFICANT BEARING ON THE APPROPRIATE PENALTIES AND FORFEITURES.

6.9.1 Although the maxim ignoratio legis haud recusat (ignorance of the law is no excuse) establishes that ignorance or inexperience is no defence as regards the question of guilt, inexperience and ignorance of the lawhave a significant effect on the mitigation of penalties and forfeitures. The Commissioner is respectfully referred to the Memorandum dated ....., paragraphs 2, 4, 6(i), 6(ii) and 6B(b), from which it is apparent that the brief period of importing and the lack of expertise of XXX's Directors, are largely contributory to the negligence and oversight from which the contravention stems. Under the circumstances, it is respectfully submitted that mitigation on this ground is appropriate.

6.9.2 In support of this submission, reference is made to the following cases:

(A) SOUTH AFRICA

In State v Smith 1974(1) SA 607 (R), the Court held in casu of a statutory provision which rendered dutiable the importation of educational books, that ignorance of the law was a mitigating factor to be considered in determining the just sentence and punishment.

Vide also: State v Mohlabane 1978(1) SA 404 (0).

(B) CANADA

In R v Potter (1978) 3CR (3d) 154 P E I (Canada), in the context of a trial relating to a customs contravention, the Court cited with approval a passage from Kenny Outlines of Criminal Law at page 69:

> "... although mistakes of law, unreasonable or even reasonable, thus leave the offender punishable for the crime which he has blundered into, they may of course afford good grounds for inflicting on him a milder punishment."

7.

7.1 As appears from Sections 4 5 and 6 supra, considerable authority accordingly exists for the view that the imposition in the present case of the severest possible penalty statutorily permitted, constitutes an undue hardship and an excessively harsh operation of law on XXX, and that leniency should attach in circumstances such as those of the present case.

7.2 For the reasons outlined supra in Sections 4 5 and 6, it is respectfully submitted that expression will be given to justice in the event that the Commissioner sets aside his former ruling and adopts the course outlined in Section 3 supra.

7.3 If it may be permitted, with due respect, it is respectfully submitted that a just ruling in the circumstances and in light of the mitigating and general submissions supra, would be:

7.3.1 that XXX should make payment in an amount equal to the duty underpaid (plus any further charges incurred as contemplated under Section 93 of the Act) R .....

7.3.2 that the Commissioner, in his discretion, should remit in full in terms of Section 93 of the Act, the forfeitures imposed, such remission being accompanied however by a letter of caution to XXX R.....

7.3.3 that the Commissioner, in his discretion, should suspend the penalties and remit the whole or any portion thereof that he considers appropriate, such remission being subject to the condition that XXX shall not commit any similar or related offence at any time during a period to be determined in the discretion of the Commissioner R.....

TOTAL PENALTIES AND FORFEITURES IMPOSED: R .....

7.4 We pray accordingly that the Commissioner of Customs and Excise, in his discretion, may find in favour of XXX on the basis outlined in paragraph 7.3 or on such further or alternative basis that he, in his discretion, may consider appropriate.

DATED AT DURBAN ON THIS THE .... DAY OF .... 19..

(SIGNED)
.....
FOR : XXX

APPENDIX A.2

EXCURSUS

APPENDIX TO SECTION 2.6 : IN ELABORATION OF FOOTNOTE (16) THEREOF:

JURISPRUDENCE AFTER JOHN RAWLS' 'A THEORY OF JUSTICE' - THE WRITINGS OF NOZICK, HAYEK, AND NONET AND SELZNICK

(1) INTRODUCTION

In the post-Rawlsian period, perhaps the most significant writings in respect of social justice from a liberalist perspective, have been those of Robert Nozick in Anarchy, State and Utopia (1974), of Friedrich Hayek in Law, Legislation and Liberty (in three volumes: in 1973, 1976 and 1979), and possibly also of Philippe Nonet and Philip Selznick in Law and Society in Transition : Towards Responsive Law (1978). Since their focus is displaced (to an extent) away from the largely contractarian theme of Rawls (albeit that their submissions are essential considerations in regard to social justice), their writings are not incorporated in the main text, and are accordingly merely mentioned in outline in this Appendix.

The analysis herein does not, nor does it purport to, analyse in depth the contributions of these philosophers. Since such lies beyond the scope of an expropriation analysis, the references made infra are intended as an observation in passing (rather than as an essay) upon these writings. For a comprehensive insight in these regards, a detailed study of these texts is necessary - such has not been undertaken by this writer.

(2) ROBERT NOZICK'S 'ANARCHY STATE AND UTOPIA'

Nozick's writings in Anarchy, State and Utopia, in certain ways share features of similarity with the writings of both Locke[1] and Kant[2] in that they adopt an individualistic interpretation of the State, the institution of private ownership, and justice within societies. Nozick's standpoint is individualistic (both in the conception of society and of rights) and conservative: he opposes any theory of justice seeking to redistribute social

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[1] Nozick op cit at inter alia 174 - 178.

[2] Ibid 32 and 228.

goods (on grounds inter alia of his objection to the frequent presumption that the abilities and capacities of Citizens are common assets, capable of being utilised for common advantage); and he reasons accordingly that such a social objective constitutes a suppression of individual liberty. For this reason, his theory is opposed to the redistributive justice approach of Rawls,[3] although he does concede the relevance and cogency of Rawls'writings to the extent that he states:

> *"Political philosophers now must either work within Rawls' theory or explain why not".* (4)

Nozick objects to Rawls' 'difference principle', since when society is viewed not from the perspective of the least well-off, but from that of the socially advantaged, the question arises as to what anticipated benefit would in the minds of the latter, justify their co-operation with the former. As an alternative, he advances his 'theory of entitlement' in which the emphasis is not directly upon social justice itself, but upon the justness of existing accumulations and holdings of wealth. He considers three principles:

(i) *the principle of acquisition,* in terms of which the original acquisition was just if it resulted without denying or infringing the rights of others;

(ii) *the principle of transfer,* in terms of which the derivative acquisition from the original titleholder is just, if it is just in itself and if the original holding is just; and

(iii) *the principle of rectification,* in terms of which subsequent holdings may be regularised (or rectified), in the event that either of the above two principles is contravened.

The effect of Nozick's formula is that vast accumulations of wealth by Citizens and unequal distributions among them, are imbued with a legality under a liberalist and individualist orientation. The State, by contrast, is seen as being "minimal", in that its powers (consistently with the

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(3) Cf: Ibid 183 - 231.

(4) Ibid p 183.

Lockesian view), are limited to those necessary for the protection, preservation and fulfilment of individual rights. Political society is capable (for Nozick) accordingly of justification only where it contributes to these purposes.

Scruton in A Dictionary of Political Thought[5] comments pertinently:

> *"His (Nozick's) views have been criticized:*
>
> *(a) because they do not take into account the difficulties posed by the idea of a 'just original acquisition';*
>
> *(b) because they are based on an unargued individualism concerning human nature and human rights, which attempts to detach the individual from the history and social arrangement which has formed him; and*
>
> *(c) because Nozick seems not to attend to the many functions that a state may fulfil besides that of policing the rights of its members".*

Notwithstanding these objections, and notwithstanding the different inflexion Nozick adopts (relative to Rawls), it emerges in overview that his writings contribute valuably to the liberalist and individualist view of the relation between Citizens and their Property.[6]

(3) FRIEDRICH HAYEK'S 'LAW LEGISLATION AND LIBERTY'

Hayek in Law Legislation and Liberty extends the conservative stance of Nozick to an extreme right-wing degree. His writings have both political and economic reference; they are liberal in character and capitalist in orientation; and they advocate the desirability of bringing political democracy into conformity with the self-regulating nature of a market economy.

Regarding the formation of the state and the operation of the processes of history, Hayek's vision contemplates a self-centred individual with a wholly-subjective conception of justice, who acts spontaneously, and whose non-conscious

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[5] 1983 p 328.

[6] Cf Chapter 3 infra, in particular Section 3.5.

activity characterises the unfolding of his circumstances. Social, political and economic systems and institutions are accordingly in his view not the consequence of conscious human creation or preconception, nor are they the product of the application of objective standards.

Marxian critics (inter alia Kamenka) object to the (right wing) assumptions of Hayek - that capitalism is morally justified, and that capitalism, with its 'invisible hand' (Cf Adam Smith), is not preplanned. It seems that some validity exists in their criticism in that the capitalist market appears to require the underlying support of a patterned and structured legal system (notwithstanding inter alia Nozick's statement to the contrary).

Ultimately, Hayek's standpoint is anarchist, in that it purports to rationalise the abolition of all institutions, since in his view, any interference by the State with the operation of broad market forces, constitutes a violation of personal freedom. Hayek's liberalism is accordingly not supported by this writer, since in its extremism, it fails to recognise the meaningful functions the State can fulfil. Rather than concluding that an interventionist State is unjust, it seems more appropriate, it is submitted, that such State should be restrained by requiring its observance of and adherence to naturalist principles.

(4) PHILIPPE NONET AND PHILIP SELZNICK'S 'LAW AND SOCIETY IN TRANSITION : TOWARDS RESPONSIVE LAW'

An innovative standpoint is introduced by Nonet and Selznick in their work Law and Society in Transition: Towards Responsive Law. An analysis of and exposition upon their writings in regard to social justice is omitted herein, *brevitatis causa* and in an effort to confine this note to the theme at hand. May it suffice to refer only to their outline of 'repressive law', in order that the presence of such in South African law (in relation in particular here to expropriation legislation) might be considered. They state:(7)

(7) Ibid p 51.

> *"If we review the various manifestations of repressive law, two cardinal features emerge. The first is a* close integration of law and politics, *in the form of a direct subordination of legal institutions to public and private governing elites: law is a pliable tool, readily available to consolidate power, husband authority, secure privilege, and win conformity. The second is* rampant official discretion, *which is at once an outcome and a chief guarantee of the law's pliability".*

Without elaborating these submissions in depth, it seems that South African expropriation law conforms with this model - in the first regard, vide Section 1.3.8, and in the latter regard, vide Appendix to Section 3.7.

(5) AN OVERVIEW

The writings of John Rawls have ushered in a new era in political and legal thinking. If the Hegelian model of history[8] were to be extended to this context, it would seem that if Rawls' Theory represents a synthetic culmination of prior contractarian thought, then his treatise has in turn within the continuum, thetically stimulated a host of reactions which are yet to experience a sublimating synthesis.

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(8) Vide Section 3.1 infra.

APPENDIX A.3

APPENDIX TO SECTION 3.4 : IN ELABORATION OF FOOTNOTE (41) THEREOF: ADMINISTRATIVE PROCEDURE UNDER THE EXPROPRIATION ACT 63 OF 1975 AS AMENDED

INTRODUCTION

The Expropriation Act 63 of 1975 as amended, is the statutory expression in South African law of the state's common law power of dominium eminens. As is submitted in the main texts supra at various stages in this exposition, the Act (particularly in respect of the expropriatee's compensation entitlement), falls short however of being an embodiment of the common law heritage and the contributions of naturalist and contractarian thinking. Although it is in a sense the consequence of legislative history (as is elaborated in respect of English law in Section 3.4 supra, and in respect of South African law in Section 1.3.9 at footnote 15), it could hardly however be said to be the synthetic (Hegelian)culmination of the diverse strands of broad history that precede it, since so many themes in legal history are discarded in it or ignored, either partially or entirely.

The 1975 Act,broadly speaking,(1) is however (from a positivist perspective), the law that regulates the relation between Citizens and their Property in circumstances of expropriation. For this reason, an outline of its provisions is appropriate in the interests of completeness. The complexities (and often the bewildering nature of administrative practice) can be distilled into the following model, which sets out in overview in a simplified fashion, the administrative procedure that exists in South Africa at present. The words of Milne J (as he then was) in Durban City Council v Jailani Cafe(2) justify perhaps the relevance of this analysis:

> *"...It (expropriation) appears to me to be a purely administrative act..."*

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(1) The various provincial ordinances et al having a bearing in matters of expropriation are not considered herein - vide inter alia Section 1.3.9 supra at footnote (20).

(2) 1978 (1) SA 151 (D) at 153 H.

In outline, there are five[3] distinct administrative stages in an expropriation:[4]

A.1 the first is the stage of *authorisation*, in terms of which the Minister, on behalf of the State, grants approval for the expropriation;

A.2 the second is the stage of *notice*, in terms of which the notice of expropriation is served upon the expropriatee;

A.3 the third is the stage of the *passing of ownership and possession* in the expropriated property to the expropriator;

A.4 the fourth is the stage of *compensation*, at which stage compensation is negotiated between the expropriatee and the expropriator;

A.5 the final stage is that of *litigation*, in the event that compensation negotiations fail.[5]

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(3) The analysis herein was prompted by Wade Administrative Law 1982 ed, where the three stages in the English system are set out.

(4) The body of this Appendix is adapted from the text of a lecture on expropriation given by the writer at the University of Natal in 1983.

(5) The writer makes reference herein to the *opinions* of Dr A Gildenhuys, Advocate M Jacobs, and certain Senior Counsel. These *opinions* were given in response to briefs to such persons, and do not form part of their published work.

A.1 THE STAGE OF AUTHORISATION

A.1.1 In terms of Section 2(1) of the Expropriation Act 63 of 1975, the power to expropriate private property for public purposes is vested in the State (as represented by the Minister of Community Development). This Section reads:

> *"Subject to the provisions of this Act, the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes, or take the right to use temporarily any property for public purposes".*

A.1.2 In regard to the above extract, it is recorded that it was the Afrikaans text of the principal Act that was signed. It is important accordingly to note that where deficiencies in translation arise, or where issues of interpretation are involved, regard must be had to the wording employed in that text.

In this regard further, it is noted that the English texts of certain of the Amending Acts were signed - it would seem here accordingly that reference in questions of construction should be to the English text.

A.1.3 The provisions of Sections 2 to 6 of the Expropriation Act set out the procedure for authorisation. In short, the Minister will receive and consider the recommendation of the appropriate Government Department, and in the event that he considers that the public need justifies the expropriation, he is empowered under Section 2(1) of the Act to authorise the expropriation, subject to a duty to pay compensation where such is statutorily provided.

A.1.4 It is noted that ANY property can be expropriated, including both immovables and movables, and the right to use property temporarily. (Vide definition of "property" in Section 1, read with Section 2(1)).

A.1.5 In terms of Section 3, the Minister is empowered to expropriate immovable property on behalf of certain juristic persons or bodies, such as Universities, Colleges, the Atomic Energy Board, the National Monuments Council, and any other juristic person contemplated in the Act or under any other law.

A.1.6 Property can be expropriated also by the Railways (vide Section 4), by local authorities or municipalities (vide Section 5), or by the Community Development Board, subject to the provisions of the Act. In the last regard, it is necessary to read certain provisions of other statutes, such as Section 38(1)(a) of the Community Development Act, 3 of 1966, in conjunction with the Expropriation Act.

A.2 THE STAGE OF NOTICE

A.2.1 In terms of Section 7(1) of the Expropriation Act, the Minister is obliged to cause a notice of expropriation to be served upon the owner of the property.

A.2.2 Service can be:

(a) on the owner personally; or
(b) sent or delivered by registered post; or
(c) published in the Government Gazette and in local newspapers in the event that there are several joint owners or if the whereabouts of the owner are unknown.

A.2.3 Registered rights must be expropriated separately and a separate notice sent to each registered rightholder.

A.2.4 The position as regards unregistered rights is different:

(a) In terms of Section 22, all unregistered rights terminate on the date of expropriation.

(b) In terms of Section 13(1), no compensation is payable by the State in respect of unregistered rights. (This is often very harsh for the expropriatee).

(c) However, there is an exception to Section 13(1) contained in Section 9(1)(d), in terms of which unregistered rights of lessees for business or agricultural purposes, prospective purchasers who have a personal right through a written contract of purchase and sale, the holders of builders' liens, and share-croppers, are permitted to obtain compensation.

(d) It is significant to note that inter alia unregistered residential lessees cannot claim compensation if their lease right is terminated by expropriation.

A.2.5 Section 7(2) contains certain peremptory provisions regarding the contents of a valid notice of expropriation - in the event that the expropriator does not comply therewith, the notice is invalid. (Vide Cockram Interpretation of Statutes Chapter VIII).

An as yet unreported matter concerning the Pinetown Municipality has recently been heard in the Supreme Court regarding the validity of an expropriation notice.

A.3 THE STAGE AT WHICH OWNERSHIP AND POSSESSION OF THE EXPROPRIATED PROPERTY PASSES TO THE EXPROPRIATOR

A.3.1 In terms of Section 8(1) of the Expropriation Act, ownership of the expropriated property passes on the date of expropriation stipulated in the notice.

A.3.2 Possession of the expropriated property will pass on a date stipulated in the notice or agreed upon between the parties. This date of possession will generally not be less than sixty days from the date of expropriation, unless the property is urgently required by the State.

A.3.3 In terms of Section 8(4), risk in the property passes on the date of possession, so the owner is responsible for taking care of and maintaining the property until that date.

A.3.4 In terms of Section 8(6), the owner continues to enjoy the benefits of and income from the property, and remains liable for rates and other charges, until the date upon which possession is handed over.

A.3.5 It is significant to note that the landowner's interest entitlement under Section 12(3) commences from the date of possession, and not from the date of expropriation. This factor can substantially affect the appropriate quantum of the claim.

A.4 THE STAGE OF COMPENSATION

A.4.1 An entitlement to compensation in South African law arises only in the event that there is legislative provision in that regard- (vide Joyce and MacGregor v Cape Provincial Administration 1946 AD 658 : discussed supra) - a claim for compensation cannot be grounded upon common law. (Cf Section 1.6 supra).

A.4.2 The provisions of Sections 9 to 13 (in particular Section 12) regulate the compensation entitlement.

A.4.3 In broad outline, the structure of expropriation claims is as follows:

(1) In the case of an expropriated landowner

(a) Claim for value of land and improvements, at market value, under Section 12(1)(a)(i).

(b) Claim for actual financial loss caused by the expropriation, under Section 12(1)(a)(ii).

(c) Claim for solatium (equal to 10% of the land value, but subject to a maximum of R10 000,00) (being an amount to compensate for inconvenience attaching to the expropriation), under Section 12(2).

(d) Claim for interest on the compensation award, under Section 12(3).

(e) Claim for costs in the event of litigation, under Section 15.

2. In the case of an expropriated rightholder who is not disqualified from claiming under the Act

(a) Claim for actual financial loss or inconvenience caused by the expropriation (including claim for loss of the right expropriated), under Section 12(1)(b).

(b) Claim for costs in the event of litigation, under Section 15.

NOTE: It is noted that an expropriated rightholder cannot claim for:

(i) solatium; or
(ii) interest.

A.4.4 The above submissions are developed in depth in the earlier work of this writer, The Expropriation of Leased Business Properties (1981).

A.4.5 The provisions of Section 12(5) are particularly significant in the determination of the quantum of compensation to be paid.

A.4.6 It is noted also that claims for compensation should always be supported by full motivation:

(a) Valuators' reports can be used to motivate land values.

(b) Accountants or actuaries can assist in the preparation of financial loss claims.

A.4.7 A section of the Expropriation Act which requires particular mention is Section 10(5), which provides for the DEEMED ACCEPTANCE of an expropriation offer in the event that an expropriatee fails to apply to an appropriate Court for the determination of compensation, within eight months from the date of the offer of the expropriator, PROVIDED THAT the expropriator has drawn the attention of the expropriatee to this section of the Act.

A.5 THE STAGE OF LITIGATION

A.5.1 The provisions of Sections 14 to 18 of the Act have a bearing upon litigation.

A.5.2 It is suggested that the course of litigation should be adopted only in the event that negotiations fail. The government departments are in the experience of the writer very amenable to representations by the expropriatee, and endeavour to assist in ways that are permitted by legislation. The importance of detailed negotiation should accordingly not be overlooked.

A.5.3 A further function of the service of summons can be to interrupt prescription. The South African law is unsettled on the question of the date from which prescription operates - whether it is three years from the date of expropriation or three years from the date of the first offer of compensation. Whereas Dr A Gildenhuys holds the latter view, the writer has received contrary opinions from Senior Counsel. Although the writer supports Dr Gildenhuys' view, it would seem expedient (until such time that the Court pronounces on this point) to issue summons prior to the expiry of a three year period from the date of expropriation, in order that the claim of a client may not be left open to doubt.

A.5.4 Furthermore, regarding the question of prescription, in the event that such does operate from the date of the offer of compensation, the writer records his support for the opinion of Advocate M S Jacobs (given in the context of Section 10(5)), that such date is the date of first offer (even if a subsequent increased offer is made).

A.5.5 Regarding the deemed acceptance of an offer under Section 10(5), it is noted further that although provision is made for the extension of the eight month period stipulated, it would seem that such consent cannot (lawfully) be given after the said period has expired.

A.5.6 In the event that the parties fail to agree upon compensation, and provided that litigation can be commenced timeously (vide supra), the following courses are open to them:

(1) they can either apply to an appropriate Court for the determination of compensation (to borrow the dictum of the Act), in which event:

(a) if it is a Supreme Court matter, litigation is instituted by way of action; or

(b) if it is a Compensation Court matter, litigation is instituted by motion; or

(2) they can agree to submit the matter to arbitration.

A.5.7 In the event that they elect to litigate, Section 14(1) of the Act sets out the jurisdiction of the Courts:

(a) In claims less than R100 000,00, the matter is heard in a Compensation Court under Section 16 and under the Regulations under Section 25; or

(b) In claims of R100 000,00 or more, the matter is heard in the Supreme Court, unless both parties consent to the jurisdiction of the Compensation Court.

A.5.8 The costs of litigation are regulated under Section 15 in accordance with the degree of success achieved by the parties respectively.

A.6 FURTHER ASPECTS

A.6.1 Further aspects of the Act (eg: Section 23: withdrawal of Expropriation) are set out in the remaining Sections thereof. The principal administrative features are however set out supra.

A.6.2 Vide also Appendix to Section 3.7.

APPENDIX A.4

APPENDIX TO SECTION 3.7 : IN ELABORATION OF FOOTNOTE (4) THEREOF: RECOMMENDATIONS FOR STATUTORY REFORM IN SOUTH AFRICA

APPENDIX TO SECTION 3.7 : (1) : INTRODUCTION

The Expropriation Act 63 of 1975 (as amended) has had operation in South African law since 1 January 1977. Its legislative history[1] is as follows:

TITLE	NUMBER	DATE OF ASSENT	DATE OF COMMENCEMENT
Expropriation Act	63 of 1975	20 June 1975	1 January 1977
Expropriation Amendment Act	19 of 1977	8 March 1977	1 January 1977
Expropriation Amendment Act	3 of 1978	3 March 1978	1 January 1977
Expropriation Amendment Act	8 of 1980	18 March 1980	28 March 1980
Expropriation Amendment Act	21 of 1982	16 February 1982	12 March 1982

From the above outline, the principal observations that can be made are that:

(i) South African expropriation law is still in a state of flux, evolution or synthesis (as evidenced by one new principal Act and four Amending Acts within the last decade);[2]

(ii) Parliament has indicated a willingness and preparedness to institute reform or amendment where it is persuaded such is appropriate - it appears reasonable to conclude that a similar approach will continue, and that recommendations for further reform will be favourably entertained;

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[1] The development of expropriation legislation prior to 1975 is discussed in Section 1.3.9 supra at footnote (15), and in the Appendix to Section 3.4 supra. For a comparison between the 1965 and 1975 Expropriation Acts, vide Van Schalkwyk op cit in particular 1 - 4; 71; 79; 170-1; 283 - 287; and also pp 60 - 65; 77 at footnote (54); 131 at footnote (88); 225.

[2] A similar pattern evidenced itself in respect of the 1965 Expropriation Act:

TITLE	NUMBER
Expropriation Act	55 of 1965
Expropriation Amendment Act	43 of 1968
Expropriation Amendment Act	85 of 1970
Expropriation Amendment Act	53 of 1971

The whole of each of these Acts was repealed by Act 63 of 1975 (cf Schedule to Act 63 of 1975). Vide also preface to Jacobs op cit.

(iii) Parliament has seen fit on two occasions (1977 and 1978) to pass retrospective legislation. Although it is noted that the amendments thereby introduced are perhaps not substantially prejudicial to an expropriatee, their effect is significant. The sections affected are:

1977 Act : Sections 5(1), 16(4), and 26(2)
1978 Act : Sections 12(2),[3] 16(7), and 25(1).

In his preface to The Law of Expropriation in South Africa, Jacobs comments:

> *"one would have thought that with so much attention lavished upon it by the legislature, the expropriation legislation presently in force in South Africa would at the very least have been* fair *to all persons whose rights are affected thereby and would have been* clear *in its terms. Unfortunately, the Act fails to satisfy either of these criteria".*

The Expropriation Act 63 of 1975 as amended, is assessed herein in relation to these two criteria:

(i) *Clarity* is considered in Section (2) hereof; and
(ii) *Fairness* is considered in Section (3) hereof.

It is recommended that the observations herein be read in relation to the sections (of the Act) to which they refer.

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[3] This amendment, regarding the solatium entitlement, is perhaps the most important.

APPENDIX TO SECTION 3.7 : (2) : RECOMMENDATIONS FOR REFORM : IMPROVED TRANSLATION AND EXPRESSION TO PROMOTE CLARITY

It is submitted that the translation of the Act from Afrikaans (the signed text) to English and the form of expression adopted, if not being deficient, is sub-optimal. In order to substantiate this proposition, an analysis is conducted herein of the translation of Sections 1 to 12 inclusive (the sections which perhaps have the greatest significance for an expropriatee prior to the stage of litigation). Although the analysis is not exhaustive, and although certain of the points infra when viewed in isolation may appear insubstantial, it is submitted that they in conjunction motivate a proposal for reform (or at least, closer attention) in the future. Linguistic accuracy and clarity is vital in statutes by reason of the importance of the statutory wording to questions of construction and in the ascertainment of the intention of the legislature.

For ease of exposition the analysis herein is conducted section by section, and set out infra on a point-form basis.

SECTION 1:

(i) The word "beteken" appears once in the subheading in the Afrikaans text, while "means" appears thirteen times, and "includes" appears six times, in the English text.

(ii) The words "grond en ander goed" ("land and other property") are capable of more precise expression. (Cf: definition of "public purposes" and heading, and Section 12(1)). Vide also definition of "owner").

(iii) In the definition of "date of offer of compensation" ("datum van die vergoedingsaanbod"), the English text is linguistically more efficient.

(vi) The definition of "owner" generates certain contradictions:

(a) firstly, it suggests that the ownership of land is distinct from the holding of rights in or over that land (vide discussion in Section 3.6.4 supra);

(b) secondly, the distinction is curious in that it suggests that land ownership involves a direct relation between the owner and the object of his ownership right, and not one in which the rights of ownership stand mediate in that relation (cf Section 3.6 supra);

(c) thirdly, the word "any" in the English text, does not appear in the Afrikaans text.

(v) There appears to be a general looseness in the use of the English words ("land", "property", "any property") as against the Afrikaans words ("grond", "goed"). Clarity would be promoted in the event that the term "property" had been more accurately defined.

(vi) There is vagueness in the words "particular property" in the definition of "Master".

(vii) In the definition of "public purposes", the words used are capable of a more accurate restatement to reflect the interpretative efforts that have been made by the judiciary (vide Section 1.3.8 supra at footnote 26) and the distinction that has been introduced thereby, between "governmental purposes" and "public purposes";

(viii) The English text at "this Act", in Section 1, suggests that the regulations (under Section 25) are subsumed under the Act in one entity. The Afrikaans text suggests (in the word "ook") that the Act and the regulations have a separate identity, but are grouped together in one universal set larger than the Act itself.

SECTION 2:

(i) The Afrikaans text uses "behoudens" and "onderworpe aan", while the English text uses "subject to" twice.

(ii) The provisions of Section 2(1) appear capable of more precise expression - in that the subsection is too broadly phrased, it contradicts (possibly) Section 22, notwithstanding the first clause of Section 2(1).

In elaboration: whereas the first "subject to" clause modifies the *power* to expropriate, it does not appear to modify the *liability* to compensate, which seems regulated by the second "subject to" clause only. Although the intention of the legislature is perhaps apparent from the Act as a whole, clarity would be promoted by the restatement of Section 2(1) to reflect that the liability to compensate is similarly subject to the other provisions of the Act.

(iii) In that the discretion of the Minister is so widely framed, the rights of expropriatees (from a naturalist and liberalist perspective) are crucially qualified. It is noted however that the exercise of such discretion requires still the element of *bona fides*.

SECTION 3:

(i) "bepaalde" is translated as "any particular" - this is not in itself irregular but is perhaps an unwarranted amplification.

(ii) A curious statutory feature exists in Section 3(1) in terms of which 'deemed public purposes' are stipulated.

(iii) "'n" is translated as "any" in Section 3(2)(h) and at several other points in the Act. In terms of Hiemstra and Gonin Engels-Afrikaanse Regswoordeboek p 11, this is acceptable, although "enige" would seem more precise.

(iv) The peremptory or otherwise nature of Section 3(3) is perhaps clouded by the translation of "word" (Afrikaans) as "shall".

(v) In Section 3(4), a vagueness exists in respect of 'by whom' and 'to whom' such monies stipulated, are "payable". The Act is silent here on certain questions (eg Estate Agent's commission).

(vi) In Section 3(5), "vergoed" is translated as "refunded".

(vii) Some redundancy and repetition perhaps appears in Sections 3(4) and 3(5).

(viii) The Act appears jurisprudentially defective here from a naturalist perspective in failing to provide that the passing of ownership is conditional upon the (ultimate or eventual, at least) payment of compensation, where an entitlement thereto exists.

SECTION 4:

(i) The emergency powers conferred in Section 4(3) appear inappropriately to have been included in expropriation legislation. (This blurs the distinction in Section 1.3 supra).

(ii) The reference in Section 4 to "goed" (or "property") appears inconsistent with the distinction in Section 1 between "grond en ander goed" ("land and other property").

SECTION 5:

(i) The grammar in Section 5(1) (regarding the positioning of "only") is incorrect.

(ii) Here "goed" is translated as "property" without the "any" that is customarily supplied.

SECTION 6:

(i) "bepaalde goed" is translated as "any particular property".

(ii) The words "any person" appear perhaps to violate the principle that dominium eminens in the hands of the State is inalienable (vide Section 1.4 supra).

(iii) "shall" is translated from both "is" and "moet". (Contra Hiemstra and Gonin op cit p 127).

SECTION 7:

(i) There appears again to be a generally loose usage of "is", "kan", "moet", "word" and "mag".

(ii) "'n" is again translated as "any".

(iii) In Section 7(2)(c), "shall" appears to lack a counterpart in the Afrikaans text.

(iv) The words "full particulars" fail to indicate the nature of the disclosure required.

(v) In Section 7(4), the words "'n kennisgewing dat ..." have a different sense to the words "a notice to the effect that....".

(vi) The word "beoog" would perhaps be more appropriate than "bedoel".

(vii) The words "of gebruik" and "moet" are omitted from the English text.

(viii) The words "if the property to be expropriated is land", suggest that the word "property" is being inconsistently used, when viewed in relation to Section 1.

(ix) "verblyfplek" is translated as "whereabouts" in Section 7(5).

(x) There is an additional word "is" in the English text that does not appear in the Afrikaans text.

(xi) The Active Voice is used in Section 7(5) in English, whereas the Passive Voice is used in Afrikaans - there would appear to be no direct justification for this.

(xii) The verbs "bestel" and "publiseer" are used in the Afrikaans text, as against "published" which is used twice in English.

SECTION 8:

(i) The customary co-identity accorded to "Minister" and the "State" , finds a divergence in Section 8(2) - the separation of these two concepts that is thereby posed, is curious.

(ii) In Sections 8(3) and 8(4) (also 7(2)(c)), "oordeel" is translated as "opinion"; contra "Section 9(1) proviso, where "discretion" is suggested by "na goeddunke".

(iii) The peremptory suggestion is on occasion lessened or heightened by the translation eg: in Section 8(3), "wat bestel moet word" becomes "to be served".

(iv) In Section 8(7), "shall" is supplied in the translation, and "koste" is translated as "charges".

SECTION 9:

(i) "die" is translated as "such".

(ii) "full particulars" again fails to disclose the nature thereof.

(iii) In Section 9(1)(b), the passive and active voices are interchanged.

(iv) In Sections 9(1)(c) and 9(1)(d), exactly the same words are translated in the English text in a different way:"indien die goed wat onteien word, grond is".

(v) In Section 9(1)(d)(i):

(a) the word "and" is supplied (cf also 9(1)(d)(ii));

(b) "die kontrak" becomes "it";

(c) "kontrak" then becomes "lease";

(vi) The reasonableness of the requirement that the contract must be written, comes into question in Section 9(1)(d)(iii).

(vii) The word "sharecropper" does not appear in the two volume Oxford English Dictionary, nor does it appear in Bosman Tweetaligewoordeboek in the English section, although "deelsaaier" does appear in the Afrikaans section thereof. It appears however in Hiemstra and Gonin, op cit.

(viii) "be posted" is translated from "gepos kan word".

(ix) The words "na goeddunke" hold less connotation of "opinion" than they do of 'at his will' or 'at his pleasure'.

(x) In Section 9(2), there are punctuation inconsistencies: commas in the English text do not appear in the Afrikaans text.

(xi) "nodig ag" is translated as "may consider necessary".

(xii) Section 9(3) is ambiguous in that it is not clear from when the "sixty days" runs.

(xiii) Sections 9(3), 9(5) and 9(6), would appear to fall short of the efficiency of operation they could have created: eg: it seems that the Minister cannot require or force the expropriatee to deliver the title deeds, but can merely charge him in the criminal law for failing to do so; furthermore, frauds appear constituted only if they appear in a *written* instrument.

SECTION 10:

(i) The words "en wel" do not appear to have a counterpart in the English text.

(ii) "... reasons exist why ..." in Section 10(1) constitutes a mistake of syntax - it should be "... reasons exist that ...", "reason" and "why" being mutually exclusive.

(iii) In Section 10(3), "shall" corresponds to "is" in the Afrikaans text.

(iv) "bepaal" is translated as "may allow".

(v) "such" is translated from "die".

SECTION 11:

(i) The wording in Section 11(1) is convoluted and clumsy.

(ii) "geag word" is translated as "shall be deemed".

(iii) The 'Tyd Wyse Plek' rule in Afrikaans grammar is not observed strictly in Section 11(1).

SECTION 12:

(i) "moet" is translated as "to be" - this is an important difference in view of the effect it has in Section 12 - it perhaps 'lessens' the degree of the compensation entitlement.

(ii) The word "eienaar" ("owner") is curiously limiting in its conventional sense (however contra Section 1) in regard to the classes of persons who are compensable.

(iii) The English words "make good" are more restrictive than the Afrikaans word "vergoed".

(iv) "any" here corresponds to "enige", in contra-distinction to the normal use in the Act of "'n".

(v) The words "all land" in the (signed) English text of Section 12(2) could be far better phrased to avoid the ambiguity as to whether solatium is claimable on each property under a combined notice of expropriation.

(vi) "verkoop was" is translated as "if sold".

(vii) "there shall be" is translated as "word daar".

(viii) "neem" in Section 12(3) appears to be positioned in contravention of principles of Afrikaans sentence structuring.

(ix) The grammar in Section 12(3)(a)(i) is defective by reason of the 'hanging preposition' found in "of".

(x) The ambiguity in the English text in "from", is not contained in the Afrikaans text in "na".

(xi) The word "resolved" is a malapropism - it should perhaps be "removed" (as translated from "verdwyn").

(xii) "na daardie datum" does not appear in the English text, nor does "en wel".

(xiii) "shall" does not appear in the Afrikaans text.

(xiv) The full stop in Section 12(3)(a)(ii) in the Afrikaans text should be a comma.

(xv) In Section 12(4), "'n" is translated as "any".

(xvi) Clarity would be promoted in Section 12(5)(h)(iii) if the extent of the word "any" (or "'n") was more clearly delineated.

In overview, it emerges that the standards of translation and expression are not of the level that ought to be embodied in statutory law. These deficiencies, inaccuracies and mistakes lessen the meaning, the clarity and the merit of the legislature's intention as expressed. The list given is by no means exhaustive, but it highlights that these defects are accordingly an appropriate forum for a focus of reform and improvement by our parliamentary draftsmen in the future. Furthermore, in the interim, in instances of controversy, reliance should be placed on the signed text.

APPENDIX TO SECTION 3.7 : (3) : THE CRITERION OF FAIRNESS: RECOMMENDATIONS FOR STATUTORY REFORM

The criterion of fairness as it exists in the Expropriation Act 63 of 1975 as amended, is considered herein from a naturalist liberalist and contractarian perspective. For ease and consistency of exposition, the analysis infra is structur within the five administrative stages set out in the Appendix to Section 3.4 supra.

(1) *THE STAGE OF AUTHORISATION:*

Within the confines of the Act itself, no major criticism is raised regarding the authorisation procedure set out. The vesting of capacity in the Minister to authorise an expropriation, is an administrative procedure acceptable under contractarian thinking, since expediency and efficiency in the executive's operations, militate against a separate legislative authorisation for each expropriation. (Contra: 1845 Land Clauses Act in England). It is noted however that since the Minister acts as the authorised agent of Parliament, he would appear bound in the exercise of his discretion, to observe the '*Volonte Generale*', and to execute this quasi-fiduciary mandate *bona fide*.

Where criticism is possible however, is at a stage antecedent to the provisions of the Act - ie at its inception. Under Social Contract theory expropriation is permissible or legitimate if authorised by the 'General Will' and in the furtherance of public purposes. Where an authority is conferred by the White Parliament upon its appointed Minister to execute functions that contravene the liberty and equality of the majority (Cf: Group Areas expropriation - cf Sections 1.3.8 and 2.6 supra), the legitimacy of this authorisation is questionable. To eliminate this objection, the political restructuring of South African society would appear to be required. Since such reform is accordingly no longer legislative in character, it is not explored further herein.

(2) : *THE STAGE OF NOTICE*

(i) In the event that the State was obliged to make an offer of compensation in the notice in respect of land claims, the potential prejudice of expropriatees in the absence of such an offer, would be considerably alleviated. On the one hand, delays in settlement could be removed thereby (since the expropriatee would have knowledge at the time of expropriation of the State's assessment of the value of his property), and on the other hand, the costs he might (unnecessarily) incur in having his property valued and in consulting his advisers, would be avoided. Both the background of practice and a consideration of equity, indicate to the writer the importance of this proposal.

This recommendation could not however extend to financial loss claims, since the quantum of such would be in the particular knowledge of the expropriatee only.

(ii) A further recommendation relates to the fact that in its present form, the Act terminates the rights of unregistered lessees (and others) yet does not necessarily require that they be given notice thereof. It appears equitable that an unregistered rightholder ought to receive formal notice that the property over which his right operates, has been expropriated. Such notice would appear best given at the time that the notice of expropriation is served upon the registered owner. This proposal would require the amendment of Section 7(4). A convenient procedure would be the obligatory publication of a notice of expropriation in the Government Gazette.

(iii) The provisions of Section 7(2)(c) do not appear to preclude the possibility of retrospective expropriations. It is submitted that such ought to be prohibited statutorily unless cogent circumstances exist requiring same.

(iv) It is recommended that legislation should be consolidated to provide a single uniform procedure. Until such is instituted, it appears necessary that the Act should permit the expropriatee to contest the adoption of a procedure prejudicial to his interests, where an alternative and less harsh procedure exists. By way of examples:

(a) If the expropriator expropriates properties under a combined notice, then the expropriatee should be entitled to contest this if such procedure operates detrimentally upon his solatium entitlement under Section 12(2);

(b) If the expropriator expropriates under (for example) Natal Ordinance 19 of 1945, the expropriatee ought to be able to require his re-expropriation under Act 63 of 1975, if the former prejudices the quantum of his compensation.

(3) : *THE STAGE AT WHICH OWNERSHIP AND POSSESSION PASS*

(i) The writer raises no objection to ownership and possession passing at the date(s) stipulated in the notice, and supports the sixty day provision in Section 8(3). Regarding the proviso to Section 8(3) however, it is submitted that the expropriatee should be permitted access to the Courts in the event that he is substantially prejudiced by the Minister's exercise of his discretion. In general in the Act, it would seem that the discretion of the Minister should be framed in a less broad manner.

(ii) The provisions of Section 8 in general however appear consistent with equity, save perhaps for the automatic release of the property from any mortgage bonds to which it is subject. This is a curious feature, in that the (real) right of the mortgagee could conceivably be prejudiced thereby - eg where the State's assessment of compensation payable is less than the amount of the bond granted.

(4) : *THE STAGE OF COMPENSATION*

(i) It is in respect of the stage of compensation, that the principal objections to the Act (on grounds of fairness) arise. In an article in the Financial Mail of 14 October 1983, at p 34, the recommendation is made in a headnote:

> *"Compensation for expropriating property in South Africa is sometimes grossly unfair. The system is cumbersome and outmoded. It needs thorough investigation".*

The article records several examples in which inequity (of a gross degree) has arisen. In outline, the following situations are mentioned - this writer appends herein his observations thereto:

(a) an instance is given in which the expropriator acquired property, and two years later resold it for twenty times the amount paid. (The writer in his experience has encountered similar inequitable situations. In one in Ladysmith, Natal, the expropriatee was offered Rx, he had a bond for R4x, and a sworn appraisal of market value for R7x. Had he accepted the offer, he would have had to contribute R3x just to repay the bond).

(b) reference is made to the fact that "there are a daunting forty expropriation statutes which deal with expropriation and compensation in South Africa" - here then again, the need for consolidation is raised.

(c) the article refers also to the fact that our laws "fall short of equity because they deal only with tangible losses incurred in the actual loss of land". In this regard, it is noted that the market value test in Section 12 is deficient in the valuation of special purpose or special use properties, (eg churches, mosques, schools, etc), and in circumstances where comparable sales are lacking. Vide: Minister of Agriculture v Federal Theological Seminary 1979(4) SA 162 (E); Minister of Agriculture v Estate Randeree and Others 1979 (1) SA 145 (A); Gray Coach Lines v City of Hamilton (1971-2) 1 LCR 181.

(d) our expropriation statute fails to consider losses occasioned by "injurious affection" - eg: the depressed effect on property values by virtue of the proximate location of a sewage farm or airport.

The writer has been advised by Dr Gildenhuys that SAPOA (South African Property Owners' Association) is currently making representations to the government that statutory recognition of such losses is appropriate. In English and American law, compensation is payable in this regard. The submission of this writer is that such inclusion would be equitable.
Vide: Tongaat Group v Minister of Agriculture 1977(2) SA 961 (A); Richmond Elks Hall Association v Richmond Development Agency 561 F 2d 1327 (USA).

(e) the solatium entitlement under Section 12(2) seems somewhat arbitrary and inflexible. For example, the same award is made where a property worth R100 000,00 is expropriated, as is made where a property worth several million rand is involved.

(f) the endorsement of the title deeds of land earmarked for expropriation is recommended, in order that prospective purchasers are not misled. (Cf Glen Anil developments in Natal).

(g) the article concludes with the observation that

> *"It is never a good idea to invest any level of government with powers without their being able to be called to account in the courts for adequate compensation. Under expropriation practice in this country today, the ability of the courts to determine fair compensation is far too circumscribed in all but straightforward cases. The whole question needs legislative review".*

It appears that the Financial Mail article leans to an extent perhaps in the direction of Robert Nozick's theory of a minimally interventionist state, as expressed in Anarchy State and Utopia (1974); but in any event, it leans in favour of fairness. Although an extreme stance on this issue is not however herein advocated, since the public need requires a certain compromise of individual liberty, the recommendations made in the Financial Mail nevertheless have considerable substance.

(ii) Jacobs in The Law of Expropriation in South Africa (at pp 5 - 8) records certain additional criticisms and suggestions for amendment, principal among which are the following:

(Those stated supra are not re-included herein. The comments of Jacobs infra, are modified by the observations of this writer):

(a) the noncompensability of unregistered rights in general, save for the exclusions in Section 9(1), is inconsistent with equity.

(b) the residual portion paid to a landowner by virtue of the provisions of Section 12(5)(h)(iii), can give rise to a particularly harsh operation of law.

(c) substantial uncertainties exist in respect of the compensation entitlement of mortgagees and purchasers (with a *jus in personam ad rem acquirendam)*.

(d) the recognition in appropriate instances of a 'value to the owner' test, represents an apparently necessary departure from strict adherence to the market value criterion - eg: modifications to a house by a paraplegic owner may even detract from its market value. The inclusion in our Act of provisions similar to those in the New Brunswick Expropriation Act (Section 38(1)(d)), would be a valuable extension - in terms of that statute, "any special economic advantage arising out of his occupation" is to be taken into account in assessing compensation.

(e) the 'home-for-a-home' principle applied in some foreign jurisdictions, is of value in circumstances where the compensation paid does not cover the costs of relocation. The opportunity and scope for the application of this principle exists in our law, particularly in respect of Group Areas expropriations. (cf: Section 15 of Ontario Expropriation Act 1973).

(iii) In addition to the above, the recommendations of this writer include the following:

(a) the failure to recognise the claims of expropriated residential lessees, appears to be without substance (contra: Section 9(1)(d)(i), which recognises leases for business or agricultural purposes).

(b) solatium (under Section 12(2)) and interest (under Section 12(3)) should not be confined only to land claims.

(c) the entitlement to the recognition of losses occasioned by the expropriation scheme broadly (cf Section 12(5)(f)), should extend to claims under Section 12(1)(b), and should not be limited (as is the case at present) to those under Section 12(1)(a) of the Act.

(d) the provisions of Section 10(5) should be amended to afford the expropriatee a protection against the deemed acceptance of compensation upon expiry of the stipulated eight month period.

(e) the expropriatee should have the right to require the Minister to advance payment (prior to settlement but after ownership and possession has passed), in an amount equal to the offer of compensation made. This would require the amendment of Section (11)(1) of the Act.

(f) consideration should be given to the introduction of 'betterment levies' (as exist in English law - vide Davies op cit and Cripps op cit), in terms of which the State can require a contribution from owners whose properties have been considerably enhanced by a broad expropriation scheme. Of course, recognition would have to be accorded to the fact that such enhancement was occasioned without the participation of the owner: a percentage-based contribution would accordingly perhaps be appropriate.

(g) it is recommended that the State should establish an independent organisation in each major centre to advise expropriatees (at a reduced charge, if any) regarding their preparation and submission of claims. Alternatively, such could perhaps appropriately be included within the ambit of the Legal Aid offices, although a revision of the means test would be necessary in respect of such matters. This proposal is made partly by reason of the fact that the expropriatee should not be required to carry the full burden of financing a claim precipitated unilaterally by the State. As a further alternative, it is submitted that legislative reform should be introduced to permit the claimability of legal costs occasioned by the expropriation, subject to the provision of a formula regulating on a sliding scale in relation to the quantum of the settlement, the maximum such costs recoverable.

(h) the list of items herein is not exhaustive. The establishment of an ongoing commission which would receive and consider representations by members of the public regarding reform, would be a valuable contribution to the promotion of social justice, particularly in view of the extent of amendment that appears necessary at present.

(5) : *THE STAGE OF LITIGATION:*

(i) The streamlining and consolidation of procedure between the various Acts and the Ordinances on the one hand, and that set out within the Expropriation Act itself (in the different nature of the proceedings instituted in the Compensation Court and the Supreme Court), is recommended in the interests of uniformity.

(ii) Under Section 14, jurisdiction is conferred upon the said two courts upon the basis of whether the claim is less than R100 000,00 or not. It is recommended that jurisdiction be conferred upon a 'small claims court' (in the event that such is established in South Africa), to hear claims of an appropriate quantum.

(iii) It is submitted that the costs formula in Section 15 should reflect recognition of 'vexations negotiations' conducted by either party prior to the stipulated date (ie "one month prior to the date for which the proceedings were first placed on the roll"). This amendment would stand against unfair offers being made by the expropriator; it would discourage inflated claims by expropriatees; it would facilitate and expedite settlement; and it would streamline the administrative process.

(The writer notes in this regard that he has encountered instances in which the first offer of an expropriator was one-third the final agreed settlement, and by contrast, expropriatees who have been pleased to accept substantially less than they initially claimed).

(6) : *FURTHER ASPECTS*

(i) It is recommended that the discretion of the Minister be extended to permit the withdrawal (in appropriate circumstances) of an expropriation *at any stage* prior to settlement. This would require the repeal of the proviso to Section 23 of the Act.

(ii) It is submitted that equity would be promoted in the event that the *audi alteram partem* principle had application in the sense that the expropriatee (or any other interested party) be entitled to make representations against the congruence of the proposed (or instituted) expropriation with considerations of public need.

(iii) The establishment of a Lands Tribunal (as in certain foreign jurisdictions) dealing in particular with expropriation and related matters, could promote a specialised focus on this field. In view of the volume of expropriation activity that is anticipated in South Africa in the future (cf Section 4.3), such recommendation may contain merit and substance.

(iv) The introduction of a procedure similar to 'inverse condemnation' in United States law (vide discussion in Section 1.3.3 supra), is recommended.

(v) In final analysis, statutory reform on a large scale emerges as being both necessary and desirable in South African expropriation law. Further detailed research in this regard is accordingly strongly recommended.

BIBLIOGRAPHY

BIBLIOGRAPHY

BIBLIOGRAPHY : SECTION B.1 : A BIBLIOGRAPHICAL NOTE ON EXPROPRIATION TEXTS

Notwithstanding the difficulty outlined in *Preface : Section P.4* supra, (that the availability of research materials in this field in South African University libraries is limited), the writer was fortunate to be granted access to certain private libraries. The majority of the non-South African works cited herein were obtained from these latter sources.

In the field of foreign and comparative expropriation law, in particular regarding the United States' system, the *magnum opus* is Nichols' twenty volume treatise The Law of Eminent Domain. To the knowledge of the writer, Advocate M S Jacobs of Cape Town has the only copy of this work in South Africa. Of commendable stature also are Orgel Valuation under the Law of Eminent Domain and Todd The Law of Expropriation and Compensation in Canada - the writer is sincerely grateful to Advocate Jacobs for having presented these two works to him as a gift. In English law, the leading treatises are Cripps Compulsory Acquisition of Land and Davies The Law of Compulsory Purchase and Compensation. These five books would constitute an invaluable extension to our University libraries in regard to expropriation law. There is an addition a recent publication by Sweet and Maxwell (UK) (of which the writer has not yet had sight), entitled Encyclopaedia of the Law of Compulsory Purchase and Compensation (ISBN 421007508).

The principal South African published writings are Gildenhuys Onteieningsreg, Jacobs The Law of Expropriation in South Africa, and the article by Gildenhuys and Grobler in Joubert The Law of South Africa. The standard of these works is particularly high (although it is noted broadly that a positivist orientation is adopted therein).

The general jurisprudential and other texts detailed infra in Sections B.2 and B.3, are not discussed in this note, since the commentary herein is confined to the leading expropriation texts.

The Bibliography herein is structured in two sections:
Section B.2 : Books
Section B.3 : Journal Articles

BIBLIOGRAPHY : SECTION B.2 : BOOKS

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