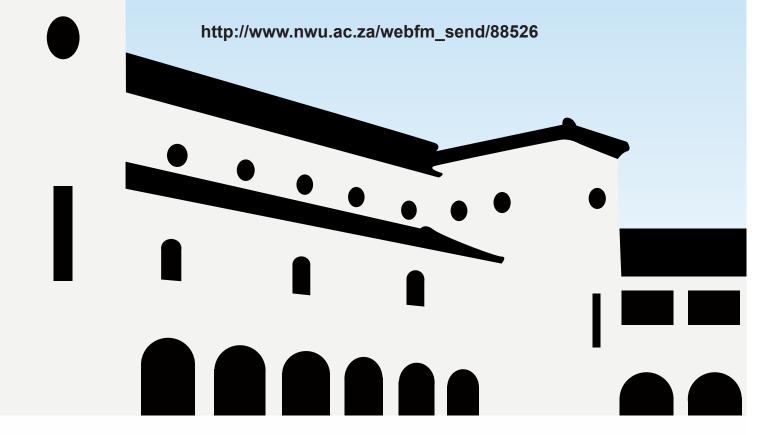
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## **UNIVERSITY OF STELLENBOSCH**

THE JUSTIFICATORY REQUIREMENTS FOR THE THIRD PARTY EXPROPRIATIONS FOR ECONOMIC DEVELOPMENT PURPOSES: "A COMPARITIVE ANALYSIS"



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# The justificatory requirements for third party expropriations for economic development purposes: a comparative analysis

**E Cornelius** 

## 1 Introduction

This essay discusses third party expropriations for economic development which have caused major controversy internationally. In modern society private parties often perform public service delivery duties on behalf of the state. For this purpose such private parties may in certain circumstances also acquire land through expropriation proceedings. However, the question is what the justificatory requirements for expropriations are where private parties use expropriation mechanisms to acquire land to develop for economic development purposes?<sup>2</sup> In the United States of America, expropriations in these circumstances went so far that they have been criticised for resulting in "a confrontation between little people and big business," "the chaos of the commons" and deleting the words "for public use" from the Takings Clause of the US Federal Constitution.<sup>5</sup> In the Federal Republic of Germany, on the other hand, no such drastic problems arose since they follow a stricter approach where the judiciary scrutinises these expropriations carefully to ensure that the specific expropriation purpose is authorised by the legislation authorising the expropriation. 6 In South Africa the legal position is uncertain and complicated by the two alternative justificatory requirements for expropriation, namely "public purpose" (the narrow requirement) and "public interest" (the broader requirement) in terms of section 25 of the Constitution. This essay will provide a comparative analysis of the interpretation of the public purpose justificatory requirement for economic development expropriations in South Africa, the Federal Republic of Germany and the United States of America. To conclude this essay will

AJ van der Walt JQR Constitutional Property Law 2009(4)2.3.1.

E Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in GM Erasmus (ed) Compensation for Expropriation: A Comparative Study Volume I (1990) 81-103 at 101.

K Gray "Human Property Rights: The Politics of Expropriation" (2005) 16 Stell LR 398-402 at 401.

Gray 2005 Stell LR 398.

Kelo v City of New London 545 US 469 (2005).

DP Currie The Constitution of the Federal Republic of Germany (1994) 290-291; AJ van der Walt JQRConstitutional Property Law 2010 (2) 2.3.

German Basic Law; Van der Walt JQRConstitutional Property Law 2009(4) 2.3.1.

argue that to prevent an expropriation catastrophe as in the United States of America South Africa should perhaps consider formulating an approach, similar to the German approach, but which will also promote the unique transformative goals of the 1996 Constitution.<sup>8</sup>

## 2 The justificatory requirements for expropriations in South African law

All expropriations must comply with the requirements in section 25(2) and (3) of the Constitution of the Republic of South Africa, 1996.9 Firstly expropriations need to be authorised by law of general application, secondly they must be for a public purpose or in the public interest and thirdly they are subject to the payment of compensation. 10 Van der Walt 11 argues that the "public purpose" requirement in section 25(2)(a) of the Constitution serves the classical liberal function of property law clauses, namely "to prevent or stop expropriations of private property for improper, unlawful purposes; and to control legitimate exercises of the power to expropriate." Furthermore section 25(4)(a) of the Constitution, defines "public interest" for the purpose of the interpretation of section 25. This definition ensures that the traditional function of the property law clause does not frustrate the government's transformative and land reform goals. 13 For this reason third party expropriations for land reform and land redistribution purposes are authorised by sections 25(2) and 25(4)(a) read together. 14 If the purpose, however, is an economic development purpose, which cannot be equated with land reform, will the expropriation still be valid? If so, does it mean that the expropriation will be valid if it is either for a public purpose (the narrower requirement) or in the public interest, (the broader requirement) or will any of the requirements suffice?

In Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd<sup>15</sup> the administrator invoked section 7(1) of the Transvaal Roads Ordinance<sup>16</sup> to

This essay follows the argument of Van der Walt JQR Constitutional Property Law 2010 (2) 2,3.

The Constitution of the Republic of South Africa 1996. See AJ Van der Walt Constitutional Property Law (2011) 335.

The Constitution of the Republic of South Africa 1996. See Van der Walt Constitutional Property Law 335.

<sup>&</sup>lt;sup>11</sup> Van der Walt Constitutional Property Law 459-460.

Van der Walt Constitutional Property Law 459.

Van der Walt Constitutional Property Law 459.

AJ van der Walt Constitutional Property Clauses: A Comparative Analysis(1999) 341-342; Van der Walt Constitutional Property Law 464.

<sup>15 1990 (4)</sup> SA 644 (A), hereafter referred to as the *Van Streepen* case.

alleviate problems caused by traffic congestion on certain roads. This Ordinance authorised the administrator to expropriate land "for the construction or maintenance of any road or for any purpose in connection with the construction or maintenance of any road." A private company owned a railway line which traversed part of the new road and had to be relocated for the project to be effected. To solve the problem the administrator, through a notice issued in terms of the Ordinance, expropriated land on behalf of Sentrachem so that the privately owned railway line could be relocated.

The Appellate Division had to decide if this expropriation was authorised by the Ordinance. The court ruled that acquisition of Van Streepen's property for purposes of relocating Sentrachem's railway line was authorised by the secondary purpose of the Ordinance, since the legislature intended a wide interpretation of the Ordinance, and the test was "not one of necessity but reasonable expediency." The acquisition of Van Streepen's land for the relocation of the railway line was causally connected to the building of the road, the primary purpose, and therefore the expropriation was authorised by the Ordinance. Furthermore, the court said that "expropriation, generally speaking, must take place for public purposes or in the public interest." 19 The court stated that "acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes" but acknowledged that it might be in the "public interest" depending on the facts and circumstances of each case. 20 In this case the court considered the fact that Sentrachem conducted a business in the "national interest" and produced strategically important products. If Sentrachem's railway line would have been disrupted it would have affected the national interest negatively. Therefore, the expropriation for the purpose of relocating its railway line was in the "public interest."

<sup>&</sup>lt;sup>16</sup> Ordinance 27 of 1957.

Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 633 (A) 649.

Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 633 (A) 658, 659.

Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 633 (A) 661.

Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 633 (A) 661.

If the *Van Streepen*<sup>21</sup> case is interpreted from a constitutional perspective it seems as if the court did not provide Van Streepen enough protection through the wide interpretation of the legislation and gave preference to the rights of Sentrachem, because it used the property to promote the national interest. It is, however, interesting to note that in 2010 an expropriation in similar circumstances was permitted in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*.<sup>22</sup> In this decision the primary purpose of the expropriation was the extension of roads and the secondary purpose the building of a shopping complex that would provide strategic economic advantages to the community.<sup>23</sup> The court ruled that the authority's powers under the relevant legislation were wide enough to authorise the expropriations for both purposes.<sup>24</sup>

In a recent Supreme Court of Appeal decision, *Offit Farming Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*,<sup>25</sup> the Court disagreed with the *Van Streepen* case<sup>26</sup> on the point that third party expropriations for economic development can not be for a "public purpose."<sup>27</sup> In this decision the court stated "many functions hit her to regarded as public are carried out by private concerns in co-operation with state authorities" and "public-private partnerships" are common cause in public service delivery.<sup>28</sup>

Van der Walt points out that the distinction between public purpose and public interest generally no longer makes any difference in principle and that section 25(2) perhaps warrants a more lenient approach towards the understanding of this requirement.<sup>29</sup> However, Van der Walt states that the interpretation of public purpose or public interest should not be clouded by the "fundamental requirement that expropriation must be for a valid and legitimate purpose in the first place."<sup>30</sup> The

Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 633 (A).

<sup>&</sup>lt;sup>22</sup> [2010] ZAFSHC 11, 4 February 2010.

AJ van der Walt JQRConstitutional Property Law 2010(2) 2.3.

AJ van der Walt JQRConstitutional Property Law 2010(2) 2.3.

<sup>&</sup>lt;sup>25</sup> 2010 (4) SA 242 (SCA).

Administrator Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd 1990 (4)SA 633 (A) 661.

Offit Farming Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2010 (4)SA 242 (SCA) 553.

Offit Farming Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2010 (4)SA 242 (SCA) 553.

<sup>&</sup>lt;sup>29</sup> Van der Walt Constitutional Property Law 462.

Van der Walt Constitutional Property Law 465.

current problem is not how section 25(2) should be interpreted or the question if third party expropriations in South Africa are allowed, since the *Expropriation Act* 63 of 1975<sup>31</sup> makes provision for expropriations on behalf of juristic persons for a public purpose<sup>32</sup> and section 25(4) of the Constitution<sup>33</sup> authorises third party expropriations for land reform purposes. The problem is which economic development purposes or interests are regarded as legitimate for such third party expropriations to be in accordance with section 25(2) and how this should be regulated to avoid abuse of expropriation procedures in favour of powerful juristic persons. In the light of these questions, comparative analysis provides useful quidelines.<sup>34</sup>

# The justificatory requirements for expropriations in the Federal Republic of Germany

## 3.1 German expropriation law background

Article 14(3) of the German Basic Law of 1949 (Grundgesetz) authorises expropriations.<sup>35</sup> Expropriations must be "for a public necessity"<sup>36</sup> (Wohl der Allgemeinheit) and "ordered by or pursuant to a law which determines the nature and extent of the compensation."<sup>37</sup> In the German context these basic requirements are tested against further specific requirements or conditions.<sup>38</sup> The focus of this discussion will be on the public necessity requirement as interpreted by the German Federal Constitutional Court (Bundesverfassungsgericht) in the context of expropriations for economic development purposes. The German approach can be effectively explained bγ discussing the two watershed cases. namely

Hereafter the Expropriation Act.

Expropriation Act 63 of 1975 section 3; Offit Farming Enterprises(Pty) Ltd v Coega Development Corporation (Pty) Ltd 2010 4 SA 242 SCA 555.

The Constitution of the Republic of South Africa 1996.

Van der Walt Constitutional Property Law 464-465 with reference to Offit Farming Enterprises(Pty) Ltd v Coega Development Corporation (Pty) Ltd 2010 4 SA 242 (SCA).

Van der Walt Constitutional Property Clauses 121,123.

This essay prefers and therefore follows the Van der Walt Constitutional Property Clauses 121 translation of Wohl der Allgemeinheit which is in accordance with the Böhmer J judgment in BVerfGE 56, 249 DürkheimerGondelbahn (1981) 273, 274.

Van der Walt Constitutional Property Clauses 121.

H Hofmann "Art. 14" in B Schmidt-Bleibtreu, H Hofmann & A Hophauf (eds) *Kommentar zumGrundgesetz* 11ed 2008 471-523; T Maunz, G Dürig et al (eds) *Grundgesetz Kommentar* Vol II 53<sup>rd</sup> update 2008; R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* 4 ed 2007 582-639.

*DürkheimerGondelbahn*<sup>39</sup> and *Boxberg*<sup>40</sup> with reference to German constitutional commentaries and other literature.

## 3.2 The DürkheimerGondelbahn Case 1981

The city of Bad Dürkheim was located close to a mountain, the *Teufelstein*. To effectively access this mountain the community wanted to set up a cableway and for this purpose a company was incorporated to establish and manage the cableway. <sup>41</sup> With this cableway several people could access the mountain more easily for recreational purposes and the cableway would promote tourism to the city. <sup>42</sup> The problem was that the cableway would traverse the air space above several properties. Due to this the company had to register land burdens (*Dienstbarkeiten*) on the properties. Many owners were not willing to sell their properties or consent to land burdens to be registered in favour of the company. Therefore the company decided to institute expropriation proceedings to enable them to register the required land burdens and continue with the project. <sup>43</sup> The expropriation was authorised by the government and the land burdens were enforced on the properties in terms of building legislation. <sup>44</sup> The owners of the property challenged the decision to expropriate the property.

In the main judgment written by Dr Benda the Federal Constitutional Court confirmed that article 14(3) of the *German Basic Law* requires an expropriation to be for a public necessity and authorised by legislation. Furthermore, forced land burdens qualify as an expropriation since the land burden limits ownership rights guaranteed in article 14(1) of the *German Basic Law*. The Court also confirmed that a taking is not justified merely in exchange for the payment of compensation, because then the property clause would lose its protective function. The Court based its main argument on the fact that legislation should not only authorise an expropriation, but the specific executive organ should also be authorised to expropriate in terms of the

<sup>&</sup>lt;sup>39</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981.

<sup>&</sup>lt;sup>40</sup> BVerfGE 74, 264 (Boxberg) 1986.

<sup>&</sup>lt;sup>41</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 250-251.

<sup>&</sup>lt;sup>42</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 253 -254.

BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 251.

<sup>&</sup>lt;sup>44</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 251-252.

<sup>&</sup>lt;sup>45</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 259.

<sup>&</sup>lt;sup>46</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 260.

<sup>&</sup>lt;sup>47</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 261.

specific legislation.<sup>48</sup> Lawfulness of the expropriation and the constitutional right in terms of article 14(1) is part of an interdependent whole and if the expropriation is invalid because it is not authorised in terms of legislation it will be contrary to article 14(1).<sup>49</sup> For these reasons the expropriation in question was found to be unconstitutional since the local authority did not have the power to expropriate in terms of the State building legislation.<sup>50</sup>

Dr Böhmer wrote a concurring judgment but based his argument on the public necessity requirement in terms of article 14(3) of the *German Basic Law*. According to Böhmer J the primary test for expropriations is the public necessity requirement, since article 14(3) underlies expropriation law. He points out that the purpose of expropriation is not to favour anyone, neither the state nor a private party. Böhmer J also links article 14(3) with planning law and states that planning law authority is but one type of state authority and can not in itself authorise expropriations. In this regard he confirms that the power to expropriate alone does not authorise the expropriation, the expropriation also needs to be necessary to promote the public necessity.

Böhmer J argued that the expropriations were unconstitutional because the building legislation did not authorise expropriation as the means to achieve the specific public purpose. Additionally the expropriations were also unconstitutional because comfortable access for recreational purposes is not a public necessity, and because the expropriations promoted the private interests of a company that was not providing a public service on behalf of the state. He also argued that in this case expropriation proceedings were abused to promote private interests.

<sup>&</sup>lt;sup>48</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 262.

<sup>&</sup>lt;sup>49</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 262.

<sup>&</sup>lt;sup>50</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 261. See also Van der Walt Constitutional Property Law 479-480.

<sup>&</sup>lt;sup>51</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 266.

<sup>&</sup>lt;sup>52</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 267.

<sup>&</sup>lt;sup>53</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 271.

<sup>&</sup>lt;sup>54</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 277.

<sup>&</sup>lt;sup>55</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 278-279.

BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 282-284. See also Van der Walt Constitutional Property Law 478.

<sup>&</sup>lt;sup>57</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 284.

<sup>&</sup>lt;sup>58</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 294, 295.

In his judgment Böhmer J discussed important principles about third party expropriations for economic development purposes. Böhmer J confirmed that expropriations are not mechanisms for financial gain, not for the state, and therefore clearly not for private parties. Economic interests promoted by a private party remain private interests and a "higher" private interest can never make it a public necessity. One of the main goals of the property guarantee in a social democracy is specifically to protect weak citizens from the economic pressure of the strong. The only instance in which third party expropriations for economic development purposes will be justified by the German Constitution is if the company fulfils a necessary public function on behalf of the state. The business should not only be established for the public necessity, it should also operate to promote the public necessity. In terms of jurisprudence expropriation may thus never be used as a means to establish a profitable business for a private party.

## 3.3 The Boxberg Case 1986

In this case the German Federal Constitutional Court had to consider if an expropriation on behalf of Daimler-Benz AG was constitutional. The company acquired property to build a test track that would create between 900 and 1000 jobs and improve the economic structure of the city. 65 With reference to the jurisprudence of the German Federal Constitutional Court the main judgment written by Dr Simon, confirmed that third party expropriations for economic development purposes can be constitutional if they are for public necessity. 66 If such expropriations are authorised by legislation and meet the public necessity requirements of article 14(3) of the German Basic Law, the identity of the acquirer of the property becomes irrelevant and it does not matter if a private party or a public authority acquires the property. 67 Due to the risk that expropriation proceedings may be abused and be detrimental to the weak in society, the Court confirmed a responsibility to scrutinise these

BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 290. See also Van der Walt Constitutional Property Law 478

<sup>&</sup>lt;sup>60</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 291.

<sup>&</sup>lt;sup>61</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 292.

BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 292-293. See also Van der Walt Constitutional Property Law 479.

<sup>&</sup>lt;sup>63</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 293.

<sup>&</sup>lt;sup>64</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn) 1981 293.

<sup>&</sup>lt;sup>65</sup> BVerfGE 74, 264 (Boxberg) 1986 265, 272.

<sup>&</sup>lt;sup>66</sup> BVerfGE 74, 264 (Boxberg) 1986 285.

<sup>&</sup>lt;sup>67</sup> BVerfGE 74, 264 (Boxberg) 1986 285.

expropriations carefully and referred to the strict requirements set out in the *DürkheimerGondelbahn*case.<sup>68</sup> The legislation should expressly state for which purposes and under which conditions the expropriation will be permissible. The public necessity requirement furthermore requires that there is certainty that the means will result in the public necessity goal being satisfied.<sup>69</sup> If the business in itself is not the public necessity, but the outcome of the business activities, then legislation should provide stricter conditions to authorise the expropriation in the specific circumstances.<sup>70</sup>

In this case the Court argued that there was no legislative authority for the expropriation. The court also found that there was no authorisation for the expropriation as the means to achieve the specific purpose, and no legislative conditions to secure the purpose of the expropriation and prevent abuse.<sup>71</sup> Since the legislation did not provide specific authorisation for this expropriation, it was not permissible.<sup>72</sup> If expropriation in broad circumstances is permitted, it would create a platform for the authorisation of expropriations in all similar weak economic areas through a wide interpretation of the State's building legislation and this would be unconstitutional.<sup>73</sup> This judgment also confirms that only the legislature may decide what constitutes public necessity. All public interests, benefits or purposes do not qualify as public necessity.<sup>74</sup> Only very important and urgent public interests would justify the infringement on private property rights. 75 Building legislation for example authorises administrators to expropriate land as part of their planning law authority. authority, however, does not automatically This planning law expropriations in all circumstances. The specific legislation should authorise

<sup>&</sup>lt;sup>68</sup> BVerfGE 56, 249 (Dürkheimer Gondelbahn), BVerfGE 74, 264 (Boxberg) 1986 285.

BVerfGE 74, 264 (Boxberg) 1986 285-286. See also Van der Walt Constitutional Property Law 480.

<sup>&</sup>lt;sup>70</sup> BVerfGE 74, 264 (Boxberg) 1986 286. See also Van der Walt Constitutional Property Law 480-481.

BVerfGE 74, 264 (Boxberg) 1986 286-287, 293, 295. See also Van der Walt Constitutional Property Law 480.

BVerfGE 74, 264 (Boxberg) 1986 287, 296-297. See also Van der Walt Constitutional Property Law 480.

<sup>&</sup>lt;sup>73</sup> BVerfGE 74, 264 (Boxberg) 1986 287.

<sup>&</sup>lt;sup>74</sup> BVerfGE 74, 264 (Boxberg) 1986 288-289, 296-297.

<sup>&</sup>lt;sup>75</sup> BVerfGE 74, 264 (Boxberg) 1986 289.

expropriation as a valid means to achieve the specific public necessity purpose in question.<sup>76</sup>

## 3.4 Summary of the German Law Approach

Expropriation is an extraordinary means of acquiring property for public necessity, through the forceful disturbance of property rights or the limitation of property rights protected by article 14(1) of the German Basic Law.<sup>77</sup> The only justification for such disturbances is public necessity and only very important, urgent "objective-public interests" can be equated with the public necessity requirement of article 14(3) of the German Basic Law.<sup>78</sup> Expropriation is only permissible through legislation, or in terms of authority derived from legislation, provided that the public necessity requirement is expressly determined in the empowering provision authorising the expropriation.<sup>79</sup> The duty of the courts is to ensure that the public necessity requirement is present and justifies the expropriation.<sup>80</sup> The expropriation should be tested against the public necessity requirement, even though legislation authorises the expropriation as a means to accomplish the public necessity duty.<sup>81</sup>

Fiscal interests of the state such as increasing revenue are not a public necessity and such expropriations are therefore prohibited. Expropriations that favour private interests are generally forbidden and therefore third party expropriations for economic development purposes have strict requirements. Public necessity and private profit are, however, not mutually exclusive, and therefore private enterprises may in certain circumstance acquire expropriated property for a public necessity

Hofmann in Schmidt-Bleibtreu *et al Kommentar zum Grundgesetz* 509 para 58, 511 para 61; Wendt in Sachs *Grundgesetz Kommentar* 606 para 77; 623-624 para 148; 628 para 160.

<sup>&</sup>lt;sup>76</sup> BVerfGE 74, 264 (Boxberg) 1986 289.

Hofmann in Schmidt-Bleibtreu et al *Kommentar zum Grundgesetz* 513 para 66; Maunz et al *Grundgesetz Kommentar* 303 paras 573, 575, 308 para 585; Van der Walt *Constitutional Property Law* 477, 481; Wendt in Sachs *Grundgesetz Kommentar* 628 para 169.

Hofmann in Schmidt-Bleibtreu *et al Kommentar zum Grundgesetz 511* para 62; Wendt in Sachs *Grundgesetz Kommentar 628* paras 158-159.

Maunz et al Grundgesetz Kommentar 303 para 574; Van der WaltConstitutional Property Law 476.

Maunz et al Grundgesetz Kommentar 303 para 574.

Hofmann in Schmidt-Bleibtreu et al Kommentar zum Grundgesetz 513 para 66; Maunz et al Grundgesetz Kommentar 304-305 para 576; Van der Walt Constitutional Property Law 478; Wendt in Sachs Grundgesetz Kommentar para 163 629.

Hofmann in Schmidt-Bleibtreu *et al Kommentar zum Grundgesetz* 513 para 66; Van der Walt Constitutional Property Law 478.

purpose to fulfil a public duty.<sup>84</sup> In these situations where private enterprises obtain property through expropriation proceedings the legislation should not only expressly authorise the specific public necessity purpose, it should also provide mechanisms to ensure that the purpose exists from the time of the expropriation and afterwards. Mechanisms to ensure that expropriation procedures are not abused should also be incorporated.<sup>85</sup>

## 4 The justificatory requirements for expropriations in the United States of America

The property clause in the *Federal Constitution of the United States of America* 1787:

appears in the Fifth Amendment (1791), read with the Fourteenth Amendment (1868), and consists of two parts, usually referred to as the "Due Process Clause" and the "Takings Clause" respectively. 86

The federal takings clause stipulates that "private property shall not be taken for public use without just compensation." This clause applies to compulsory acquisitions of propertyin terms of the states' eminent domain power which are referred to as takings in the United States of America legal context. Additionally, this clause also applies to regulations of property in terms of the state's police-power that go too far, in which case it is said that they constitute a regulatory taking. For third party expropriations for economic development purposes to be constitutional, the economic development purpose should be in accordance with the public use requirement, and if so, subject to the payment of just compensation. 89

It is the interpretation of the public-use requirement, in the context of third party expropriations for economic development, which resulted in the controversial and

Hofmann in Schmidt-Bleibtreu et al *Kommentar zum Grundgesetz* 513 para 66; Maunz et al *Grundgesetz Kommentar* 306 para 581, 307 para 582; Van der Walt *Constitutional Property Law* 479; Wendt in Sachs *Grundgesetz Kommentar* 628 para 161.

Hofmann in Schmidt-Bleibtreu et al Kommentar zum Grundgesetz 513 para 66; Maunz et al Grundgesetz Kommentar 305 para 578; 306 para 579; 308 para 586; Van der Walt Constiutional Property Law 481; Wendt in Sachs Grundgesetz Kommentar 628-629 para 162, 629 para 164.

Van der Walt Constitutional Property Clauses 398-399.

Van der Walt Constitutional Property Clauses 399.

<sup>&</sup>lt;sup>88</sup> Van der Walt Constitutional Property Clauses 423.

<sup>&</sup>lt;sup>89</sup> Van der Walt Constitutional Property Law 483.

highly criticised jurisprudence of the US Supreme Court and other state courts. <sup>90</sup> The principal cases that established the precedent which was followed by other courts were the US Supreme Court cases *Berman v Parker* <sup>91</sup> and *Hawaii Housing Authority v Midkiff*. <sup>92</sup>

In the 1954 judgment of *Berman v Parker*<sup>93</sup> property was taken from private owners for resale to a private enterprise to develop as part of a project to rid the area of slums. The appellants in this case owned property in the area on which a department store was situated and described the project as "a taking from one businessman for the benefit of another businessman." They argued that their property was commercial and not residential slum housing, that it would be put under private and not public management, and that it was to be redeveloped for private and not public use. For these reasons they argued that the expropriation would be unconstitutional. The US Supreme Court followed a deferential approach and subsequently rejected the argument. The court referred to the established general constitutional principles that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation" and that the "role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." Since the legislation authorised the purpose, the court was not willing to interfere and declared the project to be constitutional.

The *Berman*<sup>100</sup> decision was later adopted in the 1984 decision of *Hawaii Housing Authority v Midkiff*. <sup>101</sup> In *Midkiff*, the redistribution of land to private persons took place in terms of a statute with the purpose to remedy the negative economic and social effects of feudal land oligopoly. <sup>102</sup> The US Supreme Court acknowledged that

GS Alexander The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence 2006 65-67; Gray 2005 Stell LR 398-412.

<sup>&</sup>lt;sup>91</sup> 348 US 26 1954.

<sup>&</sup>lt;sup>92</sup> 467 US 229 1984.

<sup>&</sup>lt;sup>93</sup> 348 US 26 1954, hereafter referred to as *Berman*.

<sup>&</sup>lt;sup>94</sup> Berman v Parker 348 US 26 1954 10-11.

<sup>&</sup>lt;sup>95</sup> Berman v Parker 348 US 26 1954 11.

<sup>&</sup>lt;sup>96</sup> Berman v Parker 348 US 26 1954 10.

<sup>&</sup>lt;sup>97</sup> Alexander The Global Debate over Constitutional Property 65; Berman v Parker 348 US 26 1954 11.

<sup>&</sup>lt;sup>98</sup> Berman v Parker 348 US 26 1954 11.

Van der Walt Constitutional Property Law 484; Van der WaltConstitutional Property Law Clauses 425.

<sup>&</sup>lt;sup>100</sup> 348 US 26 1954.

<sup>467</sup> US 229 1984, hereafter referred to as Hawaii Housing Authority.

Hawaii Housing Authority v Midkiff 467 US 229 1984 15.

courts have a role to play in reviewing the public use requirement in legislation, but following *Berman*<sup>103</sup> it still held that that this role was a narrow one. The court also confirmed that previous courts have already decided the public use requirement should not be interpreted literally but that a purely private taking would be against the public use requirement and void. To conclude the court denied that the expropriation in this case was a purely private taking, since the legislature had a rational and legitimate public purpose. To

Although the Supreme Court of Michigan case Poletown Neighbourhood Council v City of Detroit<sup>107</sup> was eventually overturned<sup>108</sup> it is necessary to mention this case, especially with reference to the strong dissenting arguments made in the minority judgments. In this case the question was whether the municipality could use its eminent domain power, granted to it by the Economic Development Corporations Act to expropriate land on behalf of the private corporation General Motors. 109 General Motors was to build a plant that would "promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state." The main argument against the expropriation was that it would be an uncontrolled use in profit making and thereby constitute a taking for private use in favour of General Motors. 111 The Court agreed that condemnations for private use is forbidden, but once again ruled that the courts can only interfere with the legislative determination of public purposes if it was arbitrary or incorrect. 112 The Court also stated that the aim of the expropriation in this case was the promotion of public purposes and that the private benefits were merely incidental to the broader public benefit. 113 Therefore, the expropriation was held to be valid.

In a minority judgment Fitzgerald J argued that business enterprises produce benefits for society and that the effect of the decision of the majority is that

<sup>&</sup>lt;sup>103</sup> Berman v Parker 348 US 26 1954.

Hawaii Housing Authority v Midkiff 467 US 229 1984 15.

Hawaii Housing Authority v Midkiff 467 US 229 1984 17.

Hawaii Housing Authority v Midkiff 467 US 229 1984 17.

<sup>&</sup>lt;sup>107</sup> 304 NW2d 455 (Mich 1981).

Overturned by County of Wayne v Hathcock 684 NW 2d 765 (Mich, 2004). See Van der Walt Constitutional Property Law 485-486.

Poletown Neighbourhood Council v City of Detroit 304 NW2d 455 (Mich 1981) 11.

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Poletown Neighbourhood Council v City of Detroit 304 NW2d 455 (Mich 1981) 12.

<sup>&</sup>lt;sup>113</sup> Poletown Neighbourhood Council v City of Detroit 304 NW2d 455 (Mich 1981) 13.

expropriations will be authorised if the commercial use of the property will produce greater public benefits. Property, although valuable to an individual owner will therefore not be immune from expropriation by a third party who can utilize the property for a "higher use." Ryan J, in another minority judgment, said that the effect of this case was that "the Court has subordinated a constitutional right to private corporate interests." 115

In the more recent decision of Kelo v City of New London the US Supreme Court had the opportunity to address this issue again. In this case the city of New London approved a development plan that would have created many jobs, raised taxes and revenue and revitalized a distressed economy. 117 To obtain the land for this project the city's development agent purchased properties from willing sellers, but had to acquire the rest of the land through its eminent domain powers. Large parts of the expropriated land included residential property. 118 The Court confirmed that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." 119 It was also confirmed that the state may transfer property from one party to another if the purpose of the taking would be the use of the property by the public. 120 The Court referred to the broader interpretation of public use as public purpose and stated that the question to be decided was whether this taking would be for a public purpose. 121 The Court acknowledged that the economic development plan in question would qualify as a public use, especially since it was part of a long and accepted function of government. 122 The Court also stated that it is often impossible to distinguish between economic development purposes and the other recognized public purposes and that the pursuit of these public purposes will often benefit private individuals. 123 The petitioners wanted the Court to find that economic development is not a public use and that alternatively a "reasonable certainty" requirement should be added as a qualification for such expropriations. The Court

Poletown Neighbourhood Council v City of Detroit 304 NW2d 455 (Mich 1981) 18.

Poletown Neighbourhood Council v City of Detroit 304 NW2d 455 (Mich 1981) 36.

Kelo v City of New London 545 US 469 (2005), hereafter referred to as Kelo.

<sup>&</sup>lt;sup>117</sup> Kelo v City of New London 545 US 469 2005 9.

<sup>&</sup>lt;sup>118</sup> Kelo v City of New London 545 US 469 2005 9.

<sup>&</sup>lt;sup>119</sup> Kelo v City of New London 545 US 469 2005 12.

<sup>&</sup>lt;sup>120</sup> Kelo v City of New London 545 US 469 2005 12.

<sup>&</sup>lt;sup>121</sup> Kelo v City of New London 545 US 469 2005 13,14.

<sup>&</sup>lt;sup>122</sup> Kelo v City of New London 545 US 469 2005 16.

<sup>&</sup>lt;sup>123</sup> Kelo v City of New London 545 US 469 2005 16,17.

rejected their requests based on the above mentioned reasons and following *Berman*<sup>124</sup> and *Hawaii Housing Authority*<sup>125</sup> confirmed that the courts cannot interfere with the legislature's determination of public purposes, unless it is arbitrary or irrational. The dissenting judges argued that the effect of the majority decision was to effectively delete the public use clause from the Takings clause of the Fifth Amendment. They also criticised the *Berman*<sup>128</sup> and *Hawaii Housing Authority*<sup>129</sup> decisions and argued that the state's police power and power of eminent domain cannot always be equated. The outcome was also said to be unconstitutional since the beneficiaries of economic development expropriations are likely to be the powerful in society and the victims those with fewer resources. Thomas J also suggested that the courts should return to the narrow interpretation of the public use interpretation.

*Gray*<sup>133</sup> points out that the jurisprudence results in the state acting like a default broker for private clients. By this he means that when private parties want to acquire specific property for their business, but the owner refuses to sell they can acquire the property through expropriation proceedings if they can persuade the state that they will utilize the property for a purpose associated with a public purpose. The *Kelo*<sup>134</sup> decision was politically opposed in the United States of America. An Executive Order of George W Bush in 2006 prohibited the abuse of the state's eminent domain power for economic development purposes and many US bills followed.<sup>135</sup>

## 5 Conclusion

From the above discussion it is clear that third party expropriations for economic development can lead to a "chaos of the commons" <sup>136</sup> as described by Gray if not treated with caution. This is because powerful individuals acquire the property of less

<sup>&</sup>lt;sup>124</sup> 348 US 26 (1954).

<sup>&</sup>lt;sup>125</sup> 467 US 229 (1984).

<sup>&</sup>lt;sup>126</sup> Kelo v City of New London 545 US 469 (2005) 18,19.

<sup>&</sup>lt;sup>127</sup> Kelo v City of New London 545 US 469 (2005) 23, 30,32.

<sup>&</sup>lt;sup>128</sup> Berman v Parker 348 US 26 (1954).

<sup>&</sup>lt;sup>129</sup> Hawaii Housing Authority v Midkiff 467 US 229 (1984).

<sup>&</sup>lt;sup>130</sup> Kelo v City of New London 545 US 469 (2005) 27, 39.

Kelo v City of New London 545 US 469 (2005) 27, 39.

Kelo v City of New London 545 US 469 (2005) 30,40.

<sup>&</sup>lt;sup>132</sup> Kelo v City of New London 545 US 469 (2005) 40.

<sup>&</sup>lt;sup>133</sup> Gray 2005 Stell LR 403-404.

<sup>&</sup>lt;sup>134</sup> Kelo v City of New London 545 US 469 (2005).

<sup>135</sup> Van der Walt Constitutional Property Law 487.

<sup>&</sup>lt;sup>136</sup> Gray 2005 Stell LR 398.

powerful individuals through expropriation, because they will arguably maximise the utility of the property for the greater benefit of society. This approach is flawed and unconstitutional. The traditional function of most Constitutional property clauses including the above discussed jurisdictions (Germany, the United States of America and South Africa) is to protect individual property rights and expropriation remains an extraordinary means of infringing on such rights. Expropriations for arbitrary purposes are also unconstitutional 137 and Alexander correctly points out that individual property rights are more than economic rights in relation to property. They "self-expression, also about self-governance, belonging and civic participation."139

From the comparative analysis it is clear that there are fundamental differences between the strict German law approach and the more lenient approach followed in the United States of America. The different approaches also often result in different outcomes, as illustrated by a comparison of the American Poletown Neighbourhood Council v City of Detroit<sup>140</sup> decision and the German Boxberg<sup>141</sup> decision discussed in this essay. These decisions had similar facts but different outcomes. 142 The main difference is that German courts have a responsibility to scrutinise expropriation proceedings carefully by strictly testing the constitutionality of the authorising legislation and the purpose of the expropriation against the public necessity requirement of the German Basic Law. 143 The American courts on the other hand defer from interfering with the authorising legislation, unless irrational and arbitrary 144 and also accept a very wide interpretation of the public use requirement. 145 In the South African context it is arguable that section 25(2) of the Constitution does not permit third party expropriations for broad and vague economic development purposes. 146 Sections 2 and 3 of the Expropriation Act 147 also do not permit such expropriations. South African courts can learn from the German law approach. To

<sup>&</sup>lt;sup>137</sup> Van der Walt Constitutional Property Law 465.

<sup>&</sup>lt;sup>138</sup> Alexander *The Global Debate over Constitutional Property* 67.

Alexander The Global Debate over Constitutional Property 67.

<sup>&</sup>lt;sup>140</sup> 304 NW2d 455 (Mich 1981).

<sup>&</sup>lt;sup>141</sup> BVerfGE 74, 264 (Boxberg) 1986.

In *Poletown Neighbourhood Council v City of Detroit* 304 NW2d 455 (Mich 1981) the expropriation was allowed, but in *BVerfGE* 74, 264 (*Boxberg*) (1986) held to be unconstitutional.

Van der Walt JQR Constitutional Property Law 2010 (2) 2.3.

Alexander The Global Debate over Constitutional Property 65.

Van der Walt Constitutional Property Law 483.

Van der Walt JQR Constitutional Property Law 2009 (4) 2.3.1.

Expropriation Act 63 of 1975.

prevent the abuse of expropriation proceedings and legal uncertainty legislation authorising third party expropriations for economic development purposes should clearly state the economic development purposes for which expropriation proceedings are permissible. The protection of private property rights and the other transformative goals of the South African constitution should be the primary consideration and an infringement of private property rights through expropriation only permissible in extraordinary and necessary circumstances. It is also important that the focus of the test is not only the public purpose of the expropriation, but also whether expropriation is a necessary means to achieve the purpose. If expropriation is not absolutely necessary the private party should rather purchase an alternative property on the market.

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<sup>&</sup>lt;sup>148</sup> Alexander *The Global Debate over Constitutional Property* 67-68.

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