THE CONCEPT OF PROPERTY AND THE CONCEPT OF COMPENSATION ON COMPULSORY ACQUISITION OF LAND

by

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1. *Introduction*

When one regards the long history of the theories of property, and the importance which philosophers and lawyers have placed on property rights, it is surprising that the well-established principle that compensation should follow compulsory acquisition of property has not received more analytical attention. In the United States, for example, while tremendous academic and judicial effort is poured into the problem of what constitutes a 'taking' of private property for the purposes of establishing liability to pay compensation in accordance with the fifth amendment of the United States' Constitution, the concept of compensation itself has not received the same degree of attention.[1] In Australia the compensation problem has been discussed in terms of the provisions of the relevant legislation. No attempt has been made to ascertain, or to articulate, the assumptions upon which that legislation is, or ought to be, based. Nor to consider to what extent such an inquiry may account for widespread public dissatisfaction with current compensation practices.

This article represents an attempt to go some of the way to remedying that deficiency by analysing the concept of compensation in terms of the concept of property.

Schacter's prefatory comment in an article concerned with certain aspects of Canadian compensation law, that, '[e]xpropriation has always been considered an intrusion into private rights because the concept of the sanctity of private property is at the core of our jurisprudence and values,'[2] invites, rather than concludes, analytical discussion. What is the nature of the concept of private property? What is the modern concept of private property? Does this concept of property constitute the basis of the concept of compensation today?

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1 See B. A. Ackerman, 'The Jurisprudence of Just Compensation', (1977) 7 *Environmental Law* 509: B. A. Ackerman, *Private Property and the Constitution* (1977); F. I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law",' (1968) 80 *Harvard Law Review* 1165; J. L. Sax, 'Takings and the Police Power', (1964) 74 *Yale Law Journal* 36; Sax, 'Takings, Private Property and Public Rights', (1971) 81 *Yale Law Journal* 146; P. Soper, 'On the Relevance of Philosophy to Law: Reflections on Ackerman's *Private Property and the Constitution*', (1979) 79 *Columbia L.R.* 44.

2 R. D. Schacter, 'Compensation for Expropriation in Urban Redevelopment Situations', (1977) 55 *Canadian Bar Review* 656 at p. 656.

2. *A Philosophical Problem*

Whatever people might want to demonstrate, whether it is electrons, love or viruses, it is not possible to start with nothing at all. To discuss or come to terms with something, it is necessary that we know what it is we are discussing or coming to terms with. Yet it is this existence which is the fundamental subject of enquiry. Plato first posed this puzzle in the *Meno* dialogue:

> It follows that, having been requested to tell me what the whole of virtue is, you are far from giving such a complete account of it: for you say, that every action is virtue which is performed with a part of virtue: as though you had already told me what virtue was in the whole, and that I should know it when you come to split it into parts. We must therefore, as it seems to me, take the matter again from the beginning, and recur to this question, what is virtue ? Or should every action, accompanied with a part of virtue, be said to be virtue itself ? For it is saying this, to say that every action, accompanied with justice, is virtue. — Do you think there is no occasion for us to resume the same question; but that a man may know a part of virtue, when it is, without knowing what virtue is itself?[3]

How might we discover the concept of compensation following compulsory acquisition of property if we do not already know that concept? Yet, if we knew already what it is, why should we need to discover it anyway? But, as Machan has pointed out, 'we really do not face this kind of problem unless we think of knowledge as coming in big solid chunks. In fact it comes gradually and it has a history.'[4] Logical analysis of the place of compensation in the prevailing legal structure suggests that compensation occurs as a result of, or as a consequence of (for the purposes of this article) a compulsory taking of private property. Therein lies its existence. An analysis of the concept of compensation must begin with that which gives rise to that state.

3. *The Power to Take*

Various theories have been advanced seeking either to derive, or to account for, the power of the State to compel the transfer to itself the property rights of its citizens.[5] The proposition that the State has such a power has never been seriously challenged, albeit attempts to define the limits on its exercise have not yielded the same uniformity of opinion.

The power of eminent domain or expropriation was first authoritatively expressed by Grotius:

> We have elsewhere said that the property of subjects is under the eminent dominion of the State, so that the State or he who acts for it may use or even alienate or destroy such property not only

3 Plato, in *Five Dialogues of Plato.* (intro. by A. D. Lindsay, 1910) at pp. 96-97.

4 T. R. Machan, *Human Rights and Human Liberties: A Radical Reconsideration of the American Political Tradition* (1975) at p. 49.

5 See W. B. Stoebuck, 'A General Theory of Eminent Domain', (1972) 47 *Washington L.R.* 553 at pp. 557-569.

> in the case 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 civil society must be supposed to have intended that private ends should give way.[6]

It has been suggested that the first recorded instance of the exercise of the power of eminent domain was King Ahab's seizure of Naboth's vineyard. The biblical account, however, would seem to suggest that the King had no such power for he had to have Naboth stoned to death before he could make the vineyard his.[7] Very little is known of Roman expropriation practice. Indeed, it would seem the principle of expropriation, if it did exist in Roman law, was never formulated by legislator or jurist.[8]

Stoebuck has investigated the origin and nature of the power to take and canvassed a number of theories. He rejects as impractical and empirically untenable, the view that the power to retake land is impliedly reserved when land is patented out by the State. In respect of this theory, he concluded that, 'while it might be the basis for some imagined system of expropriation',[9] it does not explain the present system.

A popular explanation of the source of the power of eminent domain is that it is an inherent and necessary power of government. Mr Justice Else-Mitchell expresses this concept as simply the power a sovereign government has in all civilized communities to take land in private ownership or occupation for public purposes.[10] With respect to this theory, Stoebuck refers to Chancellor Kent's classical exposition in *Kohl* v. *United States* (1875) that the power of eminent domain is essential to the State's 'independent existence and perpetuity.'[11] The inherent power theory derives from the writings of four civil law jurisprudents: Pufendorf, Bynkershoek, Vattel and Grotius. The fundamental assumption of this theory is its reliance on the notion of necessity. The power of eminent domain is 'inherent', for the State cannot exist without it. That power is basic to the orderly structuring of society and instrumental in the implementation of works for the 'public utility'.

Although this account provides, it is suggested, a probable ideological basis for compulsory acquisition in the American experience it would seem the origins of the eminent domain in English law are to be found not in the writings of the civil law jurisprudents, but in the many instances where, dating from 1427, the King in Parliament exercised supreme authority to appropriate for the purposes of a variety of public works. In this regard, Stoebuck's exhaustive research has revealed that

6 Referred to by C. F. Randolph in 'The Eminent Domain' (1887) 3 *L.Q.R.* 314 at p. 316.
7 1 *Kings* 21.
8 J. W. Jones, 'Expropriation in Roman Law', (1929) 45 *L.Q.R.* 158.
9 Stoebuck *op. cit.* n. 5 at p. 558.
10 R. Else-Mitchell, 'Unto John Doe His Heirs and Assigns Forever, A Study of Property Rights and Compensation', (1967) 5 *Australian Planning Institute Journal* 5 at p. 7. Generally, see W. D. McNutty, 'Power of Compulsory Acquisition Under the Law of England', (1911) 21 *Yale L.J.* 639.
11 91 *U.S.* 367 at pp. 371-372, quoted by Stoebuck *op. cit.* n. 5 at p. 559.

from the 'beginning of the sixteenth century, many, many English and colonial statutes authorized condemnation of land and building materials, either for specific projects or generally, for: roads, bridges, fortifications, river improvements and for the great fen drainage projects that were carried out in seventeenth and eighteenth century England.'[12]

When F. A. Mann considered the source of the State's power to take, he concluded that 'it is not the existence or the source, but the exercise of the State's right to take private property, which poses the real problems of legal significance.'[13] Yet, discussion of the *power* to take is necessary if the limitations upon its exercise, and the principle of compensation itself, are to be fully understood. If the nature of the power to take is considered a justifiable right on the grounds of 'public utility' and the furtherance of the common good, the concept of compensation must, necessarily, be affected by the nature of that power as being something 'good' than if that power was considered, as it were, a perquisite of government to be exercised at whim for any purpose at all.

Of contemporary interest in this context, is s. 17 of the *Pitjantjatjara Land Rights Act* 1981 (S.A.) which provides as follows:—

> Subject to this Act, where land has vested in Anangu Pitjantjatjaraku in pursuance of this Part, no estate or interest in the land —
> (a) may be alienated from Anangu Pitjantjatjaraku; or
> (b) may be compulsorily acquired, resumed or forfeited under the law of this State.

One of the questions raised by this provision is whether the South Australian government has the constitutional power to deprive itself, and future governments of South Australia, of the power of compulsory acquisition. It is beyond the scope of this article to explore this question. The provision highlights one of the potential legal pitfalls facing recognition by Australian law of Aboriginal claims to land.

It is suggested that the eminent domain, being a governmental power, is, of its very nature, a *political* concept. It is here that the historical debates, rallying to the cry of, 'no taxation without representation',[14] become relevant. Not only is this great principle a pillar upon which representative government in the English tradition rests, but it places the concept of compensation firmly in the realm of the institution of property. When compensation is seen not as a 'pay-off'[15] or as a tire-

12 W. B. Stoebuck, *op. cit.* n. 5 at pp. 561-562. See, too, W. R. Riddell, 'Early Provincial Interference with Private Property', (1933) 11 *Can.B.R.* 176.

13 F. A. Mann, 'Outlines of a History of Expropriation', (1959) 75 *L.Q.R.* 188 at p. 193.

14 For an Australian instance see E. Sweetman, *Australian Constitutional Development* (1925) Ch. XVIII 'The Great Crisis'. See, too, V. Windeyer, 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1961) 1 *U.Tas.L.R.* 635 at pp. 638-646 and at p. 653. For an account of an application of this principle in American constitutional history see J. P. Reid: 'In an Inherited Way: English Constitutional Rights, The Stamp Act Debates, and the Coming of the American Revolution' (1976) 49 *Southern California L.R.* 1109.

15 *Compensation for Compulsory Purchase: A Comparative Study.* J. F. Garner (ed.) and J. P. W. D. McAuslan 'Compensation, Participation and the Compulsory Acquisition of "Homes" ' at p. 56.

some, but necessary, appendage to the eminent domain, but as integral to the eminent domain, it is appreciated that the concept of compensation should highlight the citizen's relationship with the taker not as a pseudo-contractual one, but as a political relationship and all that that means. Thus Thorpe, in a passage which reflects the Lockeian tradition of representative government, draws attention to a part of that relationship:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share of the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him or applied to public uses, without his own consent, or that of the representative body of the people... and whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor.[16]

This passage also provides glimpses of the Lockeian theory of the social contract which maintains that good or right government rests on the consent of those whose rights are regulated by it. This must proceed from the acquiescence of each person on the basis of his natural right to protect himself and his property. 'Accordingly, the consent by which each person agrees with others to form a body politic obligates each to submit to majority rule. Effectively, then, agreement of the majority is agreement of the entire society.'[17] Thus, while the political concept of the eminent domain describes a relationship between those whose property is appropriated and the taker, this rubric may be seen as part of, almost engrated upon, the concept of property.

The concept of compensation, then, by examining the power to take or expropriate, must derive from the property-owner's relationship with the State.[18] Indeed, whilst it may be said with truth that property is the creation of the State,[19] and all property rights derive from the State, the eminent domain describes a political relationship in which the consent of the individual is crucial if the whole notion of representative government is to have any meaning at all. It is submitted, therefore, that the concept of compensation should reflect this 'greater' aspect, that the individual forms part of a polity, and that the eminent domain, ostensibly

16 F. Thorpe, *Federal and State Constitutions* (1909) quoted by Stoebuck *op. cit.* n. 5 at p. 567. See, too, W. H. Hamilton, 'Property According to Locke', (1932) 12 *Yale L.J.* 864 and W. Friedmann, *Legal Theory* (1944) at pp. 123-124.

17 C. S. Telly, 'The Classical Economic Model and the Nature of Property in the Eighteenth and Nineteenth Centuries', (1978) 13 *Tulsa L.J.* 406 at p. 439.

18 Compare F. S. Philbrick, 'Changing Conceptions of Property in Law', (1938) 86 *U. Pennsylvania L.R.* 691 at p. 710. See, too, H. A. Overstreet, 'The Changing Conception of Property', (1915) 2S *International Journal of Ethics* 165.

19 See for example, J. P. Proudhon, *What is Property? An Inquiry Into The Principle of Right And Of Government.* (B. R. Tucker trans. and intro by G. Woodcock), (1970, first published 1840) at pp. 75 and 76.

created for the protection and good progress of that polity, requires compensation that reflects the individual's position in that structure.

Stoebuck, however, does not regard the principle of compensation as fundamentally a political one, but considers the political element of this principle as merely an aspect of its ideological history: 'So, the principle that first came to mind, even before the compensation requirement, was that property could be taken only by consent — of the individual in person or by his representatives consenting for him.'[20] It is suggested, however, that this view does not go far enough. Logically, the concept of compensation only arises from the power of eminent domain, the very basis of the compulsory taking creates a something which has come to be known as 'compensation'. The relationship between individual and State demanded it. This relationship may be characterized as a political relationship constructed on the notion of property.[21]

4. *Compensation: The Development of a Principle*

The position appears to be that there is no right at common law to compensation upon a compulsory acquisition of property by the State. Yet this does not really do justice to the importance which the common law attached to compensation and to private property rights. Thus Gough, in his illuminating study, *Fundamental Law in English Constitutional History*, has written:

> Englishmen did not need Locke to tell them that the chief reason why civil government was established was to protect property. The sanctity of property was (and indeed still is, however much weakened by modern legislation and attacked by modern political theory) one of the cardinal principles of English common law. Whatever rights were fundamental we may be sure they included the right of property.[22]

It is submitted, however, that by virtue of the English constitutional system, the sanctity of property, as involving inalienable rights, was robbed of the status of an 'entrenched' fundamental right by the doctrine of parliamentary sovereignty. Hence, although the practice evolved, and to this extent reflected the protective attitude of the common law in this area, that statutes appropriating land for public use should provide a form of compensation for the person whose property had been taken, this was never elevated to a position from which it could challenge the place of an 'immutable' doctrine of English constitutional law. Nonetheless, the possibility of Parliament enacting appropriating legislation without providing for the payment of compensation was so horrific as to constitute a *de facto* exception to, or inroad into, the doctrine of parliamentary sovereignty:

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20 *Op. cit.* n. 5 at p. 567.

21 Compare H. Laski, *A Grammar of Politics.* (4th ed. 1948) at p. 209 and A. Lenhoff, 'Development of the Concept of Eminent Domain', (1942) 62 *Columbia L.R.* 596 at p. 607. See, too, n. 24 *infra.*

22 (1955) at p. 54. See, too, *Land Values: The Report of the Proceedings of a Colloquium held in London.* (Peter Hall (ed.) 1965) 'The History of Compensation and Betterment Since 1900' by Parker at p. 53.

> ... no-one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of this kind; the Parliament with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind.[23]

Grant has demonstrated that, between about 1800 and the American Civil War, American state courts often supported the right to compensation as an enforceable and fundamental right on the basis of natural law, and this, in the absence of any constitutional fiat to do so.[24] Thus, though the common law did not provide a right to compensation so as to enable the courts to exercise a power of judicial review, natural law supplied the means by which the prevailing judicial philosophy, sensitive to any infringements of private property rights, could give effect to a compensation requirement following compulsory acquisition.

The private property rights foundation of the concept of compensation could not unfaithfully be described as only a particular, though important, manifestation of a much larger and greater concept or tradition — the institution of property. The power to take and the whole notion of the compensation requirement represent, fundamentally, derivations from, or applications of, that tradition. Thus, the concept of compensation may be seen not only as a political concept, highlighting one aspect of a person's relationship to the State and society, but as an *organic* concept. This must necessarily be so if it is accepted that an intimate, indeed vital, relationship exists between the concept of property and the concept of compensation, and that one, the concept of compensation, is a function of the other. Now this constitutes an approach which may leave current compensation practices without their traditional basis in property rights *as* private or natural human rights.[25]

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23 *Vanhorne's Lessee* v. *Dorrance* (1795) 2 Dall. 304, *per* Patterson J. quoted in Mann *op. cit.* n. 13 at pp. 199-200.

24 J. A. C. Grant, 'The "Higher Law" Background of the Law of Eminent Domain', (1930-31) 6 *Wisconsin L.R.* 67. Compare Ackerman's (*Private Property and the Constitution*) *op. cit.* n. 1 at p. 193. See, too, 'A Reconsideration of American "Styles of Judicial Reasoning" in the Nineteenth Century', [1975] *Wisconsin L.R.* 1 and, generally, M. J. Horowitz, 'The Transformation in the Conception of Property in American Law, 1780-1860', (1972-1973) 40 *University of Chicago L.R.* 248.

25 With respect to property rights as natural human rights see Machan *op. cit.* n. 4 at pp. 121-127, R. Schlatter, *Private Property: The History of an Idea* (1951) Chapter 7 and C. B. Macpherson 'Human Rights as Property Rights' (1977) 24 *Dissent* 72. Compare L. G. Sager 'Property Rights and the Constitution' in *Property: Nomos XXII* J. Roland Pennock and John W. Chapman (eds.) (1980) at pp. 378-379 where he observes :—

> Although governmental entities must pay for land they acquire, once a decision to undertake the expense is made the compensation requirement does not provide even marginal deterrence to the use of eminent domain to sever an individual from his property. The compensation requirement is thus only indirectly and insubstantially promotive of the relationship between individuals and particular pieces of property.

It is clear from the history of the institution of property that it has exercised a profound influence on the development of human traditions and mores. It is also clear, in the words of Philbrick's dazzling observation that, 'the concept of property never has been, is not, and never can be of definite content. The paradigm of a sanskrit verb of a 1000 forms could not approach in diversities the phases of that concept in any single time and place.'[26] Yet the universal basis upon which the principle of compensation has hitherto developed has embraced only one form of the Sanskrit verb and, as it were, consequently tied the concept of compensation to a particular tradition — the concept of property as comprising of private property rights. Why has the concept of compensation developed in this manner? The traditional concept of compensation, it is submitted, of which Schacter's prefatory comment cited in the introduction to this article is representative, requires re-examination to ascertain whether the position it espouses ought to be maintained.

5. *The Concept of Property and the Concept of Compensation*

The theory of private property rights, namely the theory of exclusive and absolute use of, and of the free alienation of, rights in property, has been an aspect of property theory from the earliest times.[27] The identification of property with private property, however, is a relatively modern phenomenon and may be traced no farther back than the seventeenth century.[28]

Macpherson has accounted for the development of modern private property by pointing out that it was exactly this kind of property which the industrial revolution and the rise of the full capitalist market society required to function most effectively. The rise of private property witnessed a concomitant and irresistible decline of feudalism in the concept of property.

Feudalism[29] had dominated the legal and political structure of England for centuries. Introduced by William I at the time of the Norman Conquest, feudalism established a hierarchy of obligations based on tenure whereby all land was held subject to services due to the King from his tenants-in-chief as original grantees of the land, and to them in turn from vassals who actually occupied the land. There might have been any number of steps in the chain of tenure. It is interesting to speculate at this stage in the history of the concept of property whether, had the King in Parliament desired to appropriate in the thirteenth, fourteenth and fifteenth centuries on a scale as great as that practised in the eighteenth, nineteenth and twentieth centuries, the concept of

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26 *Op. cit.* n. 18 at p. 696.
27 In addition to n. 24 *supra* see *Property: Mainstream and Critical Positions* (ed. and intro. by C. B. Macpherson 1978) at pp. 9-11. Generally see J. Lurye, 'Evolution and Philosophy of Property', (1946-47) 3 *Res Judicate* 181 and Schlatter, *Private Property: The History of an Idea op. cit.* n. 25.
28 See Macpherson *ibid*, at p. 10 and Telly *op. cit.* n. 17.
29 For a general discussion see P. Lafargue, *The Evolution of Property from Savagery to Civilization*, 1895 Chapter 4.

compensation, and indeed, the concept of compulsory acquisition itself, would have been radically different today. This view suggests that the commonest obligation in the feudal system in these circumstances would have been not knight's service, but a duty to relinquish possession of land without compensation other than that compensation afforded by the possibility of moving elsewhere.

Thus, in the context of the modern concept of compensation, Stoebuck's condemnation of the reserved power theory of the power to take, in the light of this imagined, albeit gross form of vassalage, would lose much of its justification. Yet, it may be pointed out, the suggested facts upon which this speculation is based renders any analytical benefit which may be derived from this approach for the modern concept of compensation nugatory simply because feudalism, by its very nature, would not have generated the imagined circumstances. However, this apparently fanciful excursus into what may have been in the history of relationships arising from the land, namely, a concept of compensation based on a duty to give to the State (which duty arising as a condition of tenure) rather than an obligation on the State to compensate on the basis of a loss of private property rights, provides an indication as to what today's concept of compensation ought to be about.

The fundamental basis of feudalism lay in the requirement that land possessed and held in a state of vassalage, dependant on the performance of certain services which, ultimately, by way of hierarchical progression, were owed to the King. The destruction of feudal restraints on individual proprietorship and the growth of political, social and economic individualism in the eighteenth and nineteenth century not only brought about the collapse of this system, but provided the basic stuff for change in the concept of property. The concept of compensation, the notion 'that compensation is designed to even the score when a given person has been required to give up property rights beyond his just share of the cost of government,'[30] was born of this melting pot of change. The great upheaval for human institutions generated by the Industrial Revolution and the demands of *laissez faire*[31] had given rise to the ideology of private property rights, the sacredness of which led, almost as a natural necessity, to the principle of compensation on a compulsory acquisition of private property rights.

The growth of private property rights for the purposes of a capitalist economy, coupled with the growing desire on the part of the State to acquire property compulsorily for the implementation of public works, begat that concept for compensation of which Schacter's view is representative. Yet the concept of property, as with the concept of compensation, is organic. It is constantly changing. Furthermore, this conception of property as being in a constant state of flux is buttressed by the recognition in the writings of modern commentators of the socio-

30 Stoebuck *op. cit.* n. 5 at p. 587, see too p. 585 and compare Farrier and McAuslan *op. cit.* n. 15.

31 For a concise treatment see Telly *op. cit.* n. 17 *supra* at pp. 463-472.

logical and cultural functions served by the notion of property in society. Telly has suggested that one reason why natural law and rights have been such a prominent feature, historically, of various conceptions of property, is that 'property has been a motivating factor behind mankind's continuing adjustments to his own character, to himself as a social being, and to that sense of justice that has led him to create systems of jurisprudence'.[32]

Hallowell has examined property from an anthropological perspective.[33] His research suggests that significant cross-cultural comparisons may be made so as to arrive at some basic, universally acknowledgeable categorical similarities in human culture. Thus, property takes its place among speech, the family, kinship, religion and economic organisation as being one of those universal similarities whose recurrence and persistence suggest that they represent the roots of human society. Hallowell concludes:

> If the core of property as a social institution lies in a complex system of recognised rights and duties with reference to the control of valuable objects, and if the roles of the participating individuals are linked by this means with basic economic processes, and if, besides, all these processes of social interaction are validated by traditional beliefs, attitudes and values and sanctioned in custom and law, it is apparent that we are dealing with an institution extremely fundamental to the structure of human societies as going concerns. For, considered from a functional point of view, property rights are an institutionalised means of defining *who* may control various classes of valuable objects for a variety of present and future purposes and the *conditions* under which this power may be exercised... Consequently, property rights are not only an integral part of the economic organisation of any society; they are likewise a coordinating factor in the functioning of the social order as a whole.[34]

The importance of property, therefore, cannot be under-estimated in coming to a proper understanding of the cultural forces which determine the nature of human societies and their fundamental structures. It is submitted, however, that private property, the apotheosis of individualism and unfettered proprietorship, cannot be regarded in a similar light.

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32 Telly *ibid.* at p. 416. Compare Proudhon *op. cit.* n. 19 at pp. 224-291. Generally see W. B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (1977) and H. A. Johnson, Book Review (In Pursuit of Hapiness: American Conceptions of Property...), (1980) 24 *American Journal of Legal History* 179.

33 A. J. Hallowell, 'Nature and Function of Property as a Social Institution', (1943) 1 *Journal of Legal and Political Sociology* 115. Generally, see A. W. Jones, *Life, Liberty and Property: A Story of Conflict and a Measurement of Conflicting Rights* (1941); R. Ardrey, *The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nations* (1967); A. Ross, 'Tu-Tu', (1957) 70 *Harvard L.R.* 812.

34 Hallowell, *ibid.* at p. 133. (Emphasis original).

It is here that Gottfried's apology for property in terms of private property is fundamentally misconceived.[35]

The notion of private property cannot be, or become, the surrogate of the concept of property. The concept of property, because of its organic nature and the roles it plays in the development of human institutions, cannot be statically described as private property rights derived from natural human rights. Although that derivation may serve as a *justification* for the institution of property, it cannot serve to fix the concept of compensation. Both concepts shift, as it were, to accommodate the changing human ethos. The question thus arises whether the concept of compensation ought still to be described in terms of an 'evening of the score' based upon a taking of private property rights.

6. *Does the Notion of Private Property Constitute the Assumption upon which the Modern Concept of Compensation is Based?*

Macpherson has isolated three basic propositions underpinning theorists' discussions of the concept of property through history.[36] The first, that a concept of property must be justificatory and therefore derived from the supposed essential nature and needs of man. So that the concept of property, in this sense, had to be based on the individual. Thus, the idea of property required the idea of an individual right. The second general proposition was that property was a right, not a thing. It is an enforceable claim to some use or benefit of something. Thirdly, that property is the creation of society, to this extent, that it is the State which will enforce the individual claim.[37]

This article is, for the most part, concerned with theories flowing from Macpherson's first proposition, though his second and third propositions may be seen running through much of the discussion. Veblen, Cohen, Reich and, indeed, Macpherson himself, and others, have attacked the notion of private property rights, decrying the efficacy of a theory of exclusive individual property rights in the concept of property in the twentieth century. Many of these attacks rely on the growth of the modern corporation, the increase in interference by government in the conduct of business and industry and the rise of the so-called 'welfare

35 Dietz Gottfried, *In Defence of Property* (1963). Compare J. W. Wiggins 'The Decline of Private Property and the Diminished Person' in *Property in a Humane Economy: A Selection of Essays Compiled by the Institute for Humane Studies* ed. by S. L. Blumenfeld (1974) at p. 71. For a recent discussion of anti-property arguments see L. C. Becker, *Property Rights: Philosophic Foundations* (1977) Ch. 8.

36 Macpherson *op. cit.* n. 27 at pp. 201-202. Compare R. Pound, *An Introduction to the Philosophy of Law,* (1954) Ch. 5 and G. W. Paton, *A Textbook of Jurisprudence* (ed. by G. W. Paton and D. P. Derham, 1972) Ch. 21 esp. at pp. 540-541.

37 Compare these propositions with the approach F. Snare adopts in 'The Concept of Property' (1972) 9 *American Philosophical Quarterly* 200 based on analytical jurisprudence. See, too, S. S. Ball, 'The Jural Nature of Land', (1928-29) 23 *Illinois L.R.* 45.

State' for their support.[38] Thus, Thorstein Veblen,[39] writing in 1923, drew attention to the rise of the modern corporation and of financial as distinct from directly productive property; that more and more of the property, in economically advanced countries, had become essentially a claim on a revenue, and in large part on the revenue produced by the labour and ingenuity of others and by the accumulated knowledge or technology which was properly a joint stock of the whole society.

Reich assumes that the basic function of property, which in his view property had fulfilled until the emergence of the welfare State, was securing to the individual an area of freedom from domination by society or the State. However, his convincing description of the United States situation likens government to a, 'gigantic syphon . . . [which] . . . draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licences'.[40] In Reich's view, property has become essentially a right deriving from, and subject to, conditions imposed by government largess: 'Hardly any citizen leads his life without at least partial dependence on wealth flowing through the giant government syphon.'[41] Reich's observation that twentieth century property rights contain features of neo-feudalism is particularly interesting. Licences, permits and other forms of regulation constitute the conditions which, imposed by the State, govern access to wealth:

> Wealth is not "owned", or "vested" in the holders. Instead it is held conditionally, the conditions being ones which seek to ensure the fulfillment [sic] of obligations imposed by the State. Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty, so government largess binds man to the State.[42]

Macpherson argues that the concept of property does not require that property be only an individual right to exclude others from the use or benefit of something. In his view, the basic three propositions, outlined above, constituting the theoretical basis of any concept of property, are equally well served by an individual right not to be excluded from the use or benefit of something. Further, that this concept of property will obviate many of the difficulties generated by the central problem of liberal — democratic theory, namely, the difficulty of reconciling the liberal property right (based on exclusive private property) with that

38 For a general discussion see Paton *op. cit.* n. 36 at pp. 531-538. See, too, n. 57 *infra.*

39 For extracts from his work in this respect see Macpherson *op. cit.* n. 27 at pp. 121-132.

40 C. A. Reich, 'The New Property' (1964), 73 *Yale L.J.* 733 at p. 733. See, too, Rudolf Dolzer, 'Welfare Benefits as Property Interests' (1977) 29 *Administrative L.R.* 525.

41 *Ibid.* at pp. 737. W. van Alstyne, 'Cracks in the New Property' (1977) 62 *Correll L.R.* 445.

42 *Ibid.* at pp. 769-770.

equal effective right of all individuals to use and develop their capacities which is the essential ethical principle of liberal democracy.[43]

Kent has condemned the 'mythic right to private property'.[44] He suggests that much of a person's wealth and income are determined not so much by a person's own effort and labour, than by the decisions of others. That a person's property is most immediately a consequence of the decisions of employers, clients, unions, governments and corporations. Kent characterises these decisions as 'authorising decisions'[45] upon which rights to property depend. The massive proportions of poverty and suffering which mankind is witnessing today, Kent argues, requires a rejection of the ideology of private property as the basis of our system of resource allocation. He advocates a new Bill of Property Rights in which the interests of the individual in property would derive from what is best for all on the basis of equity and justice.[46]

Finally, in this brief survey of views calling for a rejection of the private property notion of the concept of property, the views of Metzger[47] and Large[48] may be referred to. They draw attention to the particular difficulties facing legislators in the United States whose efforts to protect the environment through land use regulation are being hampered by the 'takings' law. The constitution's protection of private property has required, for example, in many cases, that the regulation of wetlands be accompanied by compensation to the owners. The preservation of wetlands is seen as ecologically necessary. However, by taking away the owner's right to 'development' of his land so as to deprive him of the power of filling in his wetlands and building, this is considered a 'taking' of private property rights as, *economically*, the land is of little value and use to the owner in its statutorily preserved condition.

Metzger regards the sanctity of private property, in the prevailing legal mores, as a major obstacle to controlling land use for the ecological and environmental benefit of the community as a whole. He considers

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43 If liberal — democratic societies are to be the guarantors of rights essential to the equal possibility of individual members using and developing their capacities, the individual property right that is needed is not the exclusive right but the right not to be excluded from the use or benefit of those things (including society's productive powers) which are the achievements of the whole society.
At pp. 205-206 Macpherson *op. cit.* n. 27. Macpherson further develops this argument in 'Human Rights as Property Rights' *op. cit.* n. 25.

44 E. Kent, 'Property, Power and Authority', (1975) 41 *Brooklyn L.R.* 541 at p. 557. For discussions of many of the issues raised by Kent see the essays collected in *Economic Foundations of Property Law* (ed. by B. A. Ackerman, 1975); W. K. Wright, 'Private Property and Social Justice' (1915) 25 *International Journal of Ethics* 498; and J. C. Grey, 'Property and Need: The Welfare State and Theories of Distributive Justice', (1976) 28 *Stanford L.R.* 880. See, too, H. Demsetz, 'Towards a Theory of Property Rights', (1967) 57 *American Economic Review: Papers and Proceedings* 347.

45 *Ibid.* at p. 556.

46 See Kent's proposed bill of property rights which outlines his alternate approach at pp. 557-558, *ibid.*

47 M. B. Metzger, 'Private Property and Environmental Sanity', (1976) 5 *Ecology L.Q.* 793. See, too, E. G. Dolan 'Environmental Policy and Property Rights', in *Property in a Humane Economy op. cit.* n. 35 at p. 209.

48 D. W. Large, 'This Land is Whose Land? Changing Concepts of Land as Property', (1973) *Wisconsin L.R.* 1039.

the land use problem as symptomatic of a greater ideological crisis: 'The fundamental denial of modern western civilisation of the inter-dependence of people with their fellows and their environment'.[49] It is upon this vital inter-dependence that Metzger and Large base their assertion that the uses to which property is put is a matter of public interest, indeed, ultimately, a matter of life and death:

> We live on what has been described as a spaceship containing a finite quantity of resources, especially land. We now realise that whatever the state of its title, one parcel of land is inextricably intertwined with other parcels, and that causes and effects flow across artificially imposed divisions in the land without regard for legal boundaries. The land simply cannot be neatly divided into mine and yours.[50]

Twentieth century property theory thus seems to be groping for a new concept of property based not on exclusive private property rights, but on a theory which explains and reflects the new circumstances and aspirations of modern society. Property rights, as it were, have been broken up. No longer can it be said that private property, with its inherent exclusiveness, forms the basis of many of the laws enacted with respect to resource allocation. The growth of statutory welfare, curbs on the employer's freedom in employment contracts, taxation, town planning and zoning regulations, collectively constitute an assault on traditional and conservative notions of private property. These controls call, in the words of Reich, for a 'new property'.[51]

Friedmann regards this fundamental shift away from private property in the way property rights have developed as causing the protection of property rights to be, 'spread over the community as a whole, where it has, in the past, essentially benefited the very limited class of owners of land and commercial property'.[52] He does not, however, completely deny private property a role in the way in which we live and adopts Hording's observation that 'it is truer to say that the notion that private property is an essential condition of human freedom is still accepted. We are giving the idea a greater practical effect than did our predecessors.'[53]

The concept of compensation on compulsory acquisition, it is suggested, as a result of its intimate relationship with the concept of property, is in a state of flux. It appears that the traditional concept of compensation as a making good of a loss to the owner, of 'evening the score', on the basis that he has been required to transfer his private property rights to the State, and that this transfer constitutes an intrusion into a sacred domain the nature of which the State is bound to protect as a term of its political and social compact with each of the

49 Metzger *op. cit.* n. 47 at p. 793.
50 Large *op. cit.* n. 48 at p. 1045.
51 Reich *op. cit.* n. 40 at p. 787.
52 Friedmann, *Law in a Changing Society* (2nd ed.) (1972) at p. 117.
53 *Ibid.* at p. 118 from A. L. Hording, 'Free Man Versus his Government', (1958) 15 *Methodist Studies in Jurisprudence* at p. 106.

members of the polity, ought to be seriously reconsidered. It is not suggested that the notion of private property ought no longer to form part of our system of values, indeed, as Gottfried has demonstrated, historically, it is a recurring theme in the concept of property.[54] Yet, it is submitted, while the concept of compensation as deriving from natural or human private property rights is historically sound, it does not sufficiently come to terms with the concept of compensation as it exists today.

7. *Conclusion: Towards a New Theoretical Hypothesis*

The power of compulsory acquisition grew at a time when the concepts of zoning, regulation of land use and natural resource conservation were either unknown or only appearing in an embryonic form. Implicit in the power to take was a political construct determining the notion of compensation. Lockeian ethics required that expropriation, like appropriation through taxation, should be based on the consent of those from whom property rights were taken. This was, in essence, a simple political compact. The individual's place in the polity rested securely on his property rights, which, in a governmental and judicial atmosphere of grand individualism, created the traditional concept of compensation. All this has now changed.

Disillusionment with the ideology of *laissez faire* from the end of the nineteenth century has provided the impetus for the massive growth in government administration and bureaucracy 'to the point where it has, with considerable validity, been called a fourth branch of government, there has come a blurring of the sharp lines of demarcation of the traditional trichotomous division of government'.[55] The concept of property has become, consequently, 'a collective description for a complex of powers, functions, expectations, . . . [and] . . . liabilities . . .'[56]

Private property rights have been rendered, to a large extent, illusory by these developments. These rights are now subject to innumerable controls and constraints. The effect on what the 'new property' and the concomitant change in the role and nature of government has on the concept of compensation, is not at all clear.[57] It is suggested however, that the traditional concept of compensation requires re-statement.

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54 Gottfried *op. cit.* n. 35 esp. at pp. 34-37. In this regard see, too, Friedmann (*Legal Theory*) *op. cit.* n. 16 at pp. 405-407.

55 A. S. Miller and R. F. Howell, 'The Myth of Neutrality in Constitutional Adjudication', (1960) 27 *U. of Chicago L.R.* 661 at p. 685.

56 Friedmann (*Law in a Changing Society*) *op. cit.* n. 52 at p. 96. See, generally, Charles Donahue Jr. 'The Future of the Concept of Property Predicted from its Past' and Thomas C. Carey 'The Disintegration of Property' in *Property: Nomos XXII* (*op. cit.* n. 25) at pp. 28 and 59 respectively.

57 See Milton Friedmann's 'Election Perspective' *Newsweek* (1980) Nov. 10 at p. 51 where the trends referred to in the text with respect to the increasing role of government are discussed in the context of the policies of the 1980 American presidential candidates. See, too, Friedmann (*Law in a Changing Society*) *op. cit.* n. 52 at pp. 102-116 and Parker *op. cit.* n. 22 at p. 56.

Clearly, private property rights no longer form the dominant notion in the concept of property. The concept of compensation is no longer concerned with making good an intrusion into private property rights, as they have, substantially, become immersed in the demands of the State. To what, then, does being 'compensated' refer?

The concept of compensation on compulsory acquisition seems concerned not so much with making good private property rights which have been taken away, as with carrying out the State's responsibility or role as the dominant source of property rights or wealth. In this sense, we are seeing a kind of inverse or pseudo-feudalism where, although not all the trappings of feudalism are present, the individual holds property subject to conditions imposed by the State, but nonetheless, has a right to compensation on compulsory acquisition. The notion of private property has become far too confining and unrealistic. Though once an ideal, it has today become an empty catch-cry.

The new concept of compensation requires a rejection of the grandiloquent exclusiveness of private property rights. They have served their purpose. Compensation is now concerned with a new hypothesis where property rights are shared and not nearly as absolute as they were required to be by the notion of private property rights. Although the concept of compensation is still fundamentally concerned with a 'making good' or a return of rights in property, this has become a right in the individual to expect from the State a just performance of its socio-political contractual obligations.