

ON THE IMPORTANCE OF EXPROPRIATION IN THE ROMAN EMPIRE AND IN MODERN EUROPE

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Abstract

The question, whether there was expropriation in the Roman Empire or not, is difficult to answer, because the ancient texts do reveal only very small evidence of public Roman law. A textbook on public law of the Roman Empire unfortunately is not known. Let us, therefore, make the following thought experiment: How would be our understanding of Roman private law, if Justinian¹ would not have bequeath such a great collection of private law to us? Our knowledge of Roman private law would then be very fragmentary, to recognize cross-correlations would be almost impossible. The scientific approach to expropriation for infrastructure projects of the state has to start from the following considerations:

“Public interest“ respectively “general welfare“ is as a legal term ubiquitous in Roman history: In the proper name “res publica Romana“, which goes back to the beginnings of Rome, occurs the commitment of the Roman society to the principles of public interest and of public welfare. In the introductory text of Iustinian's >Digests< from the 5th century AD there is given an attempt to define the term “public law“, the recourse to the public interest is evident (Ulpian², D. 1.1.1.2):

„Publicum ius est quod ad statum rei Romanae³ spectat, privatum quod ad singulorum utilitatem; sunt enim quaedam publice utilia, quaedam private“.

Public law does refer to the Roman state, private law does refer to the affairs of single people; there are subject-matters, that are useful for public interest, whereas other subject-matters are useful for private welfare⁴.

Here the following is to be seen: The history of road construction and road regulations can be concentrated on the public interest for the planning

¹ Hartmut Leppin, Justinian and the restoration of the Roman Empire. The illusion of renewal, in: Mischa Meier (ed.), They created Europe, Munich, 2007, p. 176–194.

² To Domitius Ulpian († 223 AD) cfr. Tony Honoré, Ulpian. Pioneer of Human Rights. 2th edition. Oxford, 2002.

³ Very concrete is the expression “res Romana”.

⁴ The translation is from the author of this paper.

process and the later usage. Road planning shall be ruled by public interest⁵ and is committed to the common good. Private ownership may therefore be dispositive and may be transferred to the state. As a rule this is done with the approval of the owners: The state acquires the necessary area for the realization of the planned road. The expropriation as coercive measure of the state is the “ultima ratio“. Unfortunately, the Roman text tradition is so poor that there remains room for speculations. It is questioned, whether there had been expropriation in the Roman Empire and this was denied by intricate jurisdictional issues for competences of Roman authorities for road administration. This research approach must lead astray: Whether the x-administration or the y-administration might have been responsible, does not alter the material issues and the corresponding answers⁶. To draw from the fact, that the ancient texts do refer to the construction of aqueducts, whereas texts to the construction of roads are rare, the conclusion that for the road sector there was no expropriation, is a very questionable approach. It is more than obvious, that the planning of aqueducts and land-based roads are very comparable; planning includes the legal instruments of expropriation. What reason should be given to treat comparable planning procedures differently? Waterways and land-based roads each serve the purpose of networked traffic management.

Keywords: Roman Empire, public law, private law, expropriation, property, road, aqueduct, Frontinus, transport, traffic, planning, privatisation.

I) Introduction

To the organizers of this conference⁷ at the University of Warmia and Mazury I am very thankful that it is possible to make a lecture on Roman law and modern infrastructure law. Infrastructure law is my interest since I started as a lawyer almost twenty four years ago at German Ministry of Transport; Roman law is an old love that started during the study of Classical Philology. The German saying “Old love does not rust” may be correct for scientific interest, but not for personal relationships in real life; in real life an old love is no longer a love.

⁵ In the act of estimating the citizens the censors were free to impose sanctions against the unworthy in order to exclude these from the cavalry; the technical term was probably “vende equum” (“sell your horse”); cfr. Gerhard Dulckheit/Fritz Schwarz/Wolfgang Waldstein, Roman legal history. Munich, 2005, p. 94.

⁶ Martin, Pennitz, The “expropriation case” in Roman law of the Republic and the Principate. A functional and comparative law problem (research on Roman Law, Vol. 37). Vienna – Cologne – Weimar, 1991, p. 106 with the evidence to the literature.

⁷ This paper is the elaborated text of a lecture that was held in Olsztyń on 4th of April 2014.

Now let us deal with the question whether there was expropriation in the Roman Empire. This includes the question whether there was a standardized expropriation procedure particular for the construction of roads and for the construction of aqueducts. The classical texts unfortunately do not give a definition for expropriation and the expropriation procedure. The German Classical philologist Otto Güthling⁸ proposes in his large German-Latin dictionary⁹ for the noun “Enteignung” (“expropriation”) the Latin translation “vindicatio alicuius rei” (“ex rei publicae¹⁰ utilitate facta”). For the verb “enteignen” (“expropriate”) Otto Güthling proposes “vindicare aliquid” (“ex rei publicae utilitate facta”) or “demere alicui possessionem ex rei publicae utilitate”. For this diction – this terminology might be taken from the terminology of civil law – no instances can be found in Frontinus (40–130 AD)¹¹, who wrote an admirable handbook about the construction of aqueducts. The Latin term “expropriatio”¹², which has prevailed in modern languages, can not be verified in the texts of Roman law¹³. Therefore, here is started form a modern understanding of expropriation, but we can be sure that in essence there was no different understanding at ancient times¹⁴:

(1) The withdrawal of property is achieved by state¹⁵ for the realisation of infrastructure projects¹⁶.

(2) The withdrawal of property¹⁷ is achieved by a specific act of public jurisdiction.

⁸ Langenscheidts United Latin Dictionary, Part II, German-Latin. Berlin/Munich/Zurich, 11th edition , 1978, p. 183.

⁹ The Thesaurus Linguae Latinae, which is the major project for lexical acquisition of the Latin vocabulary, does not help, because the letter “v” has not yet been addressed.

¹⁰ The term “res publica” bears the common good in its name.

¹¹ More about this later under section VI.

¹² The term appears as “expropriation of expropriators” in Marxist theory.

¹³ The Oxford Latin Dictionary (col. 1495) gives as related terms only “propriarius” (= “owner”) and “proprietas” (= “ownership”).

¹⁴ To details on expropriation for road infrastructure projects Manfred Aust, in: Kodal, Systematic Handbook on road law in the Federal Republic of Germany. 7th edition. Munich, 2010, Chapter 39.

¹⁵ According to German law expropriation can be allowed in favor of a private person or private organization, for example in favor of an energy company, if the energy is produced for the general public.

¹⁶ Cfr. http://en.wikipedia.org/wiki/Eminent_domain: “Eminent domain (United States, the Philippines), compulsory purchase (United Kingdom, New Zealand, Ireland), resumption (Hong Kong), resumption/compulsory acquisition (Australia), or expropriation (South Africa, Canada) is the power to take private property for public use by a state or national government. However, it can be legislatively delegated by the state to municipalities, government subdivisions, or even private persons or corporations when they are authorized to exercise functions of public character”.

(3) The withdrawal of property must serve the common good (general welfare/general public interest/ public good).

(4) The expropriated owner receives a compensation by state; the compensation is based on the market value of his property.

II) To the importance of expropriation for infrastructure projects

Modern constitutional law¹⁸ allows for expropriation: Article 14, paragraph 3 of the Basic Law of the Federal Republic of Germany¹⁹ uses the term “expropriation” as *terminus technicus*²⁰:

“Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be held to the ordinary courts”.

According to German constitutional law there is a distinction between expropriation by law (so-called legal expropriation) and administrative expropriation which is executed on the basis of a yet existing law; the administrative expropriation is according to the jurisprudence of the Federal Constitutional Court the exceptional case, because otherwise the recourse to the courts would be shortened.

Expropriation is not mentioned in the Constitution of the Republic of Poland of 2nd April 1997²¹. The interpretation of Article 64 (paragraph 3), however, shows that expropriation²² is permitted on the basis of law:

“Property shall only be restricted by means of the law and only to such an extent, that the core of property is not violated”²³.

¹⁷ If the state intervention takes place not targeted, but is the effect of an administrative error, the citizen is not without legal protection: In German law compensation is granted in accordance with the principles of confiscatory procedure or of the expropriation procedure.

¹⁸ Developing countries such as Egypt have a very rigorous law of expropriation; to the situation in Egypt cfr. Franz-Rudolf Herber, EU-Twinning-Project in order to enhance road safety in Egypt, in: BayVBl. 2012, p. 298–300.

¹⁹ The German text of the German Constitution can be found under <http://www.gesetze-im-internet.de/gg/index.html>.

²⁰ An English translation of the German Constitution can be found under http://www.gesetze-im-internet.de/englisch_gg/.

²¹ The Polish version can be found under <http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>.

²² To the ideologically motivated expropriations by socialist nationalization Grazyna Ewa Herber, Reconstruction of Warsaw's old town after the 2nd World War. The conflict between historic preservation principles, political enslavement and social expectations. Bamberg, 2014, p. 224 ff.

²³ A German translation of the Polish Constitution can be found under <http://www.sejm.gov.pl/prawo/konst/niemiecki/kon1.htm>.

Expropriation does have in practice an outstanding importance: In the first month of my professional career as a lawyer in the Federal Ministry of Transport, I came intensively in touch with the road law of the Republic of Poland; it was in December 1991: The comeback of the Republic of Poland in the infrastructure sector was in full swing, the comeback of Eastern Germany was in full swing as well²⁴. The Ministries of Transport of the Republic of Poland and of the Federal Republic of Germany were concerned with the preparation of state treaties for the planning and construction of border bridges²⁵ that should serve the connection of long-distance roads. The bridges were built long ago, the connections of the long-distance roads were established long ago, these long-distance roads do now fulfill a very important function for the coping of traffic in the European Union; the Republic of Poland and the Federal Republic of Germany are strong partners in the European Union. Important Polish-German road projects are referring to the following European regions²⁶:

- Görlitz – Zgorzelec²⁷.
- Forst – Olzyna²⁸.
- Guben – Gubinek²⁹.
- Frankfurt (Oder) – Słubice³⁰.

For a moment we shall imagine the following: The competent authorities of the Republic of Poland and of the Federal Republic of Germany planed this bridges and road connections “lege artis”. But what should happen, if owners of private land, that was necessary for the realisation of the

²⁴ Franz-Rudolf Herber, Bridges from east to west - Poland's transport policy and opening process to the reunified Germany, in: uni.vers, The Magazine of the University of Bamberg, Issue 4, June 2003, p. 16–17.

²⁵ Franz-Rudolf Herber, Border bridge agreements with the neighbouring countries of Germany, in: K. Bauer/F.-R. Herber (ed.), Law and technology: Cooperation between lawyers and engineers in the road administration, Part I, 1997, Bonn, p. 169–178.

²⁶ The preservation of these high-quality border bridges is settled by the agreement of 20th of March 1995 between the Federal Republic of Germany and the Republic of Poland.

²⁷ The legal basis in international law is the Agreement of 29th of July 1992 between the Federal Republic of Germany and the Republic of Poland on border crossing facilities for the new highway bridge in the Görlitz and Zgorzelec area.

²⁸ The legal basis in international law is the Agreement of 20th of March 1995 between the Federal Republic of Germany and the Republic of Poland on border crossing facilities for the new highway bridge in the Forst and Olzyna area.

²⁹ The legal basis in international law is the Agreement of 20th March 1995 between the Federal Republic of Germany and the Republic of Poland on the border facilities as parts of the German federal road B 97 and the Polish national road 274 in the Guben and Gubinek area.

³⁰ The legal basis in international law is the Agreement of 23th of April 1993 between the Federal Republic of Germany and the Republic of Poland on border crossing facilities for the new highway bridge in the Frankfurt/Oder and Słubice area.

road projects, were not inclined to sell their land to the Polish state respective to the German state? The legal solution would have been expropriation for compensation. Any other solution would have been an unacceptable result (with the exception of an easement on the private land for the state).

III) To the Roman road sector

If we turn our interest back to the ancient world, the Romans are the first important road builders this world has ever seen. Even today impressive relics of this architecture can be admired³¹, here can be mentioned only a few examples:

(1) The construction of the world-famous Via Appia³² was started in 312 BC under the consul Appius Claudius Caecus (340–273 BC)³³. Today the Via Appia is state road Nr. 7 in the Italian highway network; she covers a distance of about 540 km from Rome to Brindisi; in essence, she takes the same route as the ancient Roman road took.

(2) The construction of the Via Egnatia³⁴ was started in 146 BC under Gnaeus Egnatius³⁵. This road section is the continuation of the Via Appia on the eastern side of the Adriatic Sea from Apollonia and Durres (Albania) via Elbasan to Ohrid, Thessaloniki and to Constantinople at Bosphorus.

(3) The construction of the Via Claudia Augusta³⁶ was started in 15 BC under Nero Claudius Drusus (38 BC–9 BC)³⁷. This road section did run from Veneto via Verona, Bolzano (Pons Drusi), Meran (Statio Maiensis) through Vinschgau over the Reschenpass, Finstermünz and the mountain pass near Füssen (Foetes) to Augsburg (Augusta Vindelicorum).

³¹ The Roman bridge over the river Moselle in Trier – the former West Rome – had been constructed in 17 BC and is still used. It is the oldest bridge in Germany and since 1986 it is part of the UNESCO World Heritage Sites. To the Porta Nigra cfr. Grazyna Ewa Herber, in: Franz-Rudolf Herber/Konrad Bauer (ed.), *Law and technology: Cooperation between lawyers and engineers in the road administration*, Part II, Cologne, 2011, p. 356 (374).

³² Ivana Della Portella (ed.), *Via Appia. Along the most important road in antiquity*. Stuttgart, 2003.

³³ Bernhard Linke, *Appius Claudius Caecus – a life in an age of change*, in: Karl-Joachim Hölkeskamp/Elke Stein-Hölkeskamp. *From Romulus to Augustus* (ed.). *Great figures of the Roman Republic*. Munich, 2000, p. 69–78.

³⁴ Angelika Gutsche, *In the footsteps of the ancient Via Egnatia - from the Western Roman Empire into the Eastern Roman Empire: A historical guide through the southern Balkans: Albania – Macedonia – Greece – Turkey*. Schweinfurt, 2010.

³⁵ The survival data are not preserved; to him cfr. Thomas Robert Shannon Broughton, *The magistrates of the Roman republic*, Volume 3, Supplement, Atlanta, 1986, p. 84.

³⁶ To him Wolfgang Czysz, *Via Claudia Augusta*, in: Wolfgang Czysz (among others), *The Romans in Bavaria*. Stuttgart, 1995.

³⁷ It is the younger one.

The following four road types can be distinguished for the Roman Empire³⁸; the classification shows that the Roman road network was rather fine ranging:

(1) For the planning and construction of the “via militaris” strategic and logistical aspects were of particular relevance; the body responsible for road construction and maintenance was the Roman Empire.

(2) The “via publica” is the classic type of road in the consolidated power range of the Roman Empire outside the provinces; the body responsible for road construction and maintenance was (again) the Roman Empire.

(3) The “via vicinalis” is the classic type of road in the provinces; the body responsible for road construction and maintenance was (again) the Roman Empire and later the provinces themselves.

(4) The “via private” was of great importance for the connection between singular estates and civil settlements; private persons were responsible for road construction and maintenance (exceptionally it was the treasury of the state).

The route length of the entire Roman road network is estimated to roundabout 200 000 km³⁹. Is it conceivable that the necessary construction projects could have been managed without expropriations? I do think that the answer is “absolutely no”.

IV) To the Roman aqueducts

For the Roman Empire there is not only an excellent road network typical, but also admirable aqueducts, which were used for water transport; they sometimes did have a length of almost 100 km. The construction of aqueducts had been started in that era, in which the road construction of the Via Appia⁴⁰ had made significant historical progress. The Aqua Appia⁴¹ had been built in 312 BC under the leadership of Appius Claudius Caecus, who was mentioned above in reference to the construction of the Via Appia⁴². The

³⁸ To the Roman road network Joachim Neumann, in: Franz-Rudolf Herber/ Konrad Bauer (ed.), Law and technology: Cooperation between lawyers and engineers in the road administration. Part II, Cologne, 2011, p. 341–355.

³⁹ Further details are available under <http://www.archaeopro.de/archaeopro/Strukturen2/R%C3%B6merstra%C3%9Fe-1.htm>.

⁴⁰ Cfr. above under section III.

⁴¹ Lawrence Richardson Jr., A New Topographical Dictionary of Ancient Rome. Baltimore, 1992, p. 15-16.

⁴² Cfr. under Section III.

Aqua Appia did take her beginning at the Via Praenestina⁴³, then she was conducted about 17 km underground and finally conducted through the Porta Capena to the Campus Martius⁴⁴ in the city of Rome. In the Rome of the 21st century there are still three aqueducts in operation:

(1) The Aqua Virgo (Acqua Vergine)⁴⁵, which feeds the Trevi Fountain and about 70 other wells.

(2) The Aqua Alexandrina (Acqua Felice)⁴⁶, which feeds the Moses Fountain.

(3) Aqua Traiana⁴⁷, which feeds the Fontana dell' Acqua Paola.

The modern secondary literature is concentrating almost exclusively on the construction of aqueducts; unfortunately the road sector is almost entirely neglected⁴⁸. The question of expropriation and expropriation procedure is to be discussed: The starting point for the modern secondary literature is the following reference, that is found in the work of the Roman historian Titus Livus (59 BC - 17 AD); presumably it gives some enigmatic information about a construction-project for the construction of an aqueduct, that had been started in the year 179 BC (11, 51):

“[Censores] habuere in promiscuo praeterea pecuniam: ex ea communiter locarunt aquam adducendam fornicesque faciendos. Impedimento opera M. Licinius Crassus fuit, qui per fundum suum non duci est passus”.

The Censores did have granted the fund for building an aqueduct. Against this project there was M. Licinius Crassus, who did want to prevent that his land should be used for the construction of the planned aqueduct⁴⁹.

This brief notice mentions the resistance of a person named M. Licinius Crassus⁵⁰, who did not wish that the aqueduct should be conducted over his property. This brief notice was the reason for various theories in modern secondary literature: The main thesis is that this text is enough

⁴³

Cfr.

under

<http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0064:entry=via-praenestina-geo>

⁴⁴ Jon Albers, *Campus Martius. The urban development of the Campus Martius of the Republic to the middle empire*. Wiesbaden, 2013.

⁴⁵ Cfr. Lawrence Richardson Jr., *A New Topographical Dictionary of Ancient Rome*. Baltimore 1992, p. 19.

⁴⁶ Cfr. Lawrence Richardson Jr., *A New Topographical Dictionary of Ancient Rome*. Baltimore 1992, p. 15.

⁴⁷ Cfr. Filippo Coarelli, *Rome. An archaeological guide*. Saverne/Mainz, 2000, p. 40–41.

⁴⁸ Cfr. under section V.

⁴⁹ Translated by the author of this paper.

⁵⁰ He is – with the exception of this episode – not mentioned (cfr. RE XIII (1926), 267 sv. „Licinius“). He is not to be confused with his namesake, who lived from 115 (or 114) to 53 BC and was legendary for his wealth.

evidence for the presumption that this infrastructure project had have to fail in the year 179 BC; this text is quoted as evidence for the wrong assumption that there existed no expropriation (procedure) in Roman Law (at any rate during the Republic)⁵¹. This conclusion, however, is not convincing:

(1) The Austrian scholar Martin Pennitz⁵², who has done impressive research on the subject matter of expropriation⁵³, has found a document in support for the thesis that this construction project from the year 179 BC had not been a failure and had been fulfilled. He makes reference to the post-Christian grammarian Sextus Pompeius Festus⁵⁴: According to Festus the aqueduct mentioned by Titus Livius was an irrigation system in Rome between Via Ardeatina and Via Latina.

(2) Titus Livius is a historian in the era of the Emperor Augustus (63 BC - 14 AD). His main work is called “Ab urbe condita libri CXLII” (“From the founding of the city – 142 books”)⁵⁵. In it there is treated the history of Rome starting with the fabulous founding in the year 753 BC to the death of Drusus in 9 BC. Unfortunately, only the books 1–10 (753–293 BC) and the books 21–45 are delivered (218–167 BC). For the above treated question of expropriation we have to see the following: Titus Livius was neither a lawyer nor was he a hydraulic engineer, so that Titus Livius does not submit his own professional vote on the complicated legal question of expropriation. Furthermore, it has to be seen that Titus Livius does not cite the vote of an expert, but merely points out, that the owner wanted to keep his property – this is a very reasonable attitude, which may have been typical for owners of property at any time.

(3) Therefore we are obliged to ask the following question: Did the Romans, who were excellent designers for roads, aqueducts and other engineering constructive works, not dare to use expropriation, if the owner of

⁵¹ Pietro Bonfante, *Course of Roman Law*, Vol. II. The property. Part I, Milan, 1966 (= correct reprint of the Rome edition, 1926), p 294; Rudolfo Lanciani, *Topography of ancient Rome. The commentaries of Frontinus about the watering system and aqueducts. Epigraphic anthology aquaria*. Rome, 1880, p. 597. Manfred Just, *The constitutiones principum and their influence on the development of property law and contract law in the early and classical period*, habil. jur., Würzburg, 1970 (unpublished), p. 127; Hans Ankum, *African Dig. 2.19.33: Liability and risk in the publicatio of leased or sold land*, in: *Savigny Magazine – Roman Division* 97 (1980), 157 (173, note 59).

⁵² Martin, Pennitz, *The "expropriation case" in Roman law of the Republic and the Principate. A functional and comparative law problem (research on Roman Law, Vol. 37)*. Vienna – Cologne – Weimar 1991, p. 71.

⁵³ Cfr. p. 356–357 f.

⁵⁴ He is probably an author of the *second* century AD; cfr. <http://www.ucl.ac.uk/history2/research/festus/index.htm> to him.

⁵⁵ Erich Burck, *The historical work of Titus Livius*. Heidelberg, 1992; idem, *Ways to Livy*, 3rd Edition, Darmstadt, 1987. Robert Maxwell Ogilvie, *A Commentary on Livy. Books I–V*. Oxford, 1965.

private land, that was necessary for project realization, was not inclined to sell his land to the state?⁵⁶ That seems to be not very likely neither for the pioneering phase, that started in third century BC for road and aqueduct construction nor for the era of Augustus, in which Titus Livius lived. In the following there is given plausible evidence that illustrates that the Romans did use the instrument of expropriation for the implementation of infrastructure projects.

V) To the “ager publicus”

The “ager publicus” was very important for the landscape design of the Roman Empire. It is to be realised that there was not the ager publicus⁵⁷, but there was a very pronounced differentiation:

(1) The “ager captivus”⁵⁸ referred to a conquered country.

(2) The “ager colonicus” was awarded to persons for the establishment of colonies.

(3) The “ager compascuus”⁵⁹ was public land that was used in particular for forests and for pastures⁶⁰.

(4) The “ager occupatorius” was land that was made arable and could be acquired by private persons; a purchasing price was not to be paid; the acquirer nevertheless got ownership.

(5) The “ager provincialis” was public land in the provinces, which was not allowed to be transferred to private ownership.

(6) The “ager stipendiarius” was public land in the provinces (later exclusively in the senatorial provinces), which was submitted to local farmers on withdrawal and for tax liability.

From the fact that there were large areas of “ager publicus” in the Roman Empire it can only deduced that for the planning of infrastructure projects, for which “ager publicus” was available the instrument of expropriation was not necessary. The conclusion that there was no procedure for expropriation is wrong. If land was submitted from the “ager publicus” in private hands⁶¹ – whether by way of lease⁶² or in a different form, it seemed

⁵⁶ To the point that the Romans did not have fundamental rights Tiziana J. Chiusi, The comprehensive dimension of Roman private law system. Theoretical remarks about a legal system that has no fundamental rights, in: Jörg Neuner (ed.), Fundamental rights and private law from a comparative law perspective. Tübingen, 2007, p 10 f.

⁵⁷ Leandro Zancan, Ager publicus. Studies about the history of Roman law. Padua, 1935; Alberto Burdese, Studies about the “ager publicus”. Turin, 1952.

⁵⁸ Veji is an example.

⁵⁹ Cfr. Max Weber, The Roman agrarian history in its importance to public and private law. Munich, 1891, p. 119.

⁶⁰ Campus Martius is an example.

⁶¹ According to Varro (rust. 1.10.2) there was an allocation in “bina iugera”.

to remain possible that this land could be reclaimed by the state for reasons of public interest.

VI) To private initiative in the Roman infrastructure sector

For the implementation of infrastructure projects the Roman Empire benefited from a phenomenon, that is almost without significance in modern times: In the republic and in the imperial period so-called extra rich persons did finance (respectively co-finance) infrastructure projects from their own assets; a closer look at the motives might be left here aside; a strong care for the common good or simply craving for recognition might have been motives⁶³. In legal categories this phenomenon is a modus of privatization; this privatization, however, is not caused by the state such as for example the so-called functional privatization⁶⁴. A very illustrative document for this infrastructure patronage by private initiative is to be found in the elegies of the poet Tibullus (55–19 or 18 BC)⁶⁵; in the seventh elegy of the first book we read the following lines in elegiac meter⁶⁶:

(57) “Nec taceat monumenta viae, quem Tuscula tellus
Candidaque Antiquo detinet Alba Lare.
(60) namque opibus congesta tuis hic Glarea dura
Sternitur, hic apta iungitur arte silex”⁶⁷.

These lines do belong to a birthday poem for Messala Corvinus (64 BC–8 AD), who was a Roman general and a patron of literature; in the struggle between Antonius (86 or 83 or 82–30 BC) and Octavianus (63 BC–14 AD) Messala did keep the side of the later “princeps”. The above quoted text shows that Messala did spend private funds⁶⁸ for the restoration of a road section of the Via Latina⁶⁹. The fact that there was infrastructure patronage in the Roman Empire does not allow the conclusion that the

⁶² Dulckheit/Schwarz/Waldstein (cfr. footnote 5) see the lease of the “ager publicus” as a rule (p. 65).

⁶³ Martin, Pennitz, The “expropriation case” in Roman law of the Republic and the Principate. A functional and comparative law problem (research on Roman Law, Vol. 37). Vienna – Cologne – Weimar, 1991, p. 108 f.

⁶⁴ To privatization H. Jörg Thieme (ed.), Privatization strategies in comparison. Berlin, 1993.

⁶⁵ To Tibullus Christoff Neumeister, Tibullus. Introduction to his work. Heidelberg, 1986; Michael Putnam (ed.), Tibullus. A Commentary. Oklahoma, 1973.

⁶⁶ Quoted from <http://www.thelatinlibrary.com/tibullus1.html#7>.

⁶⁷ It consists of hexameter and pentameter.

⁶⁸ It is not excluded that these funds stemmed from the spoils of the military campaign against the Aquitanians, who were defeated by Roman troops; in the year 27 BC Messala Corvinus was honored with a triumph for this military success.

⁶⁹ The Via Latina is one of the oldest Roman roads and was built later than the 5th century BC; it had led from Roma to Capua; today it is a part of the Italian road network.

instrument of expropriation did not exist. It has to be taken into account that infrastructure patronage did not take place to such an extent that the huge Roman road network was financed only by private funds; we should keep in mind that Roman road network did consist of round-about 200 000 km.

VII) To freehand purchasing

It is clear that coercion measures should only be used by government, if the voluntary principle does not promise success. In modern law it is the case that the instrument of expropriation is only used if freehand purchase cannot be achieved on reasonable terms. Freehand purchasing means that the state has to initiate intensive efforts to acquire the land, that is necessary for the realization of infrastructure projects, on the estate market at market prices⁷⁰. The economic problem, that occurs since ancient times, is the following: If a property owner recognizes that government planning⁷¹ may jack up prices for land, he is hardly inclined to sell. The planning law, however, should not make it possible that the land owner may dictate the prices for the freehand purchasing by the state⁷². Otherwise land owners could decide, whether a public infrastructure project shall be realized or not⁷³. For the benefit of the common good it should be taken into account how the price expectations of the potential seller were, if a planning project implementation would not exist.

VIII) To ownership restrictions

The fact that ownership restrictions were recognized in the Roman Empire is no argument for the assumption that the instrument of expropriation was not known. Important ownership restrictions were the following:

- (1) Prohibition of sale for objects that were needed for sacred rituals⁷⁴.
- (2) Prohibition of burials on particular private land within city limits.
- (3) Restrictive regulations for private property for the sake of the safety of buildings⁷⁵.

⁷⁰ For the so-called figuration of submarkets cfr. <http://hss.ulb.uni-bonn.de/2007/1273/1273-3.pdf>.

⁷¹ On the necessity of planning approval process for federal highways and other roads Dürr, in Kodal, Handbook on road law in the Federal Republic of Germany. 7th edition. Munich, 2010, Chapter 27.

⁷² To the fact that roads are built on the basis of municipal development plans, Dürr, in Kodal, Handbook on road law in the Federal Republic of Germany. 7th edition. Munich, 2010, Chapter 27.

⁷³ To the whole Manfred Aust/Rainer Jacobs/Dieter Pasternack, The expropriation. 6th edition. Munich, 2007.

⁷⁴ Cfr. Cic. off. 3.16.66.

(4) Disposal bans for the allocation of land that was distributed to persons from the “ager publicus”⁷⁶.

(5) Purchase of buildings for demolition activities.

These case scenarios show that Roman law was sensibilized for restrictions on private property. As restrictions on property were allowed, it was only a very small step to the withdrawal of private property for the construction of infrastructure projects. In the modern secondary literature the thesis is found that the idea >freedom of property< was degraded in the absolutist imperial state. There is the hypothesis, that the Emperor Marcus Aurelius (121–180 AD) promoted, that the common good under certain circumstances should have precedence over private property. It may be that this prudent emperor-philosopher⁷⁷ worked clearly out the tension between private property and public welfare, for the hypothesis that Marcus Aurelius played an historical role in this juridical matter of expropriation there is no proof:

(1) The term “res publica”, that became an essential part of the proper name of the Roman state, clearly points out that for the Romans the distinction between public good and private interests was very important.

(2) In the works of the outstanding Greek philosophers and teachers of constitutional law – i.e. Plato (428 or 427–348 or 347 BC)⁷⁸ and Aristotle (384 BC–322 BC)⁷⁹ – this issue is almost ubiquitous.

(3) The Roman philosopher and statesman Marcus Tullius Cicero (106–43 BC) did assume philosophical Greek doctrines and made these Greek doctrines suitable for Rome⁸⁰. The tension between public good and private property is clearly worked out by Cicero. In his work >De Inventione<⁸¹ there is given an ideal link between general welfare and individual well-being, which refers to the tension between public good and private property (2.160⁸²):

“Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem”.

⁷⁵ Ulp. D. 17.2.52.10.

⁷⁶ To the „ager publicus“ cfr. above under section V.

⁷⁷ Anthony Birley, Marcus Aurelius. Emperor and philosopher. 2nd, revised and expanded edition. Munich, 1977; Jörg Fündling, Marcus Aurelius. Emperor and philosopher. Darmstadt, 2008; Marcel van Ackeren, The philosophy of Marcus Aurelius. 2 volumes, Berlin/New York, 2011.

⁷⁸ Andreas Eckl/Clemens Kauffmann (ed.), Political Platonism. Würzburg, 2008.

⁷⁹ For further development Christoph Horn/Ada Neschke-Hentschke (ed.), Political Aristotelianism. The reception of Aristotle's Politics from antiquity to the 19th century. Stuttgart, 2008.

⁸⁰ Cfr. Woldemar Görler, Studies to Cicero's philosophy. Heidelberg, 1974.

⁸¹ Cfr. Bruce Kimball, Orators and Philosophers. New York, 1995. p. 13.

⁸² Dulckheit/Schwarz/Waldstein, (cfr. footnote 5), p. 159.

Justice is a habit of mind, that grants everybody for the sake of the the common good the dignity, that is deserved.

In his work >De Officiis<⁸³ this ethical questions are almost omnipresent; here is only one instance picked out of many instances, which highlights the importance of individual rights (2.78):

”Aequitas tollitur omnis, si habere non licet cuique suum”.

There is no justice, if the just part is not granted to the person, that deserves it⁸⁴.

According to Cicero there should exist no true common good at the expense of individual well-being (2, 78):

“[78] Qui vero se populares volunt ob eam causam aut agrariam rem temptant, ut possessores pellantur ab suis sedibus aut pecunias creditas debitoribus condonandas putant, labefactant fundamenta rei publicae, concordia primum, quae esse non potest, cum aliis adimuntur, aliis concondantur pecuniae, deinde aequitatem, quae tollitur omnis, si habere suum cuique non licet. Id enim est proprium, ut supra dixi, civitatis atque urbis, ut sit libera et sollicitia suae rei cuiusque custodia.

[78] But they who pose as friends of the people, and who for that reason either attempt to have agrarian laws passed, in order that the occupants may be driven out of their homes, or propose that money loaned should be remitted to the borrowers, are undermining the foundations of the commonwealth: first of all, they are destroying harmony, which cannot exist when money is taken away from one party and bestowed upon another; and second, they do away with equity, which is utterly subverted, if the rights of property are not respected. For, as I said above, it is the peculiar function of the state and the city to guarantee to every man the free and undisturbed control of his own particular property⁸⁵”.

These instances from Cicero are not directed against the legal requirement of expropriation for infrastructure projects, but they condemn any state measures that might obliterate private rights. In the last instance quoted Cicero points out that by means of so-called “leges agrariae” – i.e. particular legislation for the reorganization of land distribution in rural areas – land is

⁸³ Cfr. Douglas Kries, On the Intention of Cicero's „De Officiis“, in: The Review of Politics, Vol. 65, 4, 2003, p. 375–393.

⁸⁴ Translation by the author of his paper.

⁸⁵ This translation into English is taken from <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0048%3Abook%3D2%3Asection%3D78>

removed from one group of private individuals to another group of private individuals⁸⁶.

(4) In the works of the philosopher and statesman Lucius Annaeus Seneca (1-65 AD)⁸⁷ – who lived before the above-cited philosopher-emperor Marcus Aurelius – the conflict between general interest and subjective interests is explored very thoroughly. The following reference from his >Epistulae Morales<⁸⁸ might also be evaluated as an evidence for the legal requirement of expropriation for infrastructure (8, 10)⁸⁹:

“Dari bonum quod potuit auferri, potest”.

A good, that was granted, may be taken away⁹⁰.

In essence, it is to be noted for the ancient world: The usage of private property was not unlimited allowed neither in relation to other subjects of private law nor in relation to aspects of public law. The tension between private property and public welfare is not an invention of the Middle Ages respectively of the modern era.

IX) Does the professional writer Frontinus offer the solution?

On the basis of the above considered instance from Livius⁹¹ it has been shown that a private owner could not prevent the routing of an aqueduct. Nevertheless, the question remains, whether there existed a legal procedure for expropriation according to Roman water law and to Roman road law. One could make reference to the application of easements, which were provided to private individuals (i.e. “servitutes praediorum rusticorum”) in regard to aqueducts. But in the here considered case scenarios the landowner would be imposed a servitude by the state. The expropriation of property, that was necessary for the realization of a construction project, would be an obvious alternative to a servitude.

Here we should turn our interest to the Roman writer for the construction of aqueducts i.e. Sextus Iulius Frontinus (about 40–103 AD)⁹².

⁸⁶ To the “leges agrariae” Martin, Pennitz, The “expropriation case” in Roman law of the Republic and the Principate. A functional and comparative law problem (research on Roman Law, Vol. 37). Vienna – Cologne – Weimar, 1991, p. 124.

⁸⁷ Seneca Gregor Maurach, Seneca. Life and work. 4th edition. Darmstadt, 2005.

⁸⁸ Cfr. Paul Veyne, Wisdom and altruism. An introduction to the philosophy of Seneca. Frankfurt am Main, 1993.

⁸⁹ In the Middle Ages the term “common good” was the prevailing expression for “bonum commune”; according to the ThLL this term is traced the first time to Seneca; according to Seneca’s philosophy man is an “animal sociale communi bono genitum” (“ a social being born for the sake of common benefit”, Sen. Clem 1.3.2.).

⁹⁰ Translation by the author of his paper.

⁹¹ To the instance 11,51 see above under section IV.

⁹² Michael Peachin, Frontinus and the curae of the curator aquarum. Stuttgart, 2004.

On his work >De aquaeductu urbis Romae<⁹³ is based all relevant knowledge about planning and construction of Roman aqueducts. Frontinus was a Roman top official⁹⁴; in the year 97 BC he was appointed as “curator aquarum”⁹⁵. His book⁹⁶ >De aquaeductu urbis Romae< is a compendium and is especially dedicated to engineering of the construction of aqueducts and relevant legal issues⁹⁷. This work⁹⁸ gives also a comprehensive guide about how attacks on water distribution systems and disorders of water operation might be prevented⁹⁹.

Frontinus relates to potential dangers that are suspected by local residents as irresponsible acts or even as acts of sabotage. The area, that is near to an aqueduct, might be obstructed by trees and blocked by buildings, so that the competent administration would hardly have access to the facility; such access was especially necessary for the performance of necessary maintenance work (>De aquaeductu urbis Romae<, 126):

„(126) Plerumque autem vitia oriuntur ex inpotentia possessorum, qui pluribus modis rivus violant. Primum enim spatia, quae circa ductus aquarum ex S. C. vacare debent, autaedificiis aut arboribus occupant. Arbores magis nocent, quarum radicibus et concamerationes et latera solvuntur. Dein vicinales vias agrestesque per ipsas formas derigunt. Novissime aditus ad tutelam praecludunt. Quae omnia S. C. quod subieci provisum sunt“.

„(126) Not infrequently, however, damages are occasioned by wrongful behavior on the part of landholders, who cause injury to the channels in a variety of ways. For one thing, they occupy with buildings or trees the spaces alongside the aqueducts which are to be left vacant in accordance with a senatorial resolution. Trees are more harmful, for their roots dislodge the vaulted coverings and sides of the conduits. For another thing, they lay out neighborhood roads and country paths over the aqueduct

⁹³ The Latin text can be found under <http://latin.packhum.org/loc/1245/2/0#0>.

⁹⁴ In addition, Frontinus was a writer on military affairs (> Strategemata libri III< and >De re militari<).

⁹⁵ Three times he even reached the consulship, the last time in the year 100 AD.

⁹⁶ A German translation can be found under <http://gutenberg.spiegel.de/buch/3501/10>.

⁹⁷ On the relationships between law and technology in road administration Konrad Bauer/Franz-Rudolf Herber (ed.), Law and technology: Cooperation between lawyers and engineers in road administration. Part II, Cologne, 2011.

⁹⁸ The Frontinus society, which has her headquarter in Bonn, takes care of the scientific heritage of Frontinus' work; further information can be found under <http://www.frontinus.de>.

⁹⁹ Cfr. Manfred Hainzmann, Water for Rome: The water supply through aqueducts. Zurich et al., 1979.

structures themselves. Finally, they deny access for maintenance. Against all these offenses provision was made in the following senatorial resolution“¹⁰⁰.

Instance 127 from Frontinus’ >De aquaeductu urbis Romae< goes back to a Senate resolution from the year 11 BC; Pennitz¹⁰¹ suspected that Frontinus wanted to highlight the continuing relevance of this Senate resolution for his age. The subject matter > prohibition zones along aqueducts<¹⁰² is illustrated by Frontinus almost in that modus, which is today-law for areas along highways¹⁰³ and major waterways¹⁰⁴: The solution was that adjacent areas should be protection zones, in which private measures were forbidden or were only allowed with the consent of the competent authority:

“(127) Quod Q. Aelius Tubero Paulus Fabius Maximus cos. V. F. aquarum, quae in urbem venirent, itinera occupari monumentis et aedificiis et arboribus conseri, Q. F. P. D. E. R. I. C. cum ad reficiendos rivos specusque iteraquae et opera publica corrumpantur, placere circa fontes et fornices et muros utraque ex parte vacuos quinos denos pedes patere, et circa rivos qui sub terra essent et specus intra urbem et extra urbem continentia aedificia utraque ex parte quinos pedes vacuos relinquiita ut neque monumentum in is locisneque aedificium post hoc tempus ponere neque conserere arbores liceret; si quae nunc essent arbores intra id spatium, exciderentur praeterquam siquae villae continentis et inclusae aedificiisessent. Si quis adversus ea commiserit, in singulas res poena HS dena milia essent, ex quibus pars dimidia praemium accusatori daretur, cuius opera maxime convictus esset quia versus hoc S. C. commisisset, pars autem dimidia in aerarium redigeretur. deque ea re iudicarent cognoscerentque curatores aquarum”.

„(127) Whereas the consuls Quintus Aelius Tubero and Paulus Fabius Maximus brought forth the subject that the rights of way for aqueducts coming into the city are being occupied by monuments and buildings and are being planted up with trees, and inquired of the senate as to what action

¹⁰⁰ The translation is quoted from <http://www.uvm.edu/~rrodgers/Frontinus.html>.

¹⁰¹ Martin, Pennitz, The "expropriation case" in Roman law of the Republic and the Principate. A functional and comparative law problem (research on Roman Law, Vol. 37), Vienna – Cologne –Weimar, 1991, p. 75 ff.

¹⁰² Manfred Aust, in Kodal, Handbook on road law in the Federal Republic of Germany. 7th edition. Munich, 2010, Chapter 39.

¹⁰³ Cfr. § 9 German Federal Highways Act. In regard to road safety and in regard to appropriate planning it is very important that activities, that refer to building, should be concentrated in towns and in villages and not close to federal trunk roads, that shall give the long-distance traffic free passage particularly outside towns and villages. Outside villages and towns it should not be allowed to build construction areas, that shall be opened up by access to highways and main roads. It has to be procured that long-distance traffic finds sound and safe conditions; therefore it cannot be tolerated that there is private access.

¹⁰⁴ Cfr. § 10 German Federal Waterways Act.

might be pleasing, Concerning the subject the senators resolved as follows: inasmuch as for repairs to channels and tunnels <obstructions must be removed> by which public structures are damaged, it is approved that there be a clearing of fifteen feet on either side of springs, arches, and walls, and that a space of five feet on either side be left vacant around the channels which are below ground and around tunnels within the city and within the built-up areas contiguous to the city, and in these places it shall after this time be permitted to locate neither monument nor building nor to plant trees; and if there now exist any trees within the said space, they are to be cut down, excepting those which may be connected with a country residence and enclosed by buildings. If anyone shall act contrary to these provisions, the penalty for each such offense shall be 10,000 sesterces, the half of which shall be given as a reward to the accuser by whose effort most of all condemnation shall have been secured for the person who acted contrary to this senatorial resolution, the other half shall be deposited in the state treasury; and in such case the water commissioners shall conduct a trial and take cognizance“¹⁰⁵.

The solution were in fact protection zones at the left and the right side of aqueducts; for the cramped conditions in the city of Rome protection zones seemed to be not so large as for the outside areas. That the regulation shows prudent technical expertise is evidenced by the fact that existing trees should not be removed, if adhesions with the hydraulic system existed. This regulation did not refer to the protection of the legal rights of citizens, the aim was the protection of construction, which might take harm, if the trees would be excavated. The above cited instance from Frontinus also shows a clear assignment of competence to the “aquarum curators”; without clear assignment of competence problems cannot be overcome. Referring to the Senate resolution mentioned above the legal possibility is shown that the state could acquire from the private sector the adjacent area, so that the necessity of a protection zone and its administrative monitoring could not even arise:

“(128) Posset hoc S. C. aequissimum videri, etiam <si> ex re tantum publicae utilitatis ea spatia vindicarentur, multo magis cum maiores nostri admirabili aequitate ea quidam eriperint privatis quae ad <com>modum publicum pertinebant, sed cum aquas perducerent, si difficilior possessor in parte vendunda fuerat, pro toto agro pecuniamintulerint et post determinata necessaria loca rursus eum agrum vendiderint, ut in suis finibus propriumius <tam> res publica quam privata haberent. Plerique tamen non contenti occupasse fines, ipsis ductibus manus adtulerunt per suffossalatera passim cursus * * * ius aquarum impetratum habent, quam ii qui quantulumcumque beneficii<impetrandi> occasione ad expugnandos * * * <duct>uum

¹⁰⁵ The translation is quoted from <http://www.uvm.edu/~rrodgers/Frontinus.html>.

abutuntur. quid porro fieret, si non universa ista. Diligentissime prohiberentur poenaque non mediocri contumacibus intentaretur? quare subscripsi verba legis (...)“.

„(128) This senatorial resolution would seem to be entirely just, even if these spaces were reclaimed by reason of usefulness to the state alone. Its fairness is all the more apparent in light of the fact that our forefathers, with remarkable equity, did not seize from private parties even those lands which were of necessary interest to the state; but when they were bringing in waters, if a landholder was recalcitrant about selling a part of his property, they paid for the whole, and then after fixing boundaries for the land that was needed they sold the property in their turn, it having been clearly established that the state as well as private parties, each within respective boundaries, should have full and absolute right. But many, not content to have encroached beyond the boundaries, have laid hands upon the conduits themselves. By penetrating the side walls here and there ... no less those who have a granted right of water, than those who take advantage of the slightest opportunity for an imperial favor to get control of the channels ... What would happen besides, were not all such actions forbidden by a statute drafted with exceptional diligence and were not the willfully disobedient threatened with a penalty more than moderately severe? For this reason I quote the words of the statute (...)“¹⁰⁶.

The text is in a central point not clear: Had the Roman state to purchase adjacent land freehand or was there in the case that the purchase failed a means of coercion in order to force the purchase – the later is expropriation. The fact that expropriation was allowed, might be concluded from the following passage from the >Institutiones< of Gaius (2, 11):

“Quae sunt publicae nullius in bonis videntur¹⁰⁷ esse; ipsius enim universitatis esse creduntur. Privatae sunt, quae sunt hominum singulorum”.

„Things, which are public, are considered to be the property of no individual, for they are held to belong to the people at large; things, which are private, are the property of individuals“¹⁰⁸.

In this text there are two messages: First, this: There is an expressed dedication for public purpose, this dedication is done in the interest of the common good and allows the withdrawal of property. Furthermore, the withdrawal of property is not necessary, if the dedication of the state is evidently superimposed on the property and the usage is not affected

¹⁰⁶ The translation is quoted from <http://www.uvm.edu/~rrodgers/Frontinus.html>.

¹⁰⁷ It should be considered whether here is given a legal fiction.

¹⁰⁸ The translation is quoted from <http://faculty.cua.edu/pennington/law508/roman%20law/GaiusInstitutesEnglish.htm#SECONDBOOK>

negatively. According to modern road law the property may remain in corresponding cases in the hands of the owner, provided that the owner consents to the dedication of the road for public purpose¹⁰⁹. Why should this legal construction (legal fiction) not have existed in ancient times?

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¹⁰⁹ Franz-Rudolf Herber, in: Kodal, *Handbook on road law in the Federal Republic of Germany*, Munich, 2010, Chapter 12.

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