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Measure of Compensation for Nationalization of Private Property

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Surprisingly, the word *expropriation* was originally used in England to denote the act of voluntarily ". . . giving up one's property under a sense of religious duty."[1] Today it is universally understood to mean a giving up under compulsion.[2] Even though compensation is paid, the compulsion is still present. Compulsory taking of property without compensation has come to be known as confiscation.[3]

In its proper governmental sense expropriation aims at developing a legal procedure capable of adjusting the claims of society and of the individual in a particular case or category of cases.[4] But to the person whose property is to be taken no procedure is apt to satisfy him which does not initially give prudent attention to his complaints concerning the proposed taking, and secondly, in case these are not sustained, a justiciable consideration to his claims for compensation.

As far back as 11 B.C. a *senatus-consultum* of the old Roman Empire provided that the value of building material ". . . taken compulsorily from a man's land for the purpose of building or repairing aqueducts should be assessed *viri boni arbitratu.*"[5]

Expropriation—or as it has come to be known more generally today, nationalization—has always considerably perplexed the legal theorist. How can it be squared with the right to own private property? Is it in substance anything more than the existence of superior force masquerading in legislative forms?[6]

There are two facets to this problem.

One facet concerns itself with the nationalization of property belonging to citizens of the country that is accomplishing the nationalization. The other deals with nationalization of property of persons who are citizens of countries other than that which is carrying on the nationalization program. The former would not normally involve any international problems. The latter would. Since this paper aims not only to point out the measure of compensation now existent internationally, but also to indicate what it believes to be certain basic principles that

[1] 45 The L. Q. Rev. 512, *Expropriation in Roman Law.*
[2] Oxford Dictionary, s.v. expropriation.
[3] Webster's new International Dictionary, 2nd Edition.
[4] Full Text of Official Notes Relating to Compensation for American-Owned Lands Expropriated in Mexico, Department of State, Pub. 1288, p. 9, "On the one hand, there are weighed the claims of justice and the improvement of a whole people, and on the other hand, the purely pecuniary interests of some individuals."
[5] *supra,* note 1 at p. 524.
[6] *ibid,* p. 526.

should be utilized in arriving at a fair, just and equitable measure of compensation internationally, it is believed wise to examine the theories upon which *national* nationalization are premised.

It should be obvious that compensation for nationalization of private property owned by citizens of countries other than those nationalizing the property, has been made most frequently only under compulsion or as a result of litigation in an international tribunal.[7] Logically and ideally there should be no differentiation between the two classes of property described above, but it is difficult to convince the ruling head or government in power that it must treat *foreigners* with the same decorum and consideration it treats its own citizens.[8] Frequently both *foreigner* and citizen are treated with the same haughty disdain and neither is compensated, either wholly or in part.

Although it may be questioned whether or not there is any such thing as a "legal" taking of property belonging to one not a citizen of the state, certain tribunals have differentiated between the result consequent upon what is essentially an "illegal" taking and a "legal" one.[9]

The *Chorzow Factory* Case says,

> The disposition of an industrial undertaking—the expropriation of which is prohibited by the Geneva Convention—then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of International Law, must be added that of compensating loss sustained as the result of the seizure.

In the *Smith* Case the arbitrator found,

> . . . that the expropriation proceedings were not, in good faith, for the purpose of public utility. . . . The destruction of the claimant's property was wanton, riotous, oppressive. . . .

The arbitrator concluded,

> . . . that it would not be inappropriate to find that according to law, the property should be restored to the claimant. . . .

It becomes obvious then that where there is a so-called illegal taking it is well established internationally that there should first be a restitution, and if this is not possible, sufficient compensation to make the former owner whole plus damages for, ". . . compensating loss sustained as a result of the seizure."[10]

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[7] See, E. g. note 4, *supra;* and 1 World Court Reports, Hudson, 475, *The Chorzow Factory Case.*

[8] Frequently there is some justification for such a distinction, at least in the mind of the ruling head or the government in power, by virtue of the fact that the *foreigner* has grossly exploited the land and property now being taken from him. He has taken out of the property manyfold his original investment.

[9] 1 World Court Reports, Hudson 475, 663 et seq., *The Chorzow Factory* Case; Damages in International Law, Whiteman, Vol. 2, p. 1408 et seq., *The Walter Fletcher Smith* Case.

[10] In the *Smith* Case the arbitrator awarded a rather handsome sum as compensation. Smith had claimed that his property was worth in excess of $200,000 whereas the government of Cuba claimed that it was worth only $35,000. The arbitrator awarded Smith $190,000. The International Tribunal in the *Chorzow* Case spoke of determining the value of the physical assets and stocks of the Chorzow Factory and including probable profit up to 17 British Year Book of International Law 1, 16 (1936); 2 Hyde, International Law Whiteman, Vol. 2, p. 857, et seq.

One authority has said, in dealing generally with the problem of compensation for international property losses,[11]

> . . . evidence of the value of the property will be received by a foreign office or an arbitral tribunal in many forms and . . . such evidence is to be weighed in connection with all other available evidence in determining the proper measure of damages . . . it will be evident from the context of the decisions in the various cases that the amount allowed in any case should be that to which the claimant is reasonably entitled under all the circumstances.

Such a generality is of little help in coming to grips with the problem. It merely reiterates that each case will be considered on its merits and facts, and the measure of compensation will be arrived at in a manner which seems fair, just, and equitable to the arbitrator or the tribunal.

Internationally, the decisions seem to be in agreement that contingent and indeterminate damage cannot be taken into account.[12] The position was quite cogently and unequivocally stated by the United States-Germany Mixed-Claims Commission.[13] It said,

> In computing the reasonable value of plants and other properties at the time of their destruction, the nature and value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand which may conceivably force the then market value above reproduction costs, even the good will of the business, and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this commission do not embrace the items claimed of prospective earnings or prospective profits.

In the exchange of notes between Mexico and the United States concerning compensation for American owned lands expropriated in Mexico,[14] the United States Government took the position that after a claimant had established his nationality and the propriety of his title he was then entitled to,

> . . . the just value of the property expropriated, the fair return from the property of which claimant has been deprived between the time of expropriation and the time of receiving compensation, as well as such other facts as in the opinion of the commissioners should be taken into account in reaching a determination as to compensation.[15]

Some international jurists maintain that foreign nationals are entitled to an international minimum standard of just and adequate compensation,[16] while

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[11] Damages in International Law, Whiteman, Vol. 2, p. 1547.

[12] 1 World Court Reports, Hudson 684.

[13] Decisions & Opinions (1925-26) 273.

[14] Full text of Official Notes July 21, 1938-November 12, 1938, *supra,* note 4.

[15] *ibid,* p. 42. It is interesting to observe, in that exchange of notes, that the Mexican Government vigorously advanced the theory, ". . . that the foreigner who voluntarily moves to a country which is not his own, in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed." The reply of the United States was just as vigorous and completely unequivocal. Such a theory, the United States maintained, ". . . presupposes the maintenance of law and order consistent with principles of International Law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."

[16] Facshiri, *Expropriation & International Law,* 6 British Year Book of International Law 159, 160 (1925); Kaeckenbeeck, *The Protection of Vested Rights in International Law,* 17 British Year Boow of International Law 1, 16 (1936); 2 Hyde, International Law 876 (1945).

others assert merely that the international jurisprudential test is whether or not both nationals and non-nationals have been treated alike.[17] The International Court of Justice and other arbitration tribunals have given credence to the fact that a nation has an international liability to non-national owners of expropriated property despite the fact that it acted as a result of non-discriminatory legislation.[18] Indeed, in the *Sicilian Sulphur Monopoly* Case in 1838,[19] the principle of an international standard of justice was sustained which would, under certain circumstances, give non-nationals more than equality with nationals. Likewise, in the *Delagoa Bay Railway* arbitration involving Portugal and the United States, Portugal was required to pay compensation conforming to international standards.[20] The tribunal that decided the *DeSalba* Case,[21] emphatically reiterated imposition of international responsibility for taking of property. It said,

> It is axiomatic that acts of government in depriving an alien of his property without compensation impose international responsibility. Panama has attempted to justify the result reached by asserting that the claimant failed to comply with the duties and take advantage of the remedies created by Panamanian law. This justification the commission . . . finds to be unsustained.

Having determined these factors let us turn to an examination of the measure and method of compensation for nationalization of property in certain European countries where it has taken place.[22]

In France, the amount of compensation paid dispossessed owners of nationalized property is based on the market quotations of the companies' stock in designated periods during 1944 and 1945, or on evaluations made by special committees based upon the market value of the assets of the companies. The compensation is paid in government securities or in bonds of the public corporations created by the nationalization laws.[23]

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[17] Baty, The Canons of International Law 131 (1930); Brierly, Law of Nations 178 (2nd ed. 1936); Williams, International Law and The Property of Aliens, 9 B. Y. B. I. L. 1, 15 (1928).

[18] See Herz, *Expropriation of Foreign Property,* 35 A. J. I. L. 248 (1941). But cf. Borchard, The Diplomatic Protection of Citizens Abroad 125-26 (1915) (Contends that legislative acts create liability on the part of the nation only in unusual circumstances.)

[19] 28 British and Foreign State Papers, 1837-38 at 1166 (1863).

[20] See 2 Moore, History and Digest of the International Arbitrations, 1865 (1898).

[21] Decided June 29, 1933, U. S.-Panama Claims Commission. See Lauterpacht Annual Digest of Public International Law Cases, 1933-34 at 241 (1935).

[22] Nationalization has been defined by one international jurist (Doman, *Compensation for Nationalized Property,* 3 Int. L. Q. 323 (July, 1950)) as ". . . a general impersonal taking of the economic structure in full or in part for the nation's benefit, with or without compensation. . . ." Where there is no compensation or that offered is inadequate, nationalization resembles confiscation; where there is an ". . . offer or granting of adequate compensation, . . ." it resembles expropriation.

[23] E. g., stockades of the *Banque de France* were paid in bonds designated as *Obligations de la Banque de France* paying 3% interest; stockholders of the electric and gas companies were compensated with bonds designated as obligations of those companies, as were stockholders of the coal mines. All of these obligations pay 3% annual interest plus, under certain circumstances, an additional sum varying with the income of the companies. Former owners of deposit banks and insurance companies are paid in *parts beneficiaries* paying a minimum of 3% interest. All these securities are amortisable over a period of 50 years except the bank obligations which are to be paid in 20 years.

Behind the so-called "Iron Curtain", nationalization has gone forward with breathtaking speed. Czechoslovakian industry was nationalized October 27, 1945,[24] Polish industry, January 3, 1946,[25] Yugoslavian industry, December 5, 1946,[26] Hungarian industry, 1948 and 1949, Rumanian industry, June 11, 1948,[27] and Bulgarian industry in December, 1946.[28]

Czechoslovakia established an Economic Fund of Nationalized Property, an independent legal entity authorized to issue interest-bearing certificates to be redeemed from the surplus earnings of the nationalized enterprises, but guaranteed as to redemption and payment of interest by the state. The compensation is to commence within six months from the day of service of the compensation assessment order. The minister of industry and the minister of finance have the authority to decide on the method of compensation.[29] A special division in the Czechoslovak Ministry of Foreign Affairs was activated to receive foreign claims. A few nations entered into special agreements with Czechoslovakia in connection with compensation claims.[30]

Polish nationalization law provides for a special commission to determine the amount of compensation. This commission must, at the request of interested persons, call qualified experts to evaluate the property transferred to the state. In determining the amount of compensation to be paid the owner of the nationalized property, these factors must be taken into consideration: (1) general decrease in value of national wealth; (2) net value of the assets of the undertaking on the day of its transfer to the state; (3) decrease in value of the undertaking as a result of war losses and losses suffered in connection with the war and occupation in the period between September 1, 1939 and the time of transfer to the state; (4) the amount of investments made after September 1, 1939; (5) special factors affecting the value of the undertaking (duration of concessions, licenses, etc.).[31] Compensation in Poland is to be paid in state obligations except in unusual, economically justified cases when cash or other values can be authorized.[32]

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[24] See Collection of Laws and Regulations of Czechoslovakian Republic, Numbers 100-103 (1945).

[25] See Sharp, Nationalization of Key Industries in Eastern Europe 75 (Foundation for Foreign Affairs 1946).

[26] Official Gazette of the Federal Peoples' Republic of Yugoslavia, Number 98, December 6, 1946.

[27] Bill of "Nationalization of Industrial, Banking, Insurance, Mining and Transport Enterprises" of June 11, 1948, published by the Ministry of Arts and Information (Bucharest, 1948).

[28] For the text of the Bill in English, see Nationalization of Industry and Banks in Bulgaria (Press Department, Ministry of Foreign Affairs, Sofia, 1948.)

[29] It is interesting to observe that conflicting compensation claims are decided by administrative and not by judicial tribunals. See Collections of Laws and Regulations of the Czechoslovakian Republic, No. 81, Decree No. 10 (1928).

[30] Up to July, 1950, few foreign owners of property in Czechoslovakia had received little, if any, compensation.

[31] *Compensation for Nationalized Property,* 3 Int. L. Q. 335-36 (July, 1950). The United States reached an agreement with Poland in connection with international problems created by the nationalization on December 27, 1946.

[32] *ibid.*

In Yugoslavia, the government promised to pay owners of nationalized enterprises their net value on the day of nationalization. Payment was to be made in government bonds payable to bearer except in unusual cases when payment may be made in cash. The government may designate by decree the manner and time of amortization of these bonds.[33] In principle, the Yugoslav government announced its willingness to return foreign property to its rightful owner under certain conditions.[34]

Section 14 of the First Hungarian Nationalization Law provides that compensation is to be prescribed by a separate act of parliament and that, in unusually meritorious cases, an advance may be granted to provide a minimum standard of living for the former owners or stockholders.[35]

Rumania established a Nationalized Industry Fund to issue securities redeemable solely from the net profit of the newly nationalized enterprises to discharge the obligations of nationalization. Compensation was to be determined by commissions consisting of three magistrates appointed by the Ministry of Justice.[36]

The measure of compensation for nationalized property in Bulgaria is invested capital only, not value of physical assets, worth as a going concern, or capitalization of earnings. By a later enactment, Bulgaria offered compensation in interest-bearing bonds of the government, the amount determined on the basis of an evaluation of assets of the nationalized enterprise reduced by a progressively growing percentage in accordance with the table to be worked out by the Council of Ministers. The language seems to suggest that something less than complete compensation is integrated into the nationalization act.[37]

Before turning again to the specific problem of measure of compensation for nationalized property and attempting to point out the various theories upon which it may be accomplished in the most justiciable and equitable fashion, it may be profitable to look at certain generally established international principles in the field of compensation and damages.

Punitive damages are rarely awarded and there is some doubt that they are ever truly awarded.[38] There does not seem to be any clear theory upon which one nation may be penalized through exemplary or punitive damages.[39] A government

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[33] *supra,* note 26.

[34] Yugoslavia has entered into agreements to effect settlement of international obligations resulting from nationalization of property owned by citizens of countries other than Yugoslavia, with Switzerland (with whom Yugoslavia engages in extensive commercial relations), the United States (who was holding property belonging to Yugoslavia), and Great Britain (who tied the agreement to a five year trade agreement).

[35] Up to July 1950 no attempt was made in Hungary to compensate owners of nationalized property.

[36] *supra,* note 31, p. 340.

[37] *supra,* note 31, p. 340-41.

[38] Wormser, Collection of International War Damage Claims, p. 213, But cf., *The Chorzow Factory* Case and the *Walter Fletcher Smith* Case, *supra* notes 9 and 10.

[39] But see preceding note.

is responsible only for the direct and proximate results of its acts or omissions, and indirect losses are not generally recoverable.[40]

Although it has been repeatedly stated that interest is not allowable against a government[41] either on the theory that "the king" is presumed to be ready and willing to discharge his obligations or on the theory that interest is a penalty and that "the king" can do no wrong, in the majority of cases that have been considered by international tribunals, interest has been allowed in appropriate cases as a part of the awards.[42] In numerous cases the date of wrongful seizure of property for which damage or compensation is claimed is adopted as the proper date from which the running of interest is computed.[43] In the United States, interest is allowed as part of the damages or compensation for property taken under the right of eminent domain as part of the just compensation required by the Constitution.[44] In England, interest is allowed from the time when possession is taken or from the time of the initial award, whichever is earliest;[45] in Ireland from the time when possession of the property is taken,[46] and in Canada, normally, from the time when possession is taken if entry is made in order to institute proceedings to condemn.[47]

A situation sufficiently analogous to warrant at least a superficial examination is that in which a government requisitions private property during time of war, either pursuant to a statute or by virtue of its inherent powers under its constitution. It has become well established that "Consequential damages or expenses, incidental to and resulting from requisitioning of property for war purposes, are not to be included in determining compensation to which . . ." a property owner is entitled.[48] Where there is a market value ascertainable when and where the property is taken, such value is normally the just measure of compensation,[49]

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[40] 5 Hackworth 724.

[41] Sutherland, A Treatise on the Law of Damages (4th ed. 1916) 1039-1040.

[42] Whiteman, Damages in International Law, Vol. 3, 1924. See also 33 A. J. I. L. 108, 110 *Compensation for Expropriations,* where it is said: "The matter of time of payment is among the factors that must always be considered because . . . the total amount will fail to be fully or strictly compensatory if it does not make provision, among other things, for interest on the investment or for loss of benefits to the owner after the property was taken and prior to payment."

[43] *ibid,* p. 1934, and footnote 109 therein.

[44] 96 A. L. R. 150. In the Federal Courts interest is usually allowed from the time of the actual entry into possession by the condemner unless the rule of the state in which the land is situated required the allowance of interest from an earlier time.

[45] 95 A. L. R. 191 citing *Regent's Canal Company v. Ware,* 23 Beav. 575, 53 Eng. Rep. 226 (1857).

[46] 96 A. L. R. 192 citing *Blount v. Great Southern and W. R. Company* 2 Ir. Ch. Rep. 40 (1851).

[47] 96 A. L. R. 193 citing *Re Foster* 32 U. C. Q. B. 162 (1871).

[48] 137 A. L. R. 1300 citing *Gulf Ref. Company v. United States* 58 Ct. Cl. 559 (1923); *Fairbanks M. & Company v. United States* 81 Ct. Cl. 439 (1935). But see *A & B Taxis v. Secretary of State for Air* 2B (Eng) 328 C. A. (1922).

[49] 137 A. L. R. 1302 citing *United States v. New River Collieries Co.,* 262 U. S. 341 (1923); *Borland v. United States,* 57 Ct. Cl. 411 (1922); *Standard Transportation Co. v. United States,* 61 Ct. Cl. 906 (1926) (writ of Cert. denied in 273 U. S. 732 (1926)).

provided the market is free.[50] This is true no matter what the property cost the owner.[51] In this connection it has been said that it is not the cost of the property but the property itself that is protected by the Fifth Amendment,[52] so just compensation does not include prospective or anticipated profits.[53] Interest in these cases is generally allowed from the time of taking or requisition to the date of payment.[54]

Compensation for property expropriated in the United States is governed by a constitutional standard.[55] In England the standard is set by statute.[56] The most commonly used method in England in the past has been the *net maintainable revenue* standard. This method computes compensation by a determination of the average annual net earnings previously realized by the enterprise and an estimate of those earnings in the future. That figure is then capitalized at the rate of return on investments applicable to the business.[57] Parenthetically, it is interesting to note that American courts reject any attempt to capitalize earnings as too speculative,[58] but ascertain plant value and going-concern value separately.[59] The latter seems scarcely less speculative.

In certain areas, compensation under the nationalization program has been predicated on the amount that a willing buyer would pay a willing seller for the assets, i.e., market value.[60] Market value for trucking companies was determined by individual assessments of physical asset value and "cessation of business damages." The latter is a means of expressing going-concern value. This may have resulted from a realization that net maintainable revenue does not adequately compensate the owners of a new and growing business.[61]

Both market value and net maintainable revenue were abandoned when the banking industry was nationalized.[62] In that instance, shareholders were given sufficient government bonds to return them an annual income equivalent to that

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[50] 137 A. L. R. 1303 citing *National City Bank v. United States,* 275 Fed. 855 (D. C. 1921) (Affirmed in 1922). See also *Prince Line v. United States,* 283 Fed. 535 (D. C. 1922) (writ of error dismissed 263 U. S. 727 (1923)).

[51] *ibid.* See also *L. Vogelstein & Co. v. United States,* 262 U. S. 337 (1923).

[52] *Brook-Scanlon Corp. v. United States,* 265 U. S. 106 (1924).

[53] *De Laval Steam Turbine Co. v. United States,* 284 U. S. 61 (1931); *Russell Motor Car Co. v. United States,* 57 Ct. Cl. 464 (1922) (Affirmed in 261 U. S. 514 (1923)).

[54] *Moore v. United States,* 60 Ct. Cl. 326 (1925); *Thermal Syndicate v. United States,* 81 Ct. Cl. 446 (1935); *R. S. Howard Co. v. United States,* 81 Ct. Cl. 646 (1935).

[55] U. S. Const., Amends. V, XIV; *Jacobs v. United States,* 290 U. S. 13 (1933).

[56] *Regina v. St. Lukes,* 7 Q. B. 148 (1841).

[57] For an excellent discussion of the problems involved in this computation see 151 *The Economist* 223 (1946).

[58] *National Waterworks Co. v. Kansas City,* 62 Fed. 853 (8th Cir. 1894); *Kennebec Water District v. Waterville,* 97 Me. 185, 54 Atl. 6 (1902).

[59] *Baxter Springs v. Bilger's Estate,* 110 Kan. 409, 204 Pac. 678 (1922); *Mifflin Bridge Co. v. Juniata County,* 144 Pa. 365, 22 Atl. 896 (1891).

[60] Electricity Act, 1947, 10 & 11 Geo. VI, c. 54; Transport Act, 1947, 10 & 11 Geo. VI, c. 49; Cable and Wireless Act, 1946, 9 & 10 Geo. VI, c. 82; Coal Industry Nationalization (Collieries) Act, 1946, 9 & 10 Geo. VI, c. 59.

[61] See 151 *The Economist* 223 (1946).

[62] Bank of England Act, 1946, 9 & 10, Geo. VI, c. 27.

received in the form of dividends from bank holdings. This was more an acquisition of capital rights in an industry controlling the financial structure of a nation than it was a taking-over of some physical assets with a going concern value. Such a transaction does not lend itself well to a concept of market value.[63]

Consequential losses to owners of nationalized property fall into two classes: (1) losses incidental to the taking; and (2) severance losses.[64] Examples of the former are costs of removing unpurchased assets and loss of good will. An example of the latter is the reduction in value of remaining property. English courts may allow compensation for such losses unless forbidden by statute.[65]

Prior to nationalization, cash was most frequently used in England in paying for condemned property, although it was not constitutionally required.[66] By judicial decision in the United States, cash must be given for condemned property.[67] Under the English nationalization program, however, the major items were paid in low interest bonds.[68] Cash payments were considered undesirable because of the difficulty of raising required amounts of cash as well as the unsettling effect on the money market of the sudden appearance of money in such large quantities.

Any discussion of the problem of compensation for nationalization of property would be incomplete without an examination of the theory behind a just and fair measure of compensation. Such an end may well never be attainable. No attempt will be made here to resolve that question, but it is believed that this should be the goal toward which all measures of compensation should be directed if nationalization of property is to survive. There should be an acceptance of the profit-earning capacity of an industry as a basis of compensation. Without it, nationalization cannot survive except at the expense of a society that might well eventually overthrow the government either by relatively peaceful means or by armed revolt.

In order to preserve the economic structure of the government—and the government itself—during the change-over from a capitalistic system to a state capitalistic one wrought by nationalization of private property, compensation must be paid the former owners of the property. In the interest of society as a whole, compensation must be the minimum amount possible that does not upset the economic system. As a practical matter, if too great a price is paid, the cost of goods and services to consumers would be greater than they feel they should bear. They will be dissatisfied with the results of the nationalization.

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[63] See Minutes of Proceedings of the Select Committee on the Bank of England Bill 7 (1945).

[64] See McCormick, Damages 535-542 (1935).

[65] Moving costs; *Cooper v. Metropolitan Board of Works* 25 Ch. D. 472 (C. A. 1883). Good Will: *Senior v. Metropolitan Ry.* 2 H. & C. 258, 159 Eng. Rep. 107 (Ex. 1863).

[66] Statutes have usually specified the payment medium.

[67] *Vanhorn v. Dorrance* 2 Dall. 304 (U. S. 1795).

[68] *supra,* notes 60 and 62.

The compensation paid should place no greater charge on the industry than it is able to bear and interest charges arising out of compensation should not be an onerous burden on the rights of the consumer nor on the wages or working conditions of the employee Where, despite application of these principles, it is still not possible to award compensation that the industry can afford, government assistance must be given. A balanced budget should be maintained insofar as possible. Any interest guaranteed should be for a limited period only. In the alternative, a subsidy reconsidered annually could be granted. Loans might also be made at low or no interest in order to carry out reconstruction and reorganization. The least desirable stock of the nationalized enterprise should carry a maximum but no minimum dividend; the amount payable would fluctuate either with adjusted earnings or production. A low minimum rate might be guaranteed in certain instances for a limited number of years in order to assure a displaced equity holder some income. The compensated stockholder should have no vote in the control of the nationalized enterprise nor obtain any pecuniary benefit from the greater security of his investment; neither should he have the right to enforce any sanction if the nationalized enterprise defaulted in the payment of its obligation.[69]

There are four possible bases of valuation: (1) stock exchange values; (2) asset values; (3) capitalized earning power; and (4) a global sum based on the amount a willing buyer would pay to a willing seller; i.e., market value. Where the last is practical, it is preferable. Where it is not, a combination of (2) and (3) assures the best method. Compensation should then be based on a combination of the potential earning power of the nationalized enterprise and its capital valuation. Compensation should be computed so as to constitute a return on the capital value of capital assets acquired, weighted by past earnings adjusted to consider probable future ones and limited by statute.[70]

Any feasible global sum should be ascertained by a tribunal directed to assay the value at which the industry could be assessed in a sale in a free market. There should be no allowance because of compulsory acquisition.

If a combination of earning and asset value is determined to be the proper course, each company's or industry's assets would have to be evaluated at a going-concern rate. This could be based on either original cost adjusted to current prices less depreciation, calculated according to the best current commercial practice, or on a ". . . basis of values placed by the company on its assets in its tax returns."[71] It may be objected that tax return valuation of assets may not be a true one. If that objection is valid, then the industry is merely paying for its past sins and omissions. Land would be acquired at the amount a willing buyer would give a

[69] How Much Compensation? Ernest Davies, New Fabian Research Bureau Society, No. 33.
[70] *Ibid,* p. 57.
[71] *Ibid,* p. 58.

willing seller. Earnings would be taken over a reasonably long period and adjusted to a common level.

No attempt is made here to justify these principles or bases from a philosophical or jurisprudential view-point. It is merely desired to point out that, no matter what the actual measure of compensation today for nationalization of property, any valid and lasting measure of compensation must take into consideration the factors set out above.

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Cruel and Unusual Punishments

A punishment is regarded as a penalty imposed by authority on one who transgresses the law. Its infliction is consequent upon the evil act of the offender. As a sanction it must operate in opposition to the malfactor's will by effectively depriving him of some good, such as life, integrity of the body, liberty, or exterior goods. The deprivation of any of these goods is a penalty. Hence, punishments are often classified as loss of life, loss of bodily integrity, loss of freedom of spontaneous action, or loss of external goods, e.g. riches, country, and fame.

While the above are generally thought to be substantial deprivations and, therefore, suitable punishments, their intensity of application has varied through the centuries. Under the Old Law of the Hebrews, for example, the means of inflicting punishment was the *lex talionis*, or law of retaliation: a method of mutilation exacting an eye for an eye, a tooth for a tooth, a life for a life.

In the past 200 years alone, there have been at least three schools of penal philosophy, each with varying concepts of punishment. The first was the classical school. When, during the latter half of the eighteenth century, men were keenly aware of the philosophical concept of the freedom of the will, penalties were immutable. The individual breaking the rule did so of his own free will, and if apprehended and convicted, paid the penalty. Hence, it was felt by those of the classical school that the punishment for the same crime should always be the same because the moral responsibility was the same.[1] From this there developed the second or neoclassical school. While recognizing freedom of the will, it also recognized that education, heredity, and other factors may affect freedom of choice, thereby lessening responsibility. The classical theory of punishment underwent a gradual change, so that the penalty for crime soon came to be graded in proportion to the individual's amount of freedom and responsibility. The third or determinist theory denies freedom of the will. If followed to its logical conclusion,

[1] *Orme v. Rogers*, 32 Ariz. 502, 260 Pac. 199 (1927).