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12 Property rights and nature conservation

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Introduction

The focus of this chapter will be on property in land-use and its restrictions through nature protection measures taken to establish the Natura 2000 network. Such restrictions follow from the protection goal for a specifi c bird or habitat protection site, and consist of rules preventing certain land uses (such as intensive agriculture, the exploitation of minerals, etc), asking for the toleration of measures (such as the construction of bird-watching paths), and requiring certain active protection measures (such as the management of water supply and drainage). All this may cause economic costs to the landowner or leaseholder, be it forgone revenue or additional expenditure. In the following, it shall be studied how the conflict is solved by constitutional principles, legislation and court practice.

General aspects of the conflict public interests v property protection

Before looking at the specifi cs of nature protection as a property restriction, we need to clarify the broader concepts of property protection of the European Convention of Human Rights, EU primary law and Member State constitutions. For the Member State level, the German Constitution is taken as an example. This is for reasons of simplifi cation, but also because the property protection concept as developed by the German Federal Constitutional Court ('Bundesverfassungsgericht' – BVerfG) provides a certain contrast to the European Court of Human Rights (ECtHR) and European Court of Justice (ECJ)

We will discuss the property guarantee proposing three steps of analysis: the scope of the guarantee, kinds of intervention, and justifi cation of interventions.

The protective scope of the property guarantee

It is common ground of the courts, including the ECtHR, the ECJ and the BVerfG, to fi rst ask if the protective scope of the property guarantee is affected

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by a given measure of a public authority. The ECtHR case law appears to define the scope more broadly than the ECJ and BVerfG, at least in relation to goodwill and economic expectations. While the ECJ and BVerfG exclude goodwill and economic expectations,[1] the ECtHR appears to allow them if they can be considered legitimate.[2]

Kinds of intervention

Expropriation and regulatory restrictions

The second question is then to qualify the kind of intervention. This leads to different legal effects the authority must respect. There are two kinds of intervention: (1) the taking of property rights, which is only allowed if based on a law, aiming at an overriding public interest and subject to full compensation, and (2) the regulation of the use of property rights.[3] Such regulation must have a legal basis, pursue a public interest, and comply with the principle of proportionality.[4] It must also respect the essential core of property. The ECtHR, ECJ and BVerfG acknowledge broad discretion of the legislature and executive when exercising regulatory powers.[5]

1 See Cases C-4/73 *Nold KG v Commission* [1974] ECR 491, para 14; C-280/93 *Germany v Council* [1994] ECR I-4973, para 79 et seq. BVerfG Cases 1 BvR 1086, 1468, 1623/82, judgment of 6 October 1987, BVerfG 77, 84 (118) where the Court stated: 'In particular, Art. 14 sec. 2 Grundgesetz does not provide comprehensive protection of economically reasonable and profitable property uses and the entrepreneurial freedoms of disposition required for such uses'.

2 ECtHR (*van Marle and Others*), Series A No 101 para 41. Somewhat differing ECtHR (*Pine Valley Developments Ltd v Ireland*), judgment of 29 November 1991 (Beschwerde-Nr 12742/87, para 51). See K Grillitsch, *Regulatorische Enteignungen. Ein Vergleich zwischen Art. 1 ZP I EMRK und Art. 1110 NAFTA* (Baden-Baden, Nomos, 2011) 83.

3 The ECtHR also acknowledges a third kind of intervention, which shall be meant by Art 1(1) first sentence 1st Protocol to ECHR. The scope of this category is however not clear. See H-J Cremer, 'Eigentumsschutz' in R Grote and T Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Tübingen, Mohr Siebeck, 2006).

4 See Art 1(2) First Protocol; Arts 17 and 52 ECHR. For a representative statement of the ECJ case law, see Joined Cases C-379 & 380/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others (C-379/08) and ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others (C-380/08)* (*Raffinerie Mediterranee*) [2010] ECR I-2007, para 80: 'As regards infringement of their right to property, invoked by the applicants in the main proceedings, the Court has consistently held that, while the right to property forms part of the general principles of EU law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.'

5 N Bernsdorff in J Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 3rd edn (Baden-Baden, Nomos, 2011) Art 17, para 22.

The BVerfG frames the second category of intervention differently from the ECtHR and ECJ. It calls this second kind of intervention the determination of the content and limits of property ('Inhalts- und Schrankenbestimmung'). This notion is based on the wording of Article 14 sec 1 sentence 2 Grundgesetz. Article 14 sec 1 and 2 of the same read:[6]

(1) The property and the right to inheritance are guaranteed. The content and limits are determined by legislation.
(2) Property is bound. Its utilization shall also serve the common good.

This phrasing indicates that the Constitution acknowledges broad powers of the legislator to determine what assets may be classed as property, and what others not. The discretion of the legislature is however predetermined on the constitutional level in two ways. First, the use of property shall be socially bound (*Sozialbindung*). Thus the German doctrine construes the public interest not only as enabling but also as mandating state action. Thereby, a difference is drawn between the more protectable private property of individuals, and the less protectable property of economic enterprises. Private property which serves the personal sphere of citizens must rather be spared from state interference,[7] while private property that bears a social function can more freely be regulated.[8] Secondly, the so-called institutional guarantee (*Institutsgarantie*) of property must be respected, which largely means that private property must remain an essential characteristic of the German legal system. This institutional guarantee of property resembles the essentiality proviso in the ECtHR and ECJ jurisprudence, although it is doctrinally somewhat more differentiated for its distinctions between personal and economic property and between private and social functions.

Restrictions jeopardizing profi table utilization

Doctrinal complications arise when the regulation is so severe that hardly any profi table use of the property right remains possible. This case forms a third category of intervention in many legal systems. It is also acknowledged by the ECtHR which calls it *de facto*, or indirect, expropriation. The ECJ appears to also know this category but rather construes it as a case of violation of the proportionality principle and thus as an illegal intervention; but it appears that the Court has not developed a precise concept of it yet.[9] The ECtHR in principle

6 Author's translation.
7 BVerfGE 53, 257 (290 et seq) concerning pension entitlements.
8 BVerfGE 50, 290 (339 et seq) concerning means of production.
9 See Joined Cases C-20 & 64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, para 68: 'However, fundamental rights are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the markets, provided that those restrictions in fact correspond to objectives of general

recognizes that a regulation if heavily intrusive may turn into an expropriation (or deprivation) of possessions in the language of Article 1(1) ECHR) and thus require full compensation.[10] But in almost all cases it found that some residual uses of the property were possible, so that the regulation still belonged to the second category of intervention.[11] The Court however sometimes held that the regulation was void because being excessive in relation to its goal and thus violating the proportionality principle.[12]

In contrast, the BVerfG does not accept the possibility of tipping (*Umschlag*) of regulation into *de facto* expropriation. Expropriation for the BVerfG is the taking of a property right for the purpose of public use. By contrast, the Court classifies heavily intrusive regulation still as content determination (*Inhaltsbestimmung*). The Court posits, however, that the *proportionality* principle may require that a potentially excessive burden caused by a regulation must be alleviated by appropriate measures, including a financial recompense which however amounts to less than full compensation.[13] The BVerfG categorizes this case as content determination requiring recompense (*entschädigungspflichtige Inhaltsbestimmung*). This has the important implication that not only the preconditions but also the amount of compensation are more flexible than in the framework of an expropriation doctrine. In effect, despite their different doctrinal framings, one can say that both the ECtHR and the BVerfG are very hesitant to acknowledge that such recompense is due.[14] They rather acknowledge broad discretion of the legislature in this respect.

This attitude of deference to decisions by politically legitimated bodies could be contrasted to other legal systems which give property protection more importance. They call the phenomenon regulatory or indirect expropriation, and deal with it in about the same way as with direct or classical expropriation, meaning that the measure must be fully compensated. Examples of this kind are found in the United States, and, in Europe, the Netherlands. The US Supreme Court has elaborated a rather sophisticated doctrine of regulatory expropriation, which was summarized as follows:

> The US Supreme Court identified three categories of per se takings, namely those involving a permanent physical invasion or occupation of the property,

interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.'

10 ECtHR Case of *Fredin v Sweden (No 1)*, Application No 12033/86, Judgment of 18 February 1991, para 41.

11 See for an exception ECtHR (*Papamichalopoulos*) Series A No 260-B, paras 41–45. See Grillitsch, above n 2, 98. In terms of the BVerfG the cases would have been categorized as excessive content defi nition and probably led to compensation for unlawful state action.

12 ECtHR Case of *Sporrong and Lönnroth v Sweden*, Application No 7151/75; 7152/75.

13 If the encroachment does not leave space for any possible use the property holder shall have a right to ask for expropriation entailing full compensation; see BVerfGE 100, 226, 243.

14 Cremer, above n 3, 95.

> those destroying or denying all economically viable use of the property and those destroying a core property right. Where the regulation does not fall into one of these categories, a three-factor test is applied to determine whether the regulation nevertheless 'goes as far'. Under these circumstances, regard is had to the nature of the government action, the diminution of value that results from the regulation and the extent to which the regulation interferes with reasonable investment-backed expectations of the property holder. [15]

Article 14 of the Dutch Constitution lays down:

> In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it.

In consequence of this extensive protection of property, the Dutch Spatial Planning Act provides for compensation if an interested party 'suffers a loss which reasonably should not be at his costs as a result of the prescriptions of a municipal zoning plan'.[16] Another basis for compensation which leads to far-reaching judge-made property protection is the doctrine of unequal sacrifice for the general public interest of property uses. This doctrine has been applied by French courts,[17] but also by the German Federal Civil Court of Justice (BGH), which by this jurisprudence has for long been in a certain tension with that of the BVerfG.[18]

Historical loss of property rights without compensation

The willingness to prioritize public interests over economic property has been acknowledged by the BVerfG in one additional and even more radical subcategory of the determination of property content (*Inhaltsbestimmung*). This third category goes further than the normal and compensation-bound content determination and even allows the removal of property positions, provided this is required in the course of a fundamental reform of a legal sector. Although such removal of rights

15 H Mostert, 'Does German Law still Matter? A Few Remarks about the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation' (2002) 9 *German Law Journal*, available at www.germanlawjournal.com/index.php?pageID=11&artID=183.

16 Art 49(a) Spatial Planning Act. See M Hertoghs, 'Owner rights, compensation and the establishment of the Natura 2000 network in the Netherlands' in M Pâques (ed), *Le droit de propriété et Natura 2000* (Bruxelles, Bruylant, 2005) 204.

17 CAA Lyon, 1 February 1994, No 92LY00587, *M Plan*, (Dalloz, 1994), J. 44, note Romi, cited by J Makowiak, 'Droit de propriété et établissement du réseau Natura 2000 en France' in Pâques, *Le droit de propriéte et Natura 2000*, above n 16, 96.

18 The leading decision is BGHZ 6, 270. On the controversy between the German courts see F Ossenbühl and M. Cornils, *Staatshaftungsrecht*, 6th edn (München, Beck, 2013).

is in its effect an expropriation in the classical sense, the classification as content determination (*Inhaltsbestimmung*) allows it to be conceived of as not requiring compensation. According to the BVerfG the legislator must however provide the property-holders with sufficient time to adapt themselves to the new situation. The reference case for this category is the wet gravel decision (*Nassauskiesungsbeschluss*) of the BVerfG.[19] A reform package of water legislation removed vested property rights of landowners in gravel mining because gravel was felt to be needed as a filtering layer protecting groundwater. No compensation was provided. The Court found this uncompensated removal of rights to be constitutional, considering that it was part of a reshuffling of water law and that the landowners were allowed up to 12 grace years to reorientate their business. In a very similar case concerning the Swedish policy of phasing out gravel mining in areas requiring nature protection, the ECtHR regarded the removal of concessions not as a *de facto* expropriation but as a regulation of property use which was found to be proportional to the public interest. The Court also referred to the fact that a grace period had been granted.[20] In functional terms therefore, both come to similar conclusions concerning the prioritising of public interests albeit by different doctrinal constructions.

A legitimate public interest and the proportionality of means

As already indicated, all kinds of intervention must be legitimated by a public interest, and the means of serving the public interest must stand the proportionality test. While the legislator has broad discretion to determine the public interest, the importance of the same differs depending on the gravity of intervention. The level of importance is highest in cases of classical expropriation. The proportionality test involves three components: the means must be capable of serving the public interest, they must be necessary, i.e. not replaceable by less intrusive means, and balanced, i.e. should not be excessively burdensome if compared with the weight of the public interest. Whenever these conditions are not met, the intervention is unconstitutional and void.

The relevance of the property guarantee at the stages of establishing the Natura 2000 network

Before the material conflict between property and nature protection is explored, a more formal question shall be asked, i.e. at what stages of the determination of Natura 2000 sites the conflict appears and may be brought to court review. The procedure is more straightforward concerning special protection areas – SPAs – under the Birds Directive and more differentiated concerning special areas of conservation – SACs – under the Habitats Directive. We will only consider the

19 BVerfG 58, 300, 348 et seq.
20 ECtHR in the *Fredin* case, above n 10, paras 36 and 51.

latter one, which comprises four major steps including (1) the introduction of the relevant legal acts, (2) the notification of candidate sites, (3) the inclusion of sites in the EU list, and (4) the establishment of a protection regime for a site and the taking of individual measures implementing the protection regime.

The introduction of the Birds and Habitats Directives

We may first ask whether the Birds and Habitats Directives breach the property guarantee of EU primary (or constitutional) law when requiring that protected sites must be created in the interest of nature protection. In terms of the property concepts discussed above, the directives do not per se take private property rights. Neither do they per se mandate authorities to severely restrict uses so that in terms of the ECHR a *de facto* expropriation is caused, or, in terms of the BVerfG, the determination of property substance is so burdensome that some compensation must be paid. Therefore, in view of EU constitutional law the directives could leave the question of compensation open and refer it to the Member State level. The establishment of the Natura 2000 network must be categorized as a normal regulation of property use. Considering the fact that seriously endangered nature is at stake, and considering the broad margin of discretion of the EU legislator, there is no doubt that Natura 2000 stands the test of proportionality. This means that a landowner must tolerate the necessary restrictions but may seek compensation under national law if the relevant preconditions are given.

Notification of candidate sites

Concerning the notification of sites, German courts have argued that this is an internal administrative communication which does not yet have an external effect on land-users, thus precluding legal remedies.[21] By implication, this means that property rights are not yet affected.[22] This opinion is questionable. The notification of a site can have *de facto* effects for a farmer. For instance, a competent administrative agency may deny a construction application, on the ground that the site was notified as a SAC. The agency would be entitled to do so, applying the doctrine of prejudicial effect of directives (*Vorwirkung*).[23]

Therefore the question may indeed be brought to court whether property interests must be taken into account when sites are selected and notified by the

21 BVerwG, decision of 07.04.2006, 4 B 58.05 www.bverwg.de/entscheidungen/entscheidung.php?ent=070406B4B58.05.0); OVG Bremen, judgment of 31.05.2005, 1 A 346/02, [2005] *Natur und Recht* 654 www.oberverwaltungsgericht.bremen.de/sixcms/media.php/13/1a34602u.pdf); BVerwG, judgement of 01.04.2004, 4 C 2.03, BVerwGE 120, 276, 286.

22 BVerwGE 120, 276 (286). Similar CE *Association coordination Natura 2000* [22 June 2001] No 219995.

23 Thus VG Bremen, judgment of 06.08.2002, 8 K 1243/00, abrogated by OVG Bremen and BVerwG, above n 21.

Member States. One would believe that this is required by the principle of proportionality, the core of which after all is the balancing of the burdensome side-effects of measures with the pursued public interest. However, the ECJ has repeatedly given a clear answer to that question: the Birds and Habitats Directives, although providing a certain margin of appreciation, only allow ecological criteria to be applied at this stage, and exclude the open balancing with economic interests. The Court reasoned that the directives do foresee such balancing, but only for the identification of general nature protection measures. For the specific regime creating the Natura 2000 network the fact that seriously endangered species and habitats were to be protected was sufficient reason to ask for specially protected sites.[24] The one-sidedness of the selection criteria was thus legitimated by the high value of the protected species and habitats. Once again, while the directives already legitimate any restriction that is necessary to establish the Natura 2000 network, the compensation question is left to Member State law. The landowner, if conceded to have standing, may however allege that the site was chosen in contravention with the established selection criteria.[25]

The inclusion of sites in the EU list

The third step, the inclusion by the Commission of a site into the EU list, poses the same problem as that related to the site selection and notification, albeit addressing the EU rather than the Member State level. In *Sahlstedt* the General Court and ECJ ruled that the listing is an internal act which affected the plaintiffs – a great number of farmers – neither directly nor individually.[26] This can once more be disputed. While it is true that the precise restrictions will only be laid down by the specific regulation of the national site, the listing does have a preliminary use-suppressing effect, as stated by the ECJ in its *Dragaggi* judgment.[27] As all of the listed sites must be put under national protection, the listing is a final decision. By their interpretation the EU courts hide away from their task to provide legal protection by shifting the burden to the Member State level. It must however be admitted that the achievable legal protection is limited. First, it could only be

24 Case C-44/95 *Regina v Secretary of State for the Environment, ex parte Royal Society for The Protection of the Protection of Birds* (*Lappel Bank*) [1996] ECR I-3805, para 24.

25 As the notification is only a preliminary stage it may occur that a notified site is finally not adopted. In such case the landowner could claim compensation if the waiting period was excessively long. A reference case in this regard is the judgment of the ECtHR in the *Sporrong* case, where an expropriation permission entailing a construction stop was left unused for many years. This was found to be an excessive and thus disproportionate encroachment on property. See Case of *Sporrong and Lönnroth v Sweden*, Application No 7151/75; 7152/75, para 39.

26 Case C-362/06 *Sahlstedt and Others v Commission* (*Sahlstedt*) [2009] ECR I-2903; in the same line General Court, Case T-80/05 *Bavendamm e. a. v Commission* [19.09.2006] para 48.

27 Case C-117/03 *Dragaggi and Others* (*Dragaggi*) [2005] ECR I-167, para 27.

granted to what the listing itself determines, i.e. the geographical scope, the protection goal, a rough spectrum of measures and the applicability of the exemption rules of Article 6(4) Habitats Directive. Second, the test of compatibility with the property guarantee of these determinations runs void. As outlined above, the landowner may ask for compensation, but would have to be referred to the Member State in that regard. The landowner could however allege the violation of established selection criteria.

The level of regulation of sites

The fourth step, the establishment of a protection regime for a site and individual measures implementing the protection regime, is certainly the one where the conflict between nature protection and property interests has its core, and where therefore legal protection must be available and is generally provided by Member State courts. Considering that, as was shown, the courts deny legal protection at the previous steps, the landowner must at the final step be heard also with arguments against the directives themselves as well as the notification and the listing of sites, by alleging that the relevant acts are void or that selection criteria were violated. If the national court finds that a provision of the directives or the listing of a site was wrongful, it needs to submit appropriate preliminary questions to the ECJ.

Applying the property guarantee to Natura 2000 measures

The fact that nature protection overrides property protection on the level of the directive does not exclude that property protection comes in when the competent authorities design the objectives and measures of protection. It should be recognized that the authorities have discretion at this stage because not every single measure can be derived from the conservation objectives and the ecological requirements of the pertinent habitats and species. The proportionality principle requires that the least intrusive measures shall be taken. However, if severe intrusions are necessary in view of the conservation objectives and requirements, this is constitutional because it is grounded in the directive, which in itself was found constitutional. What remains is to test whether compensation must be paid in such situations. This issue shall now be addressed. We will do this by following the normal tiered analysis addressing the scope of property, the kind of intervention and the justification of intervention.

The scope of the property guarantee

As a first test it must be clarified whether there is a property position which is being taken or the use of which is being restricted. It must be stated from the outset that property positions are not predetermined by pre-societal 'natural law', but are creations of political decision of legislators. At first sight, this could lead into a

circular reasoning: the yardstick of property protection that is used in order to assess a given law is itself a product of law. The circle can however be avoided if some core characteristics of the property guarantee are defined as constitutional requirements that are not at the free disposition of the legislature. Three of these characteristics are relevant in our context: the fact that farmers' land is part of natural cycles, the kind of holder of the property, and the inclusion or not of use expectations.

Property bound in natural cycles

When identifying the possibilities and limits of state intervention into property positions there is wide agreement that private property is embedded in social life, and should therefore be so construed that the holder can unfold her personality in society but also accepts restrictions necessitated by society. The focus has thus been on weighing different societal interests. However, with the growing concern about environmental protection, an ecological redefinition of the basic characteristics appears to be necessary. It is true that courts have been eager to give proper weight to environmental protection. However, they have done so by framing environmental protection as a legitimate reason for introducing restrictions of property use. By contrast, it would be even more stringent to give nature a place in the design of the property right itself.

In the realm of property in land this would mean that a farmer must keep his agriculture within the cycles of nature, rather than to exploit nature to its maximum. The implication would, for instance, be that the farmer must tolerate a certain percentage (perhaps 10 per cent) of his harvest to be lost (because of weeds, insects, bad weather or whatever else) as a contribution to the trophic chain of nature of which her land is a component.

Another aspect of this concept is that a given piece of land may be situated in a less or a more endangered ecosystem. This will in turn shape the possible uses of the related land property. The approach might be phrased as conceiving property as being bound by its ecographical situation. The notion was developed by the German Bundesgerichtshof (BGH), which termed it the *Situationsgebundenheit* of a property (situation bond of property). For instance, in a famous decision on a case where a farmer wanted to cut down a historical site of age-old beeches, the Court said that his property was bound by this situation so that the trees had to be preserved.[28] The BGH framed this doctrine as follows:

> Accordingly, every landed property is characterized by its location and properties as well as its embeddedness in landscape and nature, that is by its 'situation'. This must be respected by the landowner when exerting his entitlements in view of the social bond of property. Therefore, every land property is in a way burdened by an immanent limitation which derives from

28 BGHZ 60, 124 (134); LM Art. 14 GG Nr. 60, DÖV 1957, 669.

> the 'situation bond' [*Situationsgebundenheit*] of the rights of the landowner and constitute limits to his powers of use and disposition.[29]

While this doctrine is somewhat static because looking at present states of nature, it could be dynamized by requiring that the ecological potential of a deteriorated site must be revitalized.

In more philosophical terms, one might speak of a new justification of property rights. While traditional theories have advocated either occupation and labour to be legitimate grounds for property, the cultivation of nature in harmony with its cycles could be a new ground which at the same time refers back to the old times of subsistence economies. This implies that those landowners who conduct their farming respecting natural cycles shall be better protected against state intervention than those who treat their land as an asset for maximal exploitation.

Family-based property

As outlined above, the German property doctrine assesses property protection differently depending on whether the propertied asset serves personal or business purposes. Reflecting this differentiation it is submitted that a distinction should be drawn between farm-scale agriculture and industrial agriculture. The former is normally based on farmers' families and should therefore be more protected by the property guarantee than the latter, which is operated on the basis of maximizing returns on investment. The distinction can also be related to the criterion of situation bond: a small or medium-sized farm is normally more adapted to the natural cycles than the latter, because the landowner is directly interacting with nature while for a limited liability company agriculture is just an investment opportunity. In legal effect compensation schemes would treat family based smaller farms more favourably than large-scale industrialized enterprises.

Legitimate expectations

A third dimension besides taking account of natural cycles and personal spheres is legitimate expectations. The general rule should be that the ~~the~~ property content is not determined by the exploitation potential of a given plot of land but rather by legally allowed prior investments of capital and labour. For instance, if someone purchases a piece of extensively cultivated land which is part of a Natura 2000 site, she cannot claim entitlement to use the land for intensive agriculture because she knew or could have known the use restrictions.[30] Likewise, if the propertied plot

29 BGH Decision of 7 July 1994, III ZR 5/93, Versicherungsrecht 1994, 1242.

30 See for a similar case where a house owner bought a house in the vicinity of an airport and claimed compensation for the noise, BGH Decision of 29 June 2006, III ZR 253/05 (http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7fdfc6b720768dbab78cdf95e7c149d9&nr=36854&pos=0&anz=1).

contains mineral resources the exploitation of which is prohibited by new nature protection regulation the landowner should not be compensated if she had not yet invested into the exploitation activities. In contrast, if a landowner has invested capital and labour into an exploitation of her land this must be respected, for instance, by allowing for a grace period for reorientation of her business or by providing compensation.

Kinds of intervention

The second step of analysis is to explore the kind of intervention into the realm of property rights. This can be direct expropriation, *de facto* or indirect expropriation and allowable use regulation according to the doctrinal concept of the ECtHR, or, in the conception of the BVerfG, expropriation, content determination in the form of either normal or compensatable use regulation, as well as the historical removal of property positions.

A Natura 2000 protection regime may be such that the transfer of the property in certain pieces of land is necessary, as, for instance, for the erection of an ecotourist centre. This is a clear case of classical expropriation which of course requires compensation.

The use restriction may be of a kind that the farming on the protected land is rendered entirely unprofitable. For instance, a plot of a farmer's land is considered as ecologically highly valuable and shall be taken out of any agricultural exploitation. Perhaps the farmer is even asked to take active protection measures, such as, for instance, the watering of an area in the dry season. This case is classified as *de facto* expropriation in the ECtHR concept, and as compensatable content determination in the BVerfG doctrine. The compensation would, according to the German concept, not be full, but tailored to the circumstances. The case would certainly also qualify as regulatory expropriation under the above-mentioned criteria of US and Dutch constitutional law. The relevant provision of the German Federal Nature Protection Act of 2009 (BNatSchG), Article 68, reads as follows:

> Should restrictions of property . . . in the individual case cause an unacceptable [*unzumutbare*] burden which cannot be mitigated by other measures such as the granting of an exception or dispensation, an appropriate [*angemessene*] compensation shall be provided.

A third variant is a use restriction or active management which causes a loss to the landowner without rendering the property unprofitable. In German constitutional terms it may be classified as normal content determination; all the more so if the above-suggested ecological property concept is accepted. Of course, the legislator is free to decide to nevertheless provide compensation without being compelled to do so. The German *Länder* laws have indeed introduced such additional compensation, but only as a discretionary and subsidiary instrument. The Land of Lower Saxony, for instance, provides such compensation in circumstances if 'the

lawfully conducted . . . use of land is seriously aggravated [*wesentlich erschwert*] and no compensation is due according to Art. 68 paras 1 to 3 BNatSchG'.[31]

There is a similar provision of the Dutch Nature Conservation Act of 1998, Article 31, which reads:

> Insofar as a third party will suffer damage caused by a decision based on Chapter III of the Act, that reasonably [*redelijkerwijs*] should not or not entirely come at his charge and compensation is not guaranteed by expropriation, paid for or by other means, the authority that is responsible for the decision can grant an equitable [*na bilijkheid*] compensation of the damage.

The fourth case consists of use restrictions which will only lead to smaller amounts of costs or frustrated gains. This would be considered as normal regulation in the public interest or content determination, respectively.

Finally, the regulation may sometimes involve the deletion of a whole category of property rights. As an example of this, the upcoming EU regulation that 5 per cent (later, 7 per cent) of the land of farms above 15 ha shall be taken out of exploitation may serve.[32] One could say that the affected land plots or stripes lose their value and are *de facto* expropriated. Against that, the BVerfG category of historical removal of rights could be used to avoid the consequence of due compensation. Alternatively, one could take the entire real estate of the farm, or the entire farm enterprise, as the affected property position. In this perspective the setting aside of 5 per cent of the land and/or cutting back of the business by 5 per cent can be construed as an immanent ecological restriction of land use, or as a normal use restriction justified by the public interest in nature protection.

Conditions of intervention

The third step is then to check whether the identified category of property encroachment meets the pertinent requirements of justification.

In the case of direct expropriation the requirements are, as already sketched out, a legal basis, an overriding public interest, and the obligation to compensate. In addition, according to the German constitution, the duty to compensate must explicitely be mentioned in the legal act allowing expropriation. This shall compel the legislator to be aware of any expropriation effects when taking decisions encroaching on property.[33] If a plot of land is needed for some public purpose but

31 Art 42, para 4 of the Lower Saxon Implementation Act to the Federal Nature Protection Act.

32 EU Commission, CAP Reform – an explanation of the main elements (http://europa.eu/rapid/press-release_MEMO-13–621_en.htm).

33 It has been discussed whether a clause would do which very generally formulates that in case of expropriation compensation must be paid. But this was regarded as too vague. The law itself must specify under what condition an expropriation shall be allowed, and with what compensation. If the legislator fails to meet the said requirements,

the authority hesitates to initiate an expropriation procedure the landowner should have the right that the authority must purchase the land from her.

In the case of grave interventions, within the ECtHR doctrine of *de facto* expropriation the same requirements apply like in the category of direct expropriation, i.e. a legal basis, a public interest and the duty to compensate. If the requirements are not fulfilled, the pertinent regulation is unconstitutional and void. In the BVerfG doctrinal framework, if such grave intervention is to be categorized as a variant of the compensatable determination of property content a legal basis, a public interest and the duty to compensate are equally required as preconditions. If no compensation is provided the likewise is unconstitutional and void.

If the measure is unconstitutional the landowner must seek legal protection to have it declared void. If the act is found legal and the relevant preconditions are given the landowner has a right to compensation. Depending on legal traditions this right to compensation will be laid down in a law or developed by the courts as judge made law. Relying on judge-made law raises concerns about the separation of powers, for courts may counter the willingness of a legislator to restrict property uses without payment of compensation. This is the reason why the BVerfG has insisted that it is the legislator which must take the decision about compensation obligations, the constitutional Court remaining responsible for an eventual checking of the constitutionality of that decision in case the legislator fails to provide compensation if this is required under constitutional law.[34] It thereby corrected the BGH which had developed a right to compensation as judge-made law. The BGH did however not fully accommodate the BVerfG pointing to the fact that sometimes damage has already been caused before the legislator has introduced appropriate compensation following a possible BVerfG verdict to that effect. Therefore the BGH has continued to grant compensation basing this obligation on an alleged customary law principle which provides that sacrifices of propertied interests in the public interest must be compensated (*Ausgleich für Sonderopfer*). This is a somewhat tricky construction because reference to customary law draws the obligation out of the scope of the principle of separation of powers as interpreted by the BVerfG. Anyway, in the area of nature protection the dispute has been solved by the German legislator which framed the compensation right as outlined above.[35]

In the case of normal regulation of land-uses the regulator must still respect the principle of proportionality. In particular, those measures should be taken which are less burdensome for the landowner provided they are equally effectively serving the nature protection goal. The legislator or regulator can of course also provide some recompense in cases of hardship or offer subsidies that support the landowner to the taking of active protection measures.

for instance if the protection goal does not necessitate expropriation, the act of expropriation or even its legal basis is void. The affected landowner must seek legal protection to have it annulled.

34 BVerfGE 58, 300, 320 et seq; BVerfGE 100, 226, 245