

PART I

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## **Property and Environmental Protection**

An Overview

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## I. General Reflections on Private Property\*

Some general reflections may be appropriate when considering the role of private property in a sectoral area such as the utilization of natural resources. They deal with the basic reasons for why private property should be guaranteed at all, the political source constituting private property, the institutional level on which property is protected, and the method and benefit of comparing concepts of property.

### I.1 Reasons for a Property Guarantee

The major reasons justifying private property have comprehensively been treated by John Locke. For Locke the appropriation of an asset such as a piece of land is legitimate if meant to secure the life of an individual (need-based approach). In addition, those objects that have been created by the work of an individual are legitimately his/her own (labour-based approach). While need and labour appear as excluding possessions beyond need and acquired other than by labour Locke acknowledges that possessions may be acquired by paying money as well as by letting employees do the work.<sup>1</sup> This means that the investment of capital and hired labour is a third ground to legitimise private property.<sup>2</sup>

In a functional perspective private property has been grounded on that it indirectly contributes to society's general welfare. Egoistic aims, it is supposed, serve collective goals.<sup>3</sup>

While these grounds are based on an individualist concept of society commons theory like K. Marx<sup>4</sup> and E. Ostrom's<sup>5</sup> contest the indirect benefits of private property and rather expect welfare to be reached by common property or strict regulation.

These different framings are not purely academic but have played a role in deciding concrete questions. For instance, the question if there is private prop-

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<sup>1</sup> J. Locke, *Two treatises of government*, ed. by P. Laslett, Cambridge Univ. Press 2nd ed. 1967, Second Treatise ch. 124.

<sup>2</sup> C. B. Macpherson, *The political theory of possessive individualism. Hobbes to Locke*, Clarendon Press 1964.

<sup>3</sup> B. Mandeville, *The fable of the bees, or private vices public benefits* (1714); A. Smith, *An inquiry into the nature and causes of the wealth of nations* (1775), Book 1 Ch. 1. Hardin, G., *The tragedy of the Commons*, Science, New Series, Vol. 162, No. 3859 (Dec. 13, 1968), pp. 1243-1248. A variant of this approach is system's theory which conceives the property guarantee as stabilizing the autonomous functioning of the economic subsystem. See N. Luhmann, *Grundrechte als Institution*, Duncker & Humblot, Berlin 1965, pp. 127 et seq.

<sup>4</sup> K. Marx, *Capital. A Critique of Political Economy* (1867) vol. 1 ch. 24 (available at <https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf>).

<sup>5</sup> E. Ostrom, *Governing the commons : the evolution of institutions for collective action*, 22. print. Cambridge Univ. Press, 2008.

erty in a social right or – in the environmental context – in environmental subsidies and permits might be dependent on whether the labour theory of property is applied (then, there cannot be property because the subsidy is a public gift) or whether the functional theory is favoured (then there can be a right as long as the activity induced by the subsidy is beneficial for society). Likewise, the labour and functional theory may react differently to the question whether the business of a craftsman deserves more property protection than that of a multinational enterprise. When it comes to pollution of *de facto* commons such as air and water there is of course a difference between individualist and commons theory the latter pleading in favour of stringent public regulation<sup>6</sup> and even of framing such commons as public property.<sup>7</sup>

In view of environmental concerns a more general perspective on property may need to be taken. While property has traditionally been conceived as a structure of relations between human beings the growing scarcity and fragility of natural resources suggest to more fundamentally build nature concerns into property concepts, and that into both the individual and the collective variant. Property may have to be construed not as a thing '*proprius*' (own) or '*Eigen-tum*' entailing free and exclusive rights to use, destroy and dispose the asset, but rather as a 'lease' or '*Leihe*' (*mutuum*) from nature allowing to harvest its yield within margins of reproduction and obliging to preserve it for subsequent users.

## 1.2 Institutions Determining Property Concepts

Who determines the scope and content of private property would be another general question. Is private property a fundamental 'pre-state' institution of natural law, is it the outcome of societal discourses and subsequent political decisions, or is it emerging from reasoned weighing of private and public interests? In the first case the concept is 'given' and only to be reconstructed by the polity and the courts, in the second it is a 'decision' of the polity and its changing majorities, and in the third it is professional legal reasoning by the courts. The concept of natural right was proclaimed in the French revolution and codified in Art. 544 Code Civil, although its 'absolute' character has much been adjusted to public interests by subsequent regulation and court jurisprudence.<sup>8</sup> The polity approach has been advocated by the German Federal Constitutional Court (BVerfG). The court frames it as a power of the legislator to determine the content and limits of the property guarantee (*Inhalts- und Schrankenbestimmung des Eigentums*). The legislator is however not absolutely free but must ensure that the possession of private property is an option in social life. This is called the guarantee of property as an institu-

<sup>6</sup> It should be noted that even Hardin in his famous article (above fn. 3) pleaded in favour of stringent regulation insofar as common goods 'cannot be fenced.'

<sup>7</sup> See on related concepts of the different European states M. Montini/ M. Ciacchi, Ch. Common Goods.

<sup>8</sup> U. Mattei, Basic Principles of Property Law. A Comparative Legal and Economic Introduction, Greenwood Press 2000, pp. 13-18.

tion (*Institutsgarantie*).<sup>9</sup> The concept appears to have been followed by the Polish Constitutional Court.<sup>10</sup> The legal reasoning approach is characteristic in the common law countries where the courts basically weigh up individual and public interests according to their own discretion (to be sure being bound by *stare decisis* and good reason).<sup>11</sup> The court based approach is also reflected in the conceptions of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), which advocate the balancing of property positions and public interests.<sup>12</sup> Often they refer to wide discretionary powers of the government, thus building a bridge to the polity concept.

### 1.3 Multilevel Property Protection

A third general problem is the role of property protection in a multilevel perspective. The property guarantee can be framed on the level of normal law, such as by the courts in common law systems. In an increasing number of countries it has however been established on the hierarchically superior level of constitutional law. In addition, property has been enshrined in international conventions such as the European Convention of Human Rights (ECHR) which is accepted as directly applicable and of supreme value by some contracting states. We must therefore be clear about the level of law when we analyse property issues, and in particular, when compensation claims for governmental encroachments on property are considered: When the normal law is examined the question can be whether a legal system has a general (judge made) rule of compensation for governmental interventions, or if such rules may only be found in existing statutory legal acts. In contrast, if constitutional law is examined one would inquire if the constitutional guarantee must be understood as setting aside a law refusing compensation where it should provide for that, and even creating a right of compensation in such situation *contra legem*. As the wardens of the higher levels are higher level (constitutional and international) courts the realm of the polity is confined, unless the courts themselves grant the legislator a broad margin of discretion.

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<sup>9</sup> See G. Winter, Ch. Germany, sec. G.

<sup>10</sup> See B. Iwanska/ M. Baran, Chapter Poland, sec. G.

<sup>11</sup> See E. Scotford, Chapter UK. It can be argued, though, that the extensive regulation of private land in a modern administrative state amounts to a form of common law property, which is partly determined by the land use policies of the government of the day. See E. Scotford and R. Walsh, The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context' (2013) 76(6) MLR 1010.

<sup>12</sup> See further J. H. Jans/ A. Outhuijse, Chapter CJEU, sec. D. 1 and B. Wegener, Chapter ECtHR, sec. C. 1. a).

## 1.4 Comparing Property Protection

Why should we present and compare different regimes of property in relation to environmental protection? First of all, it of course is of interest for lawyers practicing in the transnational sphere to know the specific brand of the national or international system within which he or she is acting. More importantly, however, national and international courts mutually observe each other's legal principles in order to learn when construing their own. This has been most obvious (and was recognized by treaty law<sup>13</sup>) in the bottom-up way taken by the CJEU when establishing basic rights at the level of primary law. But such mutual learning is also happening in the horizontal dimension between national courts as well as in the vertical dimension – top down – between the CJEU and the ECtHR on the one side and national courts on the other. By these tokens a European *ius commune* might evolve.

In this perspective a summary report should not list all details of the legal systems. Rather, only significant differences and convergences shall be highlighted. In doing this a functional perspective should be applied: Rather than only comparing structures functions should be identified and examined as to how different legal constructs fulfil the functions. In this way it can (and will often) be the case that two very diverging constructs are nevertheless functionally equivalent. For instance, while indirect expropriation may be classified as one subcategory of expropriation in one legal system, it may be regarded as a separate category in the another, both of them however having the same effect, namely to trigger compensation.

A workable structure of analysis would be to distinguish between the scope of property, the intensity of protection, different kinds of interventions, and the respective preconditions and consequences attached to these interventions. It must however be kept in mind that the four steps of analysis are closely inter-related. For instance, the scope of property is intricately linked to the obligation to compensate an encroachment. The broader the scope the more restrictive the preconditions of compensation must be expected to be, and vice versa. For instance, if market opportunities are included in the scope of property, one can expect that only in extreme cases of full loss of market access an (indirect) expropriation will be acknowledged as given.

## 2. Private Property, Public Property, Common Good

Private property is a basic category of liberal societies. The individual is construed as proprietor of assets entailing the exclusive right to use, pledge, trade and dispose them. Even in liberal states the state (including central, regional and local authorities) can also own private property such as land, buildings and various equipment. It is then – as a *fiscus*, as it is called in

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<sup>13</sup> Art. 6 sec. 2 TEU of 1992; Art. 6 sec. 3 TEU of 2007.

some jurisdictions – subject to private and public law like any other proprietor.<sup>14</sup> In addition, however, special rights and duties may be imposed to the extent the assets provide a public service or must specially be protected in the public interest. This is the case for exploitable goods such as minerals, for public infrastructure like roads, and – increasingly – for life sustaining natural resources such as forests and waters.

Some legal systems, such as the Italian and the Hungarian, have established the category of public property for this purpose. This category entails prerogatives and duties of management and preservation in the public interest.<sup>15</sup> With regard to natural resources some jurisdictions have created specific legal constructs such as ‘national asset’, ‘common heritage’, ‘common good’, etc. that also indicate and entail special duties of management and protection.<sup>16</sup>

### 3. Private Property in Private and Public Law

Private property is of importance both in private and public law. In private law the object of property normally is real things, immovable and movable. While also other assets may be framed as exclusive rights, such as a personality right or a patent right, prompting economists to also call them property rights, they are commonly not classified as property in private law. This is due to the diverging contractual and non-contractual rights and duties attached to the different categories of exclusive rights.

The rights and duties attached to private property may vary depending on whether the actor encroaching on the property is a private person or an administrative body. Civil law systems construe rights and duties between the owner of private property and administrative bodies as special remedies of administrative law, while common law systems, still based on Dicey’s denial of differences between private and administrative actors, apply the same remedies in both relationships.<sup>17</sup> For instance, the rules on contract, nuisance, torts etc. apply indistinctly in common law systems, while in civil law systems a special form of administrative contract, injunction in case of encroachment, liability for unlawful and even for lawful administrative action, and tort liability for administrative negligence have emerged. However, the systems somewhat converge because when administrative bodies are involved common law does acknowledge special concerns while, vice versa, civil law does partially apply general principles of private law. Thus, in functional terms, both systems subject administrative bodies to some special regime that on the one hand concedes certain preroga-

<sup>14</sup> See, for instance, Z. Mikosa, Ch. Latvia, sec. J, on the applicability of environmental law to the municipal waste disposal site.

<sup>15</sup> M. Montini, Ch. Italy, sec. D.G. Bandi, Ch. Hungary sec. E, citing Art. 38 of the Fundamental Law.

<sup>16</sup> See for a cross-country analysis M., Montini/ M. Ciacchi, Ch. Common Goods.

<sup>17</sup> For an in-depth and critical analysis of the common law approach see C. Harlow, R. Rawlings, *Law and Administration*, Cambridge University Press 2006, pp. 7-9, 39-45.

tives required in the public interest and on the other hand erects barriers controlling public power.

#### 4. Constitutionalising Private Property

The protective content of property in public law is in liberal societies taken so seriously that it is framed as a property guarantee of constitutional importance. In common law systems, that guarantee is construed as an interpretive principle underlying rights of the proprietor in relation to the government, including, notably, the presumption of compensation in case of expropriation. In most civil law systems, the property guarantee was established as part of the written constitution. This means in many countries that it has a higher status than ordinary law nullifying the latter in cases of breach. Those countries, like the Netherlands, which do not recognize the higher status of the property guarantee have accepted it by dint of the European Convention of Human Rights.<sup>18</sup> In addition, it has to be noted that the right to property as developed by the CJEU and codified in Art. 17 ChFR is binding on the Member States insofar as they implement EU law.<sup>19</sup> This obligation has somewhat confined the scope of Art. 345 TFEU which reserves the property guarantee to the discretion of the Member States. One concrete problem arising from this tension is what authority actually determines the regulatory encroachment on a citizen's property and is thus liable to pay compensation if the pertinent preconditions are given: the EU by its regulation or directive, or the Member State by its implementing measures.<sup>20</sup>

#### 5. The Objects of Property

The scope of objects of property is in most reported legal system broader in public law than in private law. While private law property is commonly confined to material things<sup>21</sup>, public law property usually extends to more assets such as an existent contractual or tort liability claim, a concession based on administrative law, a vested interest in using a public good, a right to

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<sup>18</sup> See J. H. Jans/ A. Outhuijse, Ch. The Netherlands, sec. A. .On the case law of the European Court of Human Rights (ECtHR) see the analysis of B. Wegener, Ch. ECtHR.

<sup>19</sup> See analysis of case law by J. H. Jans/ A. Outhuijse, Ch. CJEU, sec. A and C.

<sup>20</sup> See J. Jans/ A. Outhuijse, Ch. CJEU, sec. C. For an in-depth analysis focussing on nature protection law, see A. Garcia Ureta, Ch. Nature Protection. Court cases related to the EU emissions trading directive and its compatibility with the property guarantee are reported by L. Lavrysen, Ch. Belgium, sec. L, and G. Winter, Ch. Germany, sec. L.

<sup>21</sup> See however for intangible objects as property object in France M. Galey, Ch. France, sec. A.; in Croatia L. Ofak, Ch. Croatia, sec. A, in Latvia Z. Mikosa, Ch. Latvia, sec. A, and in Norway O. Fauchald, Ch. Norway, sec. A.

a pension payment, etc.<sup>22</sup> The reason for this difference of scope might be that the state has broader powers and means to intervene than a private person, so that a more comprehensive concept of property is needed. Another reason could be that the doctrinal sophistication of interrelations between asset owners and encroachers is more advanced in private than in public law.

Looking at property in natural resources it must be noted that many of them are not subject to property at all. The atmosphere, the air, the outer space, the sea, the wind, radio waves, the genetic resources, wild animals, for instance, are not owned by anybody. They have been considered to be *res nullius*.<sup>23</sup> While this remains a precise category if viewed from the legal construct of property, the increasing exploration and exploitation of those resources have prompted legal systems to embed *res nullius naturae* in a conglomerate of powers and duties of management and preservation in the public interest which have been labelled as common good, commons, heritage, patrimony, *domanialité publique*, *öffentliche Sache*, etc.<sup>24</sup> Confusingly, these notions can also reach into private and public property and make them bound to public interests.

Natural resources other than *res nullius* are subject to property. Many of them can be private property and are as such subject to environmental protection regulation. A major object of private property is land.<sup>25</sup> According to all reported legal systems land property includes plants, the soil, and the underground. Wild animals are a free good until appropriation by the hunter. Differences exist as to the extension to minerals and other underground resources: In rare cases the minerals and groundwater belong to the landowner.<sup>26</sup> Often a horizontal layer is drawn with resources above belonging to the landowner and below to the state, regions, municipalities or society as a whole.<sup>27</sup> Other systems draw the line resource-wise allocating some resources (such as gravel and sand) to the land owner and others (such as metals, oil and coal) to the public sphere.<sup>28</sup> The air column above a real estate is rather conceived as a free good, although a layer close to the ground may be considered to belonging to the land.

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<sup>22</sup> See L. Lavrysen, Ch. Belgium, citing ECtHR (*Depalle v France*) of 29 March 2010, Appl. No 34044/02, no. 62. See further B. Wegener, Ch. ECtHR, sec. C.

<sup>23</sup> For Belgium see L. Lavrysen, Ch. Belgium, sec. A/B. If deer is kept in closed preserves it may be considered property of the breeder, see for Czechia I. Jancarova, J. Hanak, V. Vomacka, Ch. Czechia, sec. A, citing a constitutional court judgement..

<sup>24</sup> See e.g. I. Jancarova, J. Hanak, V. Vomacka, Ch. Czechia, sec. A.; M. Galey, Ch. France, sec. D.

<sup>25</sup> The former socialist countries in Europe have all given up their earlier policy that land should in principle belong to the state or sub-state collectives. See the country reports on Czechia, Hungary, Poland and Latvia.

<sup>26</sup> This is the case in Latvia. The landowner must however obtain a permit of exploitation under certain circumstances. See Z. Mikosa, Ch. Latvia, sec B.

<sup>27</sup> See for the French example M. Galey, Ch. France, sec. B.

<sup>28</sup> See for an elaborate system in Norway see O. Fauchald, Ch. Norway, sec. A.



## 6. Property as Opponent and as Defender of Environmental Protection

The most common way to look at private property in relation to environmental protection is to see both as opposing each other, such as, for instance, if a farmer is asked to reduce the application of agrochemicals for reasons of protection of groundwater and biodiversity, or if the operator of an industrial installation is commanded to reduce the emission of air polluting substances. This common conflict will be the focus of the remainder of this report. It should however be noted that private property may not only be an opponent to but also a defender of environmental protection.<sup>29</sup> For instance, the owner of land in the vicinity of a dangerous installation may claim more protection against noxious emissions, by filing action under private law against the polluter or action under administrative law against the supervisory authority.<sup>30</sup> If the pollution is caused by public infrastructure, the land owner may bring a nuisance action against the responsible administrative body.<sup>31</sup> The same can be done by a private trust or NGO that buys land in order to protect its biodiversity.<sup>32</sup>

To put it shortly, in the first setting the conflict is between property used for economic purposes and environmental protection, while in the second setting it is the conflict between property used/ asking for environmental protection and economic activities (be it of private parties or the state).

The picture becomes more complicated if conflicts between different environmental goods are included in the analysis. Thus, a farmer producing biomass as a renewable energy source may conflict with regulation protecting biodiversity.

Table 1 summarizes the three constellations of conflict between property use and regulatory aims.

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<sup>29</sup> These uses of property are dealt with in Rajko Knez, Ch. Property in defense of environmental protection. See also the comparative analysis of B. Pozzo, Property rights in the defense of nature, in: B. Pozzo (ed.) *Property and environment*, Stämpfli Publ. 2007, pp. 3-61. For the related case law of the ECtHR see B. Wegener, Ch. ECtHR, sec. C.2. As J. H. Jans/ A. Outhuijse, Ch. CJEU, sec. D. 2. note, jurisdiction of the CJEU is still scarce in this regard.

<sup>30</sup> For an example of the variety of remedies available in defense of environmental protection see I. Jancarova, J. Hanak, V. Vomacka, Ch. Czechia, sec. C.

<sup>31</sup> This would be the normal nuisance action in common law systems, while civil law systems have special remedies under administrative law such as the French action for 'dommage de travaux publics', see M. Galey, Ch. France, sec. I.

<sup>32</sup> For examples in that regard see M. Galey, Ch. France, sec C., and G. Winter, Ch. Germany, sec. C.

Table 1: Conflicts between property and regulation

property use →	regulatory aims ↓	
	economic	environment
economic	[e.g. competition law]	industrial property vs pollution regulation (classical case)
environment	houseowner vs industry	biomass vs biodiversity (new case)

7. The Scope of Private Property in Relation to Environmental Protection

Environmental protection measures often encroach upon private business. This raises the question if business is considered a private property. The answer is: not in every respect. All reported legal systems including also EU law and the ECHR exclude from the protected scope mere market opportunities. For instance, the sales quantity of a product that due to costly and price driving environmental regulation may have decreased is not protected as property. Differences exist as to whether the entirety of a business amounts to property. A legal system may tend to only recognize the real substratum of the business, such as the land, buildings and machinery, as property<sup>33</sup>, while other systems may include the business know how and good will.<sup>34</sup> In the context of ICSID arbitration the functional equivalent of property is the investment. It is remarkable how easily property protection concepts have been transferred to investment. The scope of protected assets has even been extended to market opportunities.<sup>35</sup>

Permits allowing the emission of polluting substances are as such not considered as property by any of the reported legal systems, nor by the EU and ECHR jurisprudence.<sup>36</sup> This does not exclude that legitimate expectations are protected. For instance, a lawful permit cannot be withdrawn without compensation, except if the holder has disregarded conditions attached to the permit. Even if the permit is unlawful its removal is excluded or must be compensated if the holder *bona fide* trusted in its legality.<sup>37</sup> In fact, the ECtHR has sometimes

<sup>33</sup> See for Germany G. Winter, Ch. Germany, sec. A.  
<sup>34</sup> Thus the ECtHR jurisdiction, see B. Wegener, Ch. ECtHR, sec. A.  
<sup>35</sup> See further O. Fauchald, Ch. Arbitration, sec. 2.  
<sup>36</sup> As an example see I. Jancarova, J. Hanak, V. Vomacka, Ch. Czechia, sec.B.  
<sup>37</sup> For details see the provisions of the Administrative Procedure Acts of several reported countries on the withdrawal and revocation of lawful and unlawful administrative acts, as, for instance, the Latvian (Z.

considered legitimate expectations as a property right *per se*<sup>38</sup>, but this is rarely found in domestic law.<sup>39</sup> A permit can however be part of a real property if it was put into practice e.g. through the construction and operation of the authorized factory. Then the authorization is protected together with the real asset. For instance, when operators of cement producing installations were by EU based MS legislation forced to obtain and surrender CO<sub>2</sub> emission allowances, they argued that their IPPC permit embraced the right to emit CO<sub>2</sub> and that the removal of this right was an expropriation. The German Federal Administrative Court (BVerwG) however rejected this allegation arguing that the IPPC permit was part of the entire business ('*Gewerbebetrieb*') including the installation and its operation, and that its modification did not expropriate the business but rather regulated its use.<sup>40</sup>

Other than simple permits concessions to exploit natural resources are in many legal systems considered as property.<sup>41</sup> This may be the case because a concession is issued on the ground that the project may have negative environmental impacts which are accepted in view of its benefits.

Subsidies for economic or environmental purposes are commonly not regarded as property. They are rather considered as governmental gifts, a perception that can be explained by the labour theory of property.<sup>42</sup> Other forms of legal protection are however available to protect statutory entitlements, even if they fall short of constituting property in a legal sense. A recurrent example is the cutting back or withdrawal of guaranteed feed-in tariffs for electricity from renewable sources. First of all, the general rules of administrative law apply. In particular, based on the principle of legitimate expectations, the grant of a subsidy may only be revoked and the money reclaimed if the grant was unlawful, or if the recipient breached the conditions of subsidy use. Further, if the time period for recurrent subsidy payments was defined and the recipient set up an undertaking legitimately trusting in the perseverance of the scheme, the subsidy cannot easily be terminated.<sup>43</sup> This situation is even considered as a property position in some legal systems, such as Czechia.<sup>44</sup> However, that posi-

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Mikosa, Ch. Latvia, sec. I).

<sup>38</sup> ECtHR (*Pine Valley Developments Ltd v Ireland*) of 29 November 1991 (Appl. no 12742/87). See for a related judgement of the Croatian Constitutional Court L. Ofak, Ch. Croatia, sec. C fn. 7.

<sup>39</sup> For an example see I. Jancarova, J. Hanak, V. Vomacka, Ch. Czechia, sec. B.

<sup>40</sup> BVerwGE 124, 47 et seq. (127); similar the Belgian Constitutional Court in its judgement case n° 92/2006, 7 June 2006 (*nv Cockerill Sambre and sa Arcelor*), cited by L. Lavrysen, Ch. Belgium, sec. L fn. 49.

<sup>41</sup> See, e.g., for France M. Galey, Ch. France, sec. B; for Norway O. Fauchald, Ch. Norway, sec. A citing a related Supreme Court case.

<sup>42</sup> Based on the personality theory subsidies for small family based business would qualify as property.

<sup>43</sup> See Scotford, Ch. UK, sec. C, citing *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453.

<sup>44</sup> I. Jancarova, J. Hanak, V. Vomacka, Ch. Czechia, sec. A. To some extent also Denmark, see P. Pagh, Ch. Denmark, sec. D. In contrast, the freedom of policy change without compensation duty is stressed by French courts, see M. Galey, Ch. France, sec. E.

tion can nevertheless be restricted and possibly removed, as will be discussed in section 10 below.

Traditional and consolidated uses of possessions or vested rights are in some states considered as property.<sup>45</sup> For instance, the establishment of protected areas may be regarded as indirect expropriation of property if encroaching on long practiced agricultural uses.<sup>46</sup>

## 8. Self-Binding Obligations as Property Content

Even if an asset falls in the scope of property in a particular legal system, the owner may nevertheless not be guaranteed to enjoy its fullest use. The scope and nature of property protection also varies within and across legal cultures. Qualifications on the use of property are sometimes expressed in the relevant provision of the constitution. For instance, Art. 14 para 2 of the German Constitution says: 'Property obliges. Its use should also serve public welfare.'<sup>47</sup> Similarly Art. 48 para 2 of the Croatia constitution formulates: 'Ownership shall imply obligations. Holders of the right of ownership and its users shall contribute to the general welfare.'<sup>48</sup> Art. 66 of the Portuguese Constitution specifies these obligations in relation to the environment: 'Everyone has the right to a healthy and ecologically balanced human living environment and the duty to defend it'.<sup>49</sup> This constitutes a self-restriction of the proprietor. Within the margin of that self-restriction, legal and governmental regulation is not even categorized as a genuine restriction of an established right but rather as a reiteration of what the proprietor is constitutionally expected to do by herself.

In addition, basic obligations of property holders are sometimes laid down in laws called basic or organic, which set a framework for further legislation and executive regulation. An example is the Portuguese 'Law on the public policy for soils, setting the framework for land use planning and urbanism' that lays down citizens' duties such as 'to use the territory and the natural resources in a sustainable and rational way, to respect the environment, cultural heritage and landscape, to use correctly the public domain goods, public infrastructures, urban services, equipment, green spaces or other spaces for collective use; and to refrain from performing any acts or from developing any activities which pose a danger to them.'<sup>50</sup> One can interpret these basic obligations to shape or construct property in land, rather than to restrict it.

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<sup>45</sup> See e.g. A. Garcia Ureta, Ch. Spain, sec. G.

<sup>46</sup> See further sec. 10.3 below.

<sup>47</sup> Remarkably the provision does not say 'property is bound' but 'binds' which means that there is not only a duty to tolerate governmental interventions but an active duty to use one's property for societal purposes.

<sup>48</sup> L. Ofak, Ch. Croatia, sec. G.

<sup>49</sup> Emphasis added. See further A. Aragao, Ch. Portugal, sec. B.

<sup>50</sup> A. Aragao, Ch. Portugal, sec. D.

Courts have also contributed to develop basic principles of property self-obligation. For instance, the German Federal Court of Justice (BGH) has in relation to uses for agricultural and development purposes proposed the concept of ‘situational binding’. If the situation of the real estate is characterised by the presence of valuable biodiversity, the land is ‘bound’ not to be used for more profitable uses. Such use potential does not form part of the property and must not be compensated in case of protective environmental regulation.<sup>51</sup> Generalising this approach one may argue that natural cycles demand a ‘contribution’ from those who make use of them so that there is no property used purely for industrialised agriculture, in other words for farming methods that take the land for nothing but as a tool for maximal yield.<sup>52</sup> However, that principle of adaptation to natural cycles should not be overdrawn in order to prevent counterproductive effects such as if farmers willfully hinder the growing of valuable nature in order to prevent stricter nature protection.<sup>53</sup>

A special problem of proprietors’ bondage is liability for environmental damage on his/her own land. In many legal systems a principle applies stipulating that the landowner is liable for cleaning up his/her polluted land.<sup>54</sup> The principle stems from general police power law where it is assumed that he who governs an asset is responsible for its safety. It has become problematic in cases where the damage is large and the landowner did not cause it. Many legal systems still apply this principle, at least as a secondary resort if the actual polluter is not available anymore.<sup>55</sup> Some however discharge the innocuous landowner and put the burden on the public budget.<sup>56</sup>

## 9. Regulation of Property Uses

Beyond constitutional and framework legal principles, property owners’ use of property can be restricted by state regulation. There is a vast practice of regulation of property uses that does not entail compensation. Such ‘normal’ regulation is also called police power in some jurisdictions<sup>57</sup>, a term that is somewhat misleading because the concept of police power emerged in

<sup>51</sup> BGHZ 60, 124 (134). For a similar argument see the Portuguese Supreme Administrative Court, cases 996/06 of 20 June 2013 and 412/10 of 28 September 2010, viz A Aragao, Ch. Portugal, sec. B fn 4..

<sup>52</sup> G. Winter, Property rights and nature conservation, in: Ch.-H. Born e.a. (eds.) *The Habitats Directive in its EU environmental law context*, Oxon: Routledge 2015, 215-228, at 224.

<sup>53</sup> See for the example of payments for damage caused by wild animals Z. Mikosa, Ch. Latvia, sec. E, citing a Constitutional Court case on damage to a fish farm from herons.

<sup>54</sup> See answers to question J in the national reports.

<sup>55</sup> See e.g. for Italy M. Montini, Ch. Italy, sec. J; for Norway O. Fauchald, Ch. Norway, sec. J, citing a Supreme Court case on the extension of the proprietor’s liability to its mother company.

<sup>56</sup> Thus, for instance, Denmark, see P. Pagh, Ch. Denmark, sec. E., citing a Supreme Court judgment on the clean-up of an oil-polluted site.

<sup>57</sup> The term is also used in the context of transnational arbitration, see O. Fauchald, Ch. Arbitration.

times when state intervention was to be restricted to cases of danger for public safety, i.e. cases where the predicted damage is large and imminent or highly probable. Modern regulation, at least that of environmental protection, must however also allow for precautionary measures, i.e. measures in situations where the damage is medium or creeping and the probability is low or uncertain.

Many states and the EU as well the ECHR require that regulatory interventions into property positions must be based on a parliamentary law, pursue a public interest, and respect the principle of proportionality.<sup>58</sup> There are variations to this principle. Some legal systems, mostly those with directly elected presidents like the French, acknowledge a genuine power of the executive to make rules in policy fields that are not reserved for parliamentary legislation.<sup>59</sup> By contrast, other countries, mostly parliamentary democracies stipulate that whenever the executive regulates a matter in a way encroaching on basic rights, it must have a legal basis (reservation of law, *Gesetzesvorbehalt*). Some constitutions, such as the German, even require that the law must lay down the content, purpose and scope of the delegation and decide on the essential issues at stake.<sup>60</sup>

The courts, when assessing the executive's power in regulating property rights, often concede that the legislator and the regulator enjoy a broad margin of political discretion in determining the public interest and applying the principle of proportionality.<sup>61</sup> This is sometimes motivated by a general culture of judicial self-restraint in political matters such as in UK law, or by a reluctance of courts to tamper with scientific and technical issues, or by acknowledging the democratic legitimization of the legislator, including also its delegation of powers to the executive.

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<sup>58</sup> For the EU see Art. 52 paragraph 1 which reads: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' For the ECHR see B. Wegener, Ch. ECtHR, sec. C. 1 b).

<sup>59</sup> Art. 37 of the French Constitution. However, according to Art. 34 paragraph 3 the determination of the fundamental principles of environmental preservation and of property belong to the realm of laws and must thus be based on a parliamentary law. The governmental powers are thus restricted in these realms.

<sup>60</sup> Art. 80 *Grundgesetz* and case law of the BVerfG such as in BVerfG 49, 89 (127). These requirements have been taken up for inclusion in Art. 290 para 2 TFEU which reads: 'The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.' It must however be kept in mind that there are still areas of EU law-making for which the Council and thus the executive is the legislator. In the environmental sector this concerns provisions primarily of a fiscal nature and measures affecting quantitative water management, land-use and energy sources and supply (Art. 192 paragraph 2).

<sup>61</sup> See for the ECtHR case law B. Wegener, Ch. ECtHR, sec. C. 1. For a national example see P. Pagh, Ch. Denmark, sec. C.

Jurisdictions vary as to the diversity of sectoral environmental laws and regulations specifying the environmental protection goals and instruments.<sup>62</sup>

In several legal systems the environmental protection interest legitimizing the regulation of property use is framed as a constitutional obligation. This can be in the form of a human right to environmental protection<sup>63</sup>, or of an ‘objective’ obligation of the state<sup>64</sup> which may constitute the environment/ natural resources as a common good, patrimony, public trust, or else.<sup>65</sup>

It should also be kept in mind that, as suggested in Section 6 above, the legislative and regulatory measures affecting private property may partly be considered not as intervention into predetermined property positions but as expression and concretization of the social bonds that are intrinsic to the very notion of property.

## 10. The Taking of Property

The taking of property is a form of property-related regulation that, for its interventionist weightiness, is subjected to additional requirements. ‘Taking’ is the core of what has traditionally been called expropriation. An analysis must distinguish between the definition or characterization of takings and the preconditions and effects they must respect/provide in order to be legally acceptable.

### 10.1 Characterization of Taking

The characteristic of a taking is that a property position is taken away from the owner. A clear case is the complete removal from the property holder of civil law property (eg in land), of a right under the law of obligations, of a concession and of a right to subsidy (if regarded as property). Less clear but also regarded as a taking is the compulsory establishment of a servitude or other real obligation.

Legal systems diverge or are undecided if the taking must include the transfer of the property position to a beneficiary, be it a public authority or a third person acting in the public interest. If a transfer is not required, the dissolution of a right also qualifies as a taking. The German BVerfG, following its narrow construction of taking, tends to advocate the first position, thus broadening the

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<sup>62</sup> See for an example of high specificity and diversity B. Iwanska/ M. Baran, Ch. Poland sec. A.

<sup>63</sup> See for a strong example G. Bandi, Ch. Hungary sec. A, citing Arts. 18 and 70/D of the Hungarian Constitution. Most importantly, a subjective right to environmental protection (albeit of the individual, not the public at large) was also developed by the ECtHR, see B. Wegener, Ch. ECtHR, sec. B and D.

<sup>64</sup> Such as in Art. 37 ChFR. J. Jans, Ch. CJEU, sec. B, critically characterises the environmental protection obligation to be weaker than the tight to property.

<sup>65</sup> See further the cross-country report of M. Montini, Ch. Common Goods.

discretionary powers of the legislature to determine the content and limits of the property guarantee.<sup>66</sup>

Legal systems also diverge as to whether property owned by public bodies are also protected by the constitutional taking's guarantee. Some treat them just as private owners, others conceive basic rights including the property guarantee as rights of citizens against the state, not of state bodies against other state bodies.<sup>67</sup>

## 10.2 Preconditions and Effects of Lawful Taking

If a measure qualifies as a taking (or expropriation in the narrow sense), it must respect certain preconditions in order to be lawful. If the preconditions are not met, the measure is unlawful. Appropriate judicial review may be available for applications to annul the relevant individual or regulatory or even legislative act. If in the course of unlawful expropriation damage has been caused, compensation can be claimed based on pertinent general rules on compensation for unlawful governmental action.<sup>68</sup>

The preconditions of a lawful taking of property are similar in all reported jurisdictions. They include that the taking must be made by individual act based on a law, it must serve a public interest, and compensation must be provided. Some jurisdictions, such as the German<sup>69</sup>, also accept expropriations self-executed by a legal act.

Legal systems diverge as to whether the public interest may be framed in general terms or must be specified by law, and if the public interest must be qualified or can reflect any political priority. Some countries have adopted a cross-sectoral expropriation law in which the allowable reasons for expropriation are specified.<sup>70</sup> In other countries, expropriation powers are spread over various sectoral laws such as construction laws, nature protection laws, etc.<sup>71</sup> Concerning the qualification of the public interest some jurisdictions stipulate that the

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<sup>66</sup> G. Winter, Ch. Germany, sec. F. Likewise the jurisdiction of the Belgian Constitutional Court, L. Lavrysen, Ch. Belgium, sec. E.

<sup>67</sup> See for the first variant L. Lavrysen, Ch. Belgium, sec. E.

<sup>68</sup> See chapters of the national reports sec. I.

<sup>69</sup> G. Winter, Ch. Germany sec. F.

<sup>70</sup> See e.g. J. Ofak, Ch. Croatia, sec. F. The Croatian Expropriation Act, for instance, lists certain infrastructure projects, constructions for public uses and minerals exploitation as grounds for expropriation, but not environmental protection. Contrastingly the expropriation laws of Czechia and Hungary do allow expropriation for environmental protection objectives, see I. Jankarova, J. Hanak, V. Vomacka, ch. Czechia sec. F, and G. Bandi, Ch. Hungary, sec. F.

<sup>71</sup> See e.g. B. Iwanska, M. Baran, Ch. Poland, sec. F, citing as an example the Polish Real Property Management Act..



same must be imperative and overriding<sup>72</sup>, which may have to be established by an analysis of the costs and benefits of the project requiring expropriation.<sup>73</sup>

As for the degree of compensation, some legal systems provide full compensation, for instance the market value of the expropriated asset, while others provide some flexibility taking into account the intensity of protection and the importance of the public interest.

## II. Onerous Restrictions of Property Uses (Indirect Expropriation, Conditioned Content Determination)

### II.1 Categorizing Use Restrictions

The taking of property is commonly distinguished from restrictions of property uses, which are often allowable forms of regulation, as discussed in section 8 above. However, most legal orders acknowledge that some restrictions on use can be so harsh that they equal the full taking of property. This is sometimes called ‘de facto expropriation’, but I believe inappropriately so, because in the normal case the de facto restrictions do have a basis in legal acts. Neither is ‘regulatory expropriation’ a better characterization because also the taking of property can be based on regulation. ‘Indirect expropriation’ better points to the fact that the direct regulation of uses indirectly challenges the substance of the property right at issue.

Some jurisdictions categorize indirect expropriation as a subcategory of expropriation besides direct expropriation (or taking).<sup>74</sup> This causes a problem if the constitution provides full compensation for expropriation because in that case also indirect expropriation must be compensated in full. The other option – to categorize it as a separate rule – allows for more flexibility, or, more particularly, a weighing up of the severity of impact and the amount of compensation. It appears that this second form of legal control is found in the majority of reported states.

In Germany, a different approach to restrictions with compensation has been developed based on the above-mentioned theory of legislative determination of the content and limits of property (‘content determination’). Traditionally, the German civil courts had adopted the concept of indirect expropriation, although differing in calling it ‘expropriating encroachment’ (*enteignender Eingriff*). The concept was called reversion theory (*Umschlagtheorie*), indicating that at some point of increasing encroachment, the normal regulation reverses into a to-be-

<sup>72</sup> See BVerfG concerning the construction of a cable car connecting a city with a nearby mountain for touristic reasons. The court denied the overriding character of this public interest.

<sup>73</sup> See for the French *déclaration d'utilité publique* M. Galey, Ch. France, sec. E, and for the Italian *dichiarazione di public utilità* M. Montini, Ch. Italy, sec. F.

<sup>74</sup> ECtHR appl. 12033/86 (Fredin), no. 42.

compensated regulation. The BVerfG<sup>75</sup> rejected this approach drawing a clear line between expropriation in the narrow sense of taking and ‘content determination’ as the remainder of the regulatory realm. It thus advocates a dualist approach, not the triple approach of normal regulation, direct and indirect expropriation. The major reason for rejecting the reversion theory was its implication that the courts interfere with the realm of the legislator by subjecting its policy to compensation claims. It should be the legislator who decides whether burdens caused by a political measure should be compensated or not.

The BVerfG nevertheless posits that the legislator is not without constitutional limits when exerting its discretion, the major yardstick being the proportionality principle. Most importantly in the present context, a regulation may disrupt a property position so gravely that the proportionality principle requires compensation. Such a proposition is similar to that within the concept of indirect expropriation; it was therefore labelled as ‘content determination stipulating compensation’ (*entschädigungspflichtige Inhaltsbestimmung*). The BVerfG concept is somewhat more flexible because monetary compensation is only one variant of command of proportionality others being alternative means mitigating or alleviating the burden.<sup>76</sup> I submit that both, ‘indirect expropriation’ and ‘content determination stipulating compensation’ should be put together under the notion of onerous restriction of property.

## II.2 Characterization

As with direct expropriation, the characterization of a measure as an onerous use restriction should be distinguished from the preconditions and effects it must respect/provide. The characterization should discriminate into two directions: direct expropriation on the one side and normal use restrictions on the other. In distinction from direct expropriation, indirect expropriation is, as already said, concerned with use restrictions rather than the removal of property. In distinction from normal use restrictions indirect expropriation presupposes that certain criteria are fulfilled. These criteria are very diverse and controversial. Three criteria are outstanding: gravity of impact, sacrifice for the common good, and importance of the public interest. Table 2 is an attempt to compare the three categories of encroachment on private property.

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<sup>75</sup> BVerfGE 58, 300 et seq.

<sup>76</sup> See BVerfGE 100, 226 (245) concerning a case of monument conservation where the court said that the authorities need to test various possibilities of alleviating the burden of the proprietor.

*Table 2: Categories, qualification and preconditions of regulation of property*

categories	qualification	preconditions/effects
normal regulation	restriction of property uses	legal basis, proportionality, public interest
taking (= expropriation in the narrow sense)	removal of property	legal basis, high public interest requiring expropriation, full compensation
onerous use restriction (= indirect expropriation, content determination)	grave/unequal/unbalanced restriction of property uses	legal basis, public interest, proportionality, variable compensation

### II.2.I Gravity of Impact

One criterion advocated by many jurisdictions is the gravity of impact of the use restriction. If the use of the property (considering the scope and intensity of protection) becomes utterly unprofitable the core precondition of indirect expropriation is fulfilled. The wording describing this threshold differs in various jurisdictions, including, for instance, deprivation of all usefulness of the property asset,<sup>77</sup> loss of control or use of the investment<sup>78</sup>, etc. Of course, there is leeway of the courts to assess the facts of the case, whether the impact actually is so harsh as alleged, etc. In the Netherlands, for instance, the courts have until now never accepted claims for compensation for reasons of serious restrictions of property use.<sup>79</sup> The ECtHR too advocates a very narrow concept of compensable property uses. In *Pine Valley*<sup>80</sup> a construction permission for industrial and office development was issued but later nullified for breach of land-use planning provisions. The court found that while this is interference with possessions, it is neither direct nor de facto expropriation given the fact that the proprietor is still able to use the property for agricultural purposes or sell it, even if at a lower price.

<sup>77</sup> E. Scotford, Ch. UK, sec. F.

<sup>78</sup> O. Fauchald, Ch. Norway, sec. F.

<sup>79</sup> J. Jans, A. Outhuijse, Ch. The Netherlands, sec. D.

<sup>80</sup> See *Pine Valley* (application no. 12742/87) where the ECtHR says: 'There was no formal expropriation of the property in question, neither, in the Court's view, can it be said that there was a de facto deprivation. The impugned measure was basically designed to ensure that the land was used in conformity with the relevant planning laws and title remained vested in Healy Holdings, whose powers to take decisions concerning the property were unaffected. Again, the land was not left without any meaningful alternative use, for it could have been farmed or leased. Finally, although the value of the site was substantially reduced, it was not rendered worthless, as is evidenced by the fact that it was subsequently sold in the open market.' See further B. Wegener, Ch. ECtHR.

### II.2.2 Sacrifice for the Public Benefit

Another criterion refers to unequal treatment of the burdened property holders. The idea is that one group of proprietors is taken out of the general public and made to serve the public's interest. The group is asked to bring a special sacrifice for society, this being a reason for compensation.<sup>81</sup> Sometimes, this criterion is somewhat formalized by pointing to whether the measure is general, i.e. equal for anyone, or specific, i.e. burdening only a few.<sup>82</sup>

The use of the sacrifice concept does not imply that in the relevant cases the principle of equal treatment is breached. The measure itself is considered to be justifiable, only the compensation is possibly due.

### II.2.2 Weighing up the Gravity of Impact and the Public Interest

A regulation rendering the property unprofitable or requesting a sacrifice for the public interest is readily subject to compensation in some jurisdictions. In others the encroachment does not by itself trigger compensation but may be legitimated by an overriding public interest such as, in particular, environmental protection.

While the ECtHR and CJEU jurisdiction<sup>83</sup> as well as many national courts<sup>84</sup> have applied such balancing test in many judgments, transnational investment arbitration has struggled with the problem for some time. While earlier panel decisions were exclusively based on the gravity criterion, called sole effects doctrine, more recent ones have complemented this by weighing the impact up with the public interest pursued by the regulation.<sup>85</sup> This concept is called police power doctrine. It appears that the combination of both: onus and public interest, is the better solution. One might even add the equality criterion to the test allowing sacrifices of property interests if the public interest pursued is particularly important.<sup>86</sup>

The possibility to disregard an encroachment for overriding reasons of public interests have in the recent past of budget cuts played a major role in relation to the restriction or even dissolution of rights to governmental subsidies.<sup>87</sup> In the

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<sup>81</sup> See notably the Netherlands where this is called the *égalité*-principle (J. Jans, A. Outhuijse, The Netherlands, sec. C).

<sup>82</sup> P. Pagh, Ch. Denmark, sec. A 1.

<sup>83</sup> See analysis of B. Wegener, Ch. ECtHR, sec. C. 1 a) and of J. H. Jans/ A. Outhuijse, Ch. CJEU, sec. D. 1.

<sup>84</sup> See, e.g., See P. Pagh, Ch. Denmark, sec. A 1.

<sup>85</sup> See further O. Fauchald, Ch. Arbitration, sec. 4.

<sup>86</sup> It appears that the Dutch Circular on Damage Compensation can be read in these terms. Cf. J. Jans, Ch., A. Outhuijse, Ch. The Netherlands, sec. B and C.

<sup>87</sup> R. Knez, Ch. Slovenia, sec. 7 and B. Iwanska, M. Baran, Ch. Poland, sec. 4.3., citing related recent judgments.

environmental policy realm this has affected subsidies for nature protection<sup>88</sup> and for the production of renewable energy.<sup>89</sup>

### II.2.3 Sectoral Legislation and Case Law

Legal systems are not always clear about the precise quality of the criteria for onerous use restrictions. Some just posit a rule of compensation that can readily be applied. Others posit such rule as a higher level constitutional requirement that is addressed to the legislator rather than being operational.

Given the elusiveness of abstract criteria for onerous and thus compensatable restrictions of property use it is of course helpful if the legislator itself decides when compensation shall be due, and to what extent. Many legal systems do take such decisions in a large variety of sectoral laws.<sup>90</sup> The courts that may be invoked in the process of application of the laws may then reinterpret them in the light of constitutionally or otherwise principled constructions, or even hold them unconstitutional.

One example of sectoral legislation and judicial reconstruction is land use and nature protection. As mentioned earlier some jurisdictions follow a principle of 'situational binding' of the land. A principle of protecting vested and profitable practices is often applied in addition, which means, for instance, that a farmer who has exploited her land in profitable ways, say mowing the grass twice a year, may claim compensation if nature protection measures only allow one mowing, thus significantly reducing her income. If however the farmer has not exploited an area that later became a valuable habitat of birds she cannot claim compensation because the area is 'bound' by its nature. This is even the case where governmental restrictions of land use is increased over time to protect the valuable habitat.<sup>91</sup>

Land-use for the construction of buildings also poses problems of accommodating conflicts between property use and regulation in the public interest. The major criterion applied by jurisdictions is the protection of vested interests as weighed against the importance of the public interest. For instance, if a proprietor lawfully built a house and is by new land-use planning or technical requirements ordered to remove it, hindered to extend it or asked to renovate it at significant costs, this may trigger compensation or at least the granting of a generous

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<sup>88</sup> See, for instance, Z. Mikosa, Ch. Latvia, sec. E, citing a judgment of the Latvian constitutional court on cutting back compensation payments for damage caused by protected species.

<sup>89</sup> See R. Knez, Ch. Slovenia, sec. H and I. Jankarova, J. Hanak, V. Vomacka, Ch. Czechia, sec. E.

<sup>90</sup> See, for instance, B. Iwanska, M. Baran, Ch. Poland, sec. I; G. Bandi, Ch. Hungary, sec. G.; P. Pagh, Ch. Denmark, sec. A 2.

<sup>91</sup> See E. Scotford, Ch. UK, sec. G. See also J. Jans/ A. Outhuijse, The Netherlands, sec. B citing the Dutch Supreme Court on the introduction of pig quota for pig rearing undertakings.

grace period.<sup>92</sup> If however the land was not yet developed, hardly any jurisdiction recognizes a *ius aedificandi* as an intrinsic element of land property.<sup>93</sup>

Industrial activities may serve as a third example. EU and national regulation has rather strict rules even for already built and operated installations, stipulating that the operator must keep up with technological development empowering administrative oversight to take appropriate measures such as the modification of permit conditions orders to install better technology.<sup>94</sup> The basic idea here is that certain installations are intrinsically risky for human health and the environment so that the authorization and subsequent investment are not regarded as a fixed property position but rather as a privilege that is held open for new regulatory requirements. For this reason no compensation can be claimed.

### II.3 Preconditions and Effects

As any regulation encroaching on private property onerous restrictions must be based on a parliamentary law, pursue a public interest and comply with the principle of proportionality. It would be logical to also require that compensation is provided by the empowering law. This would imply that if no compensation is foreseen the law is unconstitutional and the restrictive measure void. If a damage has already been caused state liability for unlawful action would apply. Alternatively, if a law fails to provide compensation the courts may complement the law accordingly.<sup>95</sup>

If compensation is due most legal systems allow for some flexibility in adjusting the amount of payment to the character of the encroachment and the public interest pursued by the regulation. When there is a legitimate public interest which is not important enough to fully justify the encroachment on property it may nevertheless be considered as a reason to reduce the amount of compensation.

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<sup>92</sup> See e.g. for Germany G. Winter, Ch. Germany, sec. G. Compensation may even then be legally excluded in certain zones of high public interest, see e.g. for Latvia Z. Mikosa, Ch. Latvia, sec. G, citing a Supreme Administrative Court case that puts this into question.

<sup>93</sup> For the sophisticated example of Portugal see A. Aragao, Ch. Portugal, sec. E.

<sup>94</sup> See e.g. the Spanish construction of installations as continuous installations ('tracto continuo'), A. Garcia Ureta, Ch. Spain, sec. G. For an elaborate example of the powers of the supervisory authority see Z. Mikosa, Ch. Latvia, sec. C.

<sup>95</sup> In Germany the latter has been the solution practiced by the civil courts while the BVerfG appears to follow the former construction. See G. Winter, Ch. Germany, sec. C and I.

## 12. Dissolution of Property Positions Through Fundamental Policy Change

When a fundamental change of governmental policy requires that property positions must be dissolved, it would be very costly and thus an obstacle for innovative politics if compensation had to be paid. Some jurisdictions have tackled this problem and sought to find an answer in order to allow transformation of industrial and social practices on imperative social grounds.

One case decided in several jurisdictions concerns the removal of gravel and other minerals in view of groundwater and nature protection. Minerals on or close to the surface have traditionally been attached to land-ownership. The protection of groundwater and other concerns have led states to detach the exploitation right from the property, dissolve the right and establish a regime of prior authorization. Where the exploitation had already been subject to a permit regime and a permit had been obtained without time limits set, the old permits were dissolved and a new, more precautionary authorization regime introduced. The German BVerfG approved such fundamental reorientation construing it as a dissolution of rights that is not expropriation but a kind of determination of property content. It however stipulates that a time period must be granted to the addressee allowing her to gradually reorientate her business.<sup>96</sup>

This doctrinal construction is possible if one assumes that expropriation is conditioned on the transfer of property. Alternatively, if expropriation is construed to in principle also cover the dissolution of property rights, compensation can still be avoided if the original property position is more closely examined. It can be argued that the property position weakens by itself in times of basic change of social needs and political priorities so that at the time of the taking of the legal decision the constitutional legal protection is about to whither away considering also that a time period is granted for the adaptation to the new circumstances. The jurisprudence of the ECtHR can be read to have adopted this very solution. In *Fredin* where gravel exploitation was at stake the court points to the fact of a longer process of policy change arguing that the proprietor could not trust anymore in the perseverance of her permit.<sup>97</sup> *Jahn* can be read in similar terms. During the occupation of the later German Democratic Republic (GDR) by the Soviet Union land of noblemen who were considered to have collaborated with the Nazi regime were expropriated. The land was redistributed to individual farmers. Their offspring could only inherit the land if the heir continued the farming. In the last few years of the GDR the heritance right was extended to the heirs who did not continue operation. Two years later, after reunification, this right was again taken away as part of a comprehensive complex approach to land property questions of the GDR. The ECtHR ruled that

<sup>96</sup> G. Winter, Ch. Germany, sec. H, citing BVerfG 58, 300 (351). See also the Croatian Constitutional Court on the necessity to grant phasing out time in J. Ofak, Ch. Croatia, sec. H.

<sup>97</sup> ECtHR appl. 12033/86, no 42.

the inheritance right of the non-farming heirs was a right indeed but an uncertain one given the situation of ongoing fundamental policy change.<sup>98</sup>

When finding the correct doctrinal construction one should not lose sight of the more fundamental context. At stake is the ability of societies and their elected government to find and implement answers to new problems. Property cannot stand as a pillar if there is a historical landslide of law.<sup>99</sup> It must fall down, or, in other words, it should not make legal change so costly that the change cannot be realized. In the past when slavery was abandoned many states just forbade it, whilst others, in great injustice, made the slaves pay for their liberation. The same controversy took place in the times of liberation of dependent farmers from the bounds to their feudal lords. Land reform in socialist countries was one more historical move, which after the dissolution of the Soviet Union and Warsaw Treaty made succeeding states to largely acknowledge that historical fact.<sup>100</sup>

It may well be that we live in a time where the overexploitation of natural resources once more necessitates a fundamental and uncompensatable dissolution of many kinds of property rights. The stepping out of nuclear power is a case in point. The phasing out of nuclear power by some countries including Germany leads to a confronting property question: where the phasing out of nuclear power stations is motivated by reasons of energy policy change rather than of proven risks of the individual plant, would that be an expropriation according to a narrow construction of property and thus trigger huge compensation payments? Alternatively, would it be regarded as a case of fundamental change that is organized as a systematic phasing out not entailing compensation?<sup>101</sup> This example is no longer a hypothetical case and it shows the importance of environmental lawyers and lawyers generally revisiting their conceptions and protections of property rights in an era of radical industrial transformation on environmental grounds.

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<sup>98</sup> ECtHR, appl. 46720/99.

<sup>99</sup> Phrase taken from the 19th century socialist politician and lawyer Ferdinand Lassalle. Cf. G. Winter, *Über Pflöcke im wandernden Rechtsboden. Die Eigentumskonzeption des Bundesverfassungsgerichts und Ferdinand Lassalles Theorie erworbener Rechte*, *Kritische Justiz* 1986: 459 – 470.

<sup>100</sup> See G. Brunner, *Verfassungsrechtlicher Eigentumsschutz und Restitution enteigneten Vermögens in Osteuropa*, in: G. Manssen, B. Banaszak, *Wandel der Eigentumsordnung in Mittel- und Osteuropa*, A. Spitz Verlag, Berlin 1998. 29–68.

<sup>101</sup> See G. Winter, *The Rise and Fall of Nuclear Energy Use in Germany: Processes, Explanations and the Role of Law*, in: 25: 1 JEL (2013), 95 – 124. While the German phasing out of nuclear power is pending at the German BVerfG, interestingly the like Belgian phasing out has not been challenged at Belgian courts. See L. Lavrysen, *Ch. Belgium*, sec. G.