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INDEX

1. PROPERTY GUARANTEE AND ITS CONSTITUTIONAL CONTEXT

Article 14 of the Basic Law

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
(2) Property entails obligations. Its use shall also serve the public good.
(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.[1]

1.1 The Components of the Article 14of the German Basic Law

1.1.1 Protection of the right to property

The guarantee of property "protects the concrete existence of assets against unjustified encroachments by public authority. A general value guarantee of asset legal positions does not follow from Article 14.1 of the Basic Law".[2] Article 14 does not guarantee merely the monetary value or equivalent of property, its main aim is not to prevent the taking of

[1] Basic Law for the Federal Republic of Germany, Translated by:Professor Christian Tomuschat and Professor David P. Currie Translation revised by: Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag. https://www.btg-bestellservice.de/pdf/80201000.pdf.

[2] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 39 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

property without compensation but, rather, to secure the maintenance and protection of existing property relationships themselves, of existing ownership itself in the hands of the owner.

1.1.2 Institutional guarantee

The property guarantee in Article 14.1 sentence 1 is further understood as comprehending an institutional guarantee which recognises private property as a legal institution. Article 14.1 sentence 1 of the Basic Law "guarantees the legal institute of private property whose essential characteristics are its private benefit and the right to dispose of the owned object".[3] The constitutional "guarantee of the legal institute ensures a basic repertoire of standards which must exist so that the right may be regarded as `private property´".[4] As far as the details are concerned, the Federal Constitutional Court has repeatedly pointed out that "it is the legislator's task to define appropriate standards when establishing the contents of the right to property pursuant to Art. 14.1 sentence 2 of the Basic Law which ensure that its use and adequate exploitation correspond to the nature and the social importance of this right".[5] The "institutional guarantee of property" prohibits the legislature from impairing the essence and subsistence of the sphere of freedom that is based on the private laws of property. The constitutional positive guarantee of property as an institution is, therefore, a limit on limiting the right to property, i.e. a limit on both its legislative determination and expropriation.

1.1.3 Legislative determination of property rights

[3] See BVerfGE 24, 367 <389-390>; 26, 215 <222>; 31, 229 <240>).

[4] BVerfGE 21, 150 (155); 24, 367 (389); 91, 294 (308).

[5] See for example BVerfGE 31, 229 <240-241>.

Under Article 14.1 sentence 2 of the Basic Law, the legislature has the power to define the contents and limits of property. The legislature may also empower the executive to determine the content and limits of the legal position of property rights owners. On the one side, the legislature may not impinge upon the right to property in a disproportionate manner, but on the other side, the legislature may not totally or disproportionately disregard social restrictions on individual property.

1.1.4 Social obligation and public good

Pursuant to Article 14.2 of the Basic Law, private ownership is socially tied, it entails social obligations. The "social obligation"-concept is a "summary" and "token" of the permissible limits that the legislature may set on the scope of protection of the right to property pursuant to Article 14. 1 sentence 2 of the Basic Law.[6] Article 14.2 sentence 1, "property entails obligations", highlights the constitutional requirement (in Article 14.1 sentence 2) of the specific enactment of a statute and a provision intended to determine the content and limits of property.[7] Given the social "ties" associated with a property asset in modern society, the constitutional protection of property does not contain the protection of a right to use the asset for exclusively individualistic market-based maximisation of private

[6] *Walter Leisner*, Eigentum, in: Isensee/Kirchhof (eds), Handbuch des Staatsrechts, 3. Auflage, Band VIII, C.F. Müller, Heidelberg 2010, p. 358, para 143.

[7] *Leisner,* p. 358-9, para 143, 145. The social obligation clause has been the research subject of very instructive and interesting comparative works in English: *A. J. Van der Walt*, Constitutional property clauses: a comparative analysis,Juta, 1999. *Hanri Moster*, The constitutional protection and regulation of property and its influence on the reform of private law ownership in South Africa and Germany: A comparative analysis, Berlin, Springer, 2002; Alexander, Gregory S., Property as a Fundamental Constitutional Right? The German Example (2003), Cornell Law Faculty Working Papers. Paper 4. http://scholarship.law.cornell.edu/clsops_papers/4; *Rebecca Lubens*, The social obligation of property ownership: A comparison of German and U.S. Law, Arizona Journal of International & Comparative Law, Vol. 24, 2007, 389-449; *Gregory Alexander*, The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence, Chicago: The University of Chicago Press, 2006; Idem, The social-obligation norm in American property law, Cornell Law Review, Vol. 94, 2009, 745-819.

preferences and wealth without any regard to public interest. The core purpose of the fundamental freedom to property under Article 14 of the Basic Law is not the maximisation of individual wealth and freedom. The social obligation of ownership does not simply encompass the negative dimension of the minimal duty not to interfere with the legal interests of others or not to create a public nuisance, while benefiting from one´s ownership. It also expresses the idea that property rights are reasonably subordinate to the public interest.

1.1.5 Expropriation

The Federal Constitutional Court draws a clear cut distinction between regulation and expropriation. An individual´s property rights must be completely or partially removed in a concrete and specific manner. For the purposes of Article 14.3 of the Basic Law the Federal Constitutional Court defines expropriation narrowly as a legal measure that takes concrete (not abstract) and indivualised (not general) aim at property interests which are covered by Article 14.1 sentence 1 of the Basic Law and results in total or partial removal of specific subjective property rights from the hands of the owner (the owner does not keep the title to the property). Even if there is no formal transfer of the title to the property, the property must at least be used for the purpose of carrying out and implementing a specific and concrete policy project in the public interest. Expropriation is limited to the cases in which, according to the classical expropriation concept, goods are procured by the state (*Güterbeschaffungsvorgang*) and are used for the realisation of a specific project in the public interest.[8] Expropriation must take place through a legal measure. Factual measures do not constitute a valid expropriation in the constitutional sense even if they are aimed at the taking of specific assets.

1.2 The constitutional context of the property guarantee

1.2.1 Democratic and social federal state

[8] BVerfGE 102, 1 (15); Baulandumlegung 104, 1 (9) ; BVerfG, 1 BvL 8/07 vom 21.7.2010, Absatz-Nr. (1 - 108), para 87 http://www.bverfg.de/entscheidungen/ls20100721_1bvl000807.html

Article 20.1 of the German Basic Law defines the Federal Republic of Germany as a democratic and social federal state. These are principles and goals for the public authorities to pursue through legislation and regulation. Article 20.1 of the Basic Law does not create subjective rights for the citizens. Pursuant to Article 28.1 sentence 1 of the Basic Law the constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law. This does not mean that the German Basic Law is not neutral regarding particular economic ideas, principles or systems, but, although the Basic Law is silent on economic matters, it does create a general framework not only for a legal order governed by the rule of law but also for a social legal state that develops a sense of responsibility and feels concerned with the question whether basic needs of its citizens are provided.

1.2.2 Human dignity and image of man

Additionally, Article 20.1 is to be interpreted in association with Article 1 of the Basic Law which guarantees the respect and protection of human dignity: "Human dignity shall be inviolable. To respect and safeguard it shall be the duty of all state authority". The commitment to a social welfare state has to be understood in close connection with the commitment of public authorities to ensure an adequate level of human dignity. Additionally, pursuant to Article 2.1 of the Basic Law every person has the right to free development of her/his personality "insofar as she/he does not violate the rights of others or offend against the constitutional order or the moral law". The right "to free development of the personality" is not independent of community. In fact, the image of man in the German Basic Law is rooted in the link between individual and social order. The Basic Law´s commitment to the social state principle, to the principle of human dignity and to the image of man as a member of community is important for the property guarantee in Article 14 of the Basic Law.

1.2.3 Property, personal autonomy, and legal system

The Federal Constitutional Court understands property in connection with the protection of personal liberty of the holder of this fundamental right and human dignity. The Court states that "(t)he guarantee of property is to ensure the holders of the fundamental right a degree of freedom under property law and hence to enable them to lead their lives on their own responsibility."[9] The property guarantee enables the holder of property rights to lead a self-governed life and to develop his/her personality as a responsible and autonomous member of society. In the case of the property rights of forced labourers during the Second World War the Federal Constitutional Court noted that "(i)t is hard to imagine property claims with a stronger personal connection than the settlement claims of persons who literally had to work for dear life."[10]

The connection of property with personal liberty is also emphasised in the "East German expropriation case". The Court states: "The right of ownership, in addition to the institutional guarantee, has an aspect directed to actual exercise of freedom in a period of time. A person who is excluded by a foreign sovereign power from disposing over his or her property in the long term, where this exclusion is legitimate under public international law, loses his or her legal position as owner. If the use of the property is excluded for a long period as the result of measures relating to it by a state power that is foreign but that has territorial jurisdiction, there is no connecting factor giving rise to the fundamental right to property in Article 14 of the Basic Law."[11]

[9] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 39 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

[10] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 55 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

[11] BVerfG, 2 BvR 955/00 of 10/26/2004, paragraphs No. (1 - 162), at para 74, http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html.

Additionally, property is deemed to "remain(n) dependent on an existing legal system that structures and guarantees it". [12] A radical change of a legal system can destroy reliance on continuity and set aside the principle of non-retroactivity. In a period of transition from one legal system (the socialist GDR regime) to another (to a free market economy), according to the Court, the property owners could not rely on the continuity of their legal title.[13] The importance of the connection of the right to property with human dignity becomes, for example, apparent in the interpretation of the Article 143.3 of the Basic Law, which governs the claims to restitution of what are known as the former owners (*Alteigentümer*) for the expropriations by corporate bodies of the German Democratic Republic, by providing "for the irreversibility of interferences with property" in that territory (the former Soviet occupation zone): In her dissenting opinion a judge of the Federal Constitutional Court drew attention precisely to the dimension of human dignity underpinning the protection of human rights. The judge thought that "(i)t was necessary to examine whether the exclusion of restitution laid down in Article 143.3 of the Basic Law and the associated acceptance of the changes in ownership that took place violated the core of human dignity of fundamental rights of the complainants, which under Article 79.3 of the Basic Law may not be violated even by a statute amending the constitution."[14]

The right of inheritance as a legal institution and as an individual right is also important for this conception of property and its link to personal autonomy. According to the

[12] BVerfG, 2 BvR 955/00 of 10/26/2004, paragraphs No. (1 - 162), paras 74-75 http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html

[13] See for a critical analysis *Ulrike Deutsch*, Expropriation without Compensation – the European Court of Human Rights sanctions German Legislation expropriating the Heirs of "New Farmers", German Law Journal, Vol 6, 2005, 1367-1380, 1370-72; *Thomas Gertner*, Pending property issues in the new federal states of Germany - cause of the phenomenon of "sleeping owners", Eur J Law Econ Vol. 27, 2009, 1-13.

[14] BVerfG, 2 BvR 955/00 of 10/26/2004, paragraphs No. (1 - 162), para 154 http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html

Federal Constitutional Court "its function is to prevent private property, as the basis of a self-determined lifestyle, coming to an end on the death of the owner, and to ensure its continuation by means of legal succession."[15]

1.2.4 Concepts of property

There are three concepts of property in German law: private law, fiscal law, and constitutional law property. Fiscal law operates with a concept of economic or beneficial ownership. Pursuant to Section 39.2 of the Fiscal Code of Germany (*Abgabenordnung*), where a person other than the owner exercises effective control over an economic good in such a way that she/he can, as a rule, economically exclude the owner from affecting the economic good during the normal period of its useful life, the economic good is attributable to this person. Further for fiscal aims, in the case of fiduciary relationships, the economic goods are attributable to the beneficiary, in the case of transferred ownerships for security purposes to the security provider, and in the case of proprietary possessions to the proprietary possessor.

Legal ownership under private law is the right by which an asset belongs to the owner to the exclusion of all other persons. The legal owner of a thing may, pursuant to section 803 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. As far as property in a constitutional sense is concerned, the sources of property interests protected under Article 14 of the Basic Law are not limited to those interests that civil law defines as property.

[15] BVerfG, 1 BvR 1644/00 of 04/19/2005, paragraph No. (62), http://www.bverfg.de/entscheidungen/rs20050419_1bvr164400en.html

1.2.5 Property in a constitutional sense

1.2.5.1 A broad meaning

Property in a constitutional sense has a broader meaning than it has for private law purposes within the framework of the German Civil Code. The property guarantee under Article 14.1 sentence 1 includes a negative individual guarantee in the form of a fundamental subjective and enforceable right shielding the individual property owner against interferences by public authorities. Protected are property rights granted by the legal order. That includes share ownership.[16] It also includes the free use of property as well as the power and capability to dispose of and let third parties make use of it upon payment. The property guarantee protects not just "physically tangible things" but also "monetary receivables" as long as they have the "nature of an exclusive right", they are "based on the (right holder´s) efforts and serving as the material basis for personal freedom". "Money is coined freedom; it can be freely exchanged for things".[17] A distinction is drawn between property (*Eigentum*) that pertains to particular objects, and assets in general (*Vermögen*). Assets in general are not protected by the right to property.

1.2.5.2 Private law rights and claims

Basic Law's protection of property includes private-law rights and claims. The Federal Constitutional Court points out that in the private-law field, the protection of property basically extends to all rights having the value of an asset which the legal system allocates to the party entitled so that she/he may exercise the attached powers, however she/he

[16] BVerfGE 5, 290 (351).

[17] BVerfG, 2 BvR 1877/97 of 03/31/1998, paragraphs No. (1 - 109), para 92 http://www.bverfg.de/entscheidungen/rs19980331_2bvr187797en.html

wishes, for her/his own private use.[18] Thus, according to the Court, the property guarantee does not just protect a person's rights *in rem* or her/his rights against all other persons claiming an interest in the property; it also protects an individual's rights under the law of obligations.[19] The Constitutional Court noted likewise that "rights under the law of obligations which seek to compensate a person for reductions in his or her quality of life enjoy to a particularly high degree the security and protection afforded by the property guarantee."[20] In its ruling on the constitutionality of the exclusion of claims of forced labourers during the Second World War pursuant to the Act on the Creation of a Foundation "Remembrance, Responsibility and Future" (*Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"*), the Federal Constitutional Court held that the actions for damages for pain and suffering which the complainants derived from being forced labourers were claims under the law of obligations based on tort law and the law of unjust enrichment. In accordance with its case law the Court found that these claims are covered by the guarantee of property in Article 14.1 sentence 1 of the Basic Law.[21]

1.2.5.3 Public law rights

Basic Law's protection of property also extends to rights under public law "that individuals may assert and that have the value of assets". However, rights under public law only fall under the scope of protection of Article 14.1 of the Basic Law "if the individual who asserts such right has obtained a legal position that corresponds to the position of an owner". The Federal Constitutional Court stresses that "the legal position must be so strong

[18] See BVerfGE 83, 201 (209); 101, 239 (258); BVerfG, 1st Chamber of the First Senate, Order of 25 April 2001 – 1 BvR 132/01 –, NJW 2001, p. 2159 (2159).

[19] See BVerfGE 42, 263 (293); 45, 142 (179); 83, 201 (208).

[20] See BVerfGE 42, 263 (293).

[21] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 45 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

that the entire concretisation of its content, and the rule-of-law content of the Basic Law, preclude its being revoked without compensation". The Court considers as "the decisive standard for assessing whether a right may be regarded as a property" the question as "to what extent the right proves to be an equivalent of the holder's own achievement or to what extent it is merely based on its being granted by the state". At any rate, the constitutional protection of property is denied by the Court "to any claims under public law in which the fact that they are granted unilaterally by the state is not complemented by an achievement of the holder that justifies the protection of property".[22] The Court found that the scope of protection provided by the property guarantee can be extended to legal positions under a public law regulation that establishes "a legal framework for situations and types of behaviour in an economic context" in the following cases: When "(1) the content of legal positions that have, as yet, already fallen under the scope of protection provided by Article 14 of the Basic Law is reorganised; or (2) a legal position that has been created by the new regulation constitutes a specific compensation for a novel obligation or burden that is imposed at the same time".[23]

1.2.5.4 Patent right

The word property as used in the context of expropriation, refers to every legally protected position of monetary value regardless of whether it is of a corporeal or incorporeal character, also covering limited rights in a thing (servitudes, usufruct, mortgage, lien, interest of a pledge) or a chose in action (for ex. a claim for the delivery of a thing or for the payment of a sum of money). For instance, the constituting elements of copyright as prop-

[22] See for all quotations BVerfG, 1 BvR 2337/00 of 07/03/2001, paragraphs No. (1 - 45), para 21 http://www.bverfg.de/entscheidungen/rk20010703_1bvr233700en.html where the Court quotes: Decisions of the Federal Constitutional Court 18, p. 392 (at p. 397); 45, p. 142 (at p. 170); 48, p. 403 (at pp. 412-413).

[23] BVerfG, 1 BvR 2337/00 of 07/03/2001, paragraphs No. (1 - 45), para 22 http://www.bverfg.de/entscheidungen/rk20010703_1bvr233700en.html with reference to BVerfGE 45, p. 142 (at pp. 170-171).

erty within the meaning of the constitution include the axiomatic allocation of the proceeds of creative activity to the author by way of the provisions of private law, and the author's freedom to dispose of his/her rights in his/her own responsibility.[24] It is settled case law of the Federal Constitutional Court "that the work created by the author and the performance it embodies are property in the sense of Art 14.1 sentence 1 of the Basic Law" and "that the author's constitutional ownership guarantee results in his obligation to commercially exploit this `intellectual´ property".[25] The Court states that "one of the constituent characteristics of the patent right as property in the constitutional sense is the principle of the association of the valuable result of the creative activity to the patentee by way of private law standardisation and the patentee's freedom to dispose of this result at his own discretion".[26] This is what constitutes the core of the patent right which is protected by the Basic Law.

1.2.5.5 Future earnings and expectations

Future earnings and mere expectations are not covered by the property guarantee. The statutory possibility of receiving subsidies, for example, is no property under the terms of Article 14.1 of the Basic Law.[27] Article 14 of the Basic Law only protects legal positions assigned by statute. The property guarantee does not cover "the result of situative assessments on the part of the market players, even if these have major economic conse-

[24] BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1 - 69), para 60 http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.htm

[25] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 13 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.html

[26] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 21 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.htm

[27] See BVerfGE 97, p. 67 [at p. 83] with reference to BVerfGE 18, p. 392 [at p. 397].

quences".[28] The scope of protection of the property right covers only what has already been acquired or accomplished through one´s own individual effort and toil or capital investment. In the words of the Federal Constitutional Court: "Article 14.1 of the Basic Law only covers legal positions to which a legal subject is already entitled, but not opportunities or potential earnings still to come".[29] Therefore, in the "Glycol warning case", the provision of market-related information by the state was not found to impair the property right guaranteed by Article 14.1 of the Basic Law. The publication by the Federal Government of a list of wines in which diethylene glycol had been found for the information of consumers only impaired the sales potential of the wine sellers affected: "Whilst the legal entitlement to offer articles for sale is included in the acquired status quo which is protected via Article 14.1 of the Basic Law, the actual potential sale is not part of what has already been acquired, but falls under profit-making activities."[30] And "even if the mere turnover and profit opportunities or actual circumstances are of considerable significance" to the operation of the wine seller´s established, practised commercial enterprises, "in terms of property law, they are not assigned by the Basic Law to the protected status quo of the individual enterprise". The same applies, according to the Court, to the reputation of the enterprise, "at least where it refers to changes and favourable opportunities", as the reputation of the enterprise "continually re-establishes itself on the market by virtue of its services and by its self-portrayal, as well as through the evaluation by the market participants, and is hence subject to constant change".[31]

[28] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 42 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

[29] See for example BVerfGE 68, 193 (222) with further references.

[30] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 40 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

[31] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 41-42 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html with reference to BVerfGE 68, 193 (222-

2. LEGISLATIVE DETERMINATION OF THE CONTENT AND LIMITS OF PROPERTY

Pursuant to Article 14.2, "Property imposes obligations. Its use shall simultaneously serve the commonweal". The restriction on property´s free use, disposal or exploitation by the legislature is known as legislative "determination of the substance of ownership and its limitations" (*Inhalts- und Schrankenbestimmung*). For example, by assenting to the Monetary Union the German legislature determined the content and limits of monetary property within the meaning of Art. 14.1, sentence 2, Basic Law.[32]

2.1 Requirements of Article 14.1 sentence 2 of the Basic Law

2.1.1 Proportionality, Equality, and the principle of consistency in practice

Property regulations are legitimate only when they are introduced by the legislature itself or by public authorities empowered by the legislature. Such restrictions are justifiable in as much as they observe the principle of equality and the principle of proportionality. The legislature must put the interests of those involved and the public interest "in a just equilibrium and a well-balanced relationship".[33] This includes the following elements: The legislature must pursue legitimate public-interest aims. In view of the broad latitude which

223); 77, 84 (118); 81, 208 (227-228); 51, 193 (221-222); 68, 193 (222-223) and to the open "question of whether and to what degree the operation of an established, practised commercial enterprise is separately covered by the property guarantee as the actual summary of the articles and rights belonging to the assets of an enterprise".

[32] BVerfG, 2 BvR 1877/97 of 03/31/1998, paragraphs No. (1 - 109), para 97 http://www.bverfg.de/entscheidungen/rs19980331_2bvr187797en.ht

[33] see BVerfGE 87, 114 (138); 95, 48 (58); 98, 17 (37); 101, 239 (259); 102, 1 (17).

Article 14.1 sentence 2 of the Basic Law gives the legislature in determining the content and limits of property,[34] the concrete legislative enactment must be suitable and necessary to achieve the public interest aims pursued by the Act. Nor should be any equally suitable but less burdensome means apparent which the legislature could have chosen. Finally, the legislative enactment must be an appropriate and well-balanced adjustment of the conflicting interests.[35]

The interpretation of a legislative determination of content and limits of property rights must be based on the following standards: In cases where the interpretation and application of non-constitutional law allow for more than one interpretation, the Federal Constitutional Court emphasises that courts must give preference to the one which corresponds to the values enshrined in the constitution[36] and which grants the fundamental rights of all persons involved the broadest possible effect. The Federal Constitutional Court requires in this context that the application of the legal enactment take place "in keeping with the principle of consistency in practice (*Praktische Konkordanz*)". In this regard, respect for the legislature (Article 20.2 of the Basic Law: All State authority "shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies") requires an interpretation in conformity with the Basic Law which is consistent with the wording of the statute and preserves the fundamental aim of the legislature.[37] According to the Constitutional Court, the interpretation may not lead to an essential element of the legislative purpose being missed or distorted.[38]

[34] see BVerfGE 53, 257 (293).

[35] See the application of this test in BVerfG, 1 BvF 2/05 vom 24.11.2010, Absatz-Nr. (1 - 298), http://www.bverfg.de/entscheidungen/fs20101124_1bvf000205en.html

[36] See BVerfGE 8, 210 (220-221); 88, 145 (166).

[37] See BVerfGE 86, 288 (320).

[38] See BVerfGE 8, 28 (34); 54, 277 (299-300).

2.1.2 Protection of the existing legal status of property, and protection of property use

Article 14 of the Basic Law contains, apart from the institutional guarantee, on the one hand a guarantee that existing property rights will be preserved and will continue to exist against state interventionism (*Bestandsgarantie*), and on the other hand, a guarantee that a property owner is entitled to use and enjoy her/his property holdings (*Nutzungsgarantie*). Still, these two guarantees, i.e. the protection guarantee of the existing legal status of property rights and the guarantee of their use and enjoyment by the owner, are not of equivalent significance with regard to the limitations on property rights.[39] Whereas a violation of the first guarantee, i.e. a purposeful deprivation of property rights in the public interest, is normally deemed to be an expropriation, limitations on the use of property are considered as expression of a social obligation of the right to property. The use of property takes place to the benefit of the owner, but it must at the same time (*zugleich*), albeit not exclusively, serve the common good. When property use limitations are so intrusive as to give property a new quality, if property use by the owner becomes an altruistic, non-profit activity promoting charity, the public welfare or a specific task of the state, then the impact and intensity of the particular restriction is comparable to a deprivation of property rights. Use restrictions of this type would never be in line with the constitution without equalising payments or non-pecuniary mitigating arrangements. In such cases, an unpermitted alienation of the purpose of the right to property (*Zweckentfremdung*) takes place insofar as the owner is forced to use her/his property for a purpose other than that authorised by the constitution.

2.1.3 Specific nature of the affected asset

[39] Papier, Maunz/Dürig, Grundgesetz Juli 2010 Lfg. 59, at para 375.

The legislature must take into account the specific nature of the affected asset or right. For example, land is a non-extendable and indispensable good, increasing the responsibility of land owners with regard to public interest and society in general. The legislature must, further, take into account the importance and significance of the good or right for the owner. When property operates as a factor safeguarding the personal liberty of the individual, it enjoys a special status and protection. The ownership of means of production which gives the owner power over third parties has a clear social component that opens up a considerable leeway for legislative action and regulation. The police measures taken against the legal owner of a dangerous object can be considered as an unreasonable interference with the owner´s property right, if the danger to be averted stems from an uncontrollable natural phenomenon or from the public at large or from third parties, and the elimination of the danger would consume a substantial portion of the owner´s assets.

2.1.4 Personal dimension, social circumstances

The German Constitutional Court restricts the margin of appreciation of the legislature in as much as it requires a serious consideration of a range of aspects. The legislature has to realise a particular social model composed on the one side of the constitution´s guarantee of private property and on the other side of the social dimension of property use. For example, the Federal Constitutional Court maintained "that unlimited protection of the patent pursuant to the principles of freedom of research and of the social obligations connected with property is not justified in cases in which this hinders technical development".[40] The Federal Constitutional Court has, further, stated repeatedly that "the question of how far the legislature is entitled to go in determining the content and limits of a person´s legal position if it falls within the property guarantee cannot be answered without looking at the reasons that led to the person being in that legal position and looking at whether there is a personal

[40] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 30 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.html

or social connection".[41] The Court holds that "the limits on parliament's legislative powers are not the same", "for all areas". It considers that the "legislature's discretion is influenced in particular by the social and political circumstances that determine the content and limits on property".[42] "In connection with reparations and how to deal with damage and consequential damage caused by the war", the Court "has repeatedly emphasised the breadth of the legislature's discretion to make its own assessments and to legislate".[43]

To set a limit on the regulation of ownership, the Federal Constitutional Court ponders not only the economic impact of regulation on the owner´s individual freedom but also its consequence on her/his self-governed personality development, self realisation and dignity as a participating and contributing member of community in the context of social and ecological interdependence that characterises contemporary society. In particular, this will apply, as the Federal Constitutional Court points out, if the land property constitutes an essential portion of substantially all of the assets of the aggrieved owner as well as the fundamental basis for the owner´s and her/his family´s private lifestyle.[44] Given the fact that tenants often associate intimate aspects of self and personhood with their home and attach value and importance to it, the Federal Constitutional Court held that this attachment approximates a protectable property interest and recognised ownership rights in tenancy.

[41] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 55 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html quoting established case-law: BVerfGE 53, 257 (292); 102, 1 (17).

[42] See BVerfGE 101, 54 (76).

[43] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 57 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html quoting BVerfGE 13, 31 (36); 13, 39 (42-43); 27, 253 (284-285); 102, 254 (298).

[44] BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), para 40 http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html

2.1.5 Mitigating the impact of property determination by or pursuant to law

The legislature defines the content and limits of property if it determines in a general and abstract manner the rights and duties of the owners. The task of the legislator "does not only consist in securing individual interests but also in establishing limits to individual rights and authorisations which are necessary in the interest of the public good; the legislator must achieve an equitable balance between the sphere of the individual and the concerns of the public good".[45] In determining the balance between the content of the right to property and its limitations the legislature will not only have to weigh the private usability against the common good. In addition, the law must clarify under which conditions certain compensatory measures might be taken in order to mitigate the limitation on the property use. These prerequisites must be laid down in advance in the applicable law itself, they may not be specified just in the future by the court in which an action might be brought by the affected owner. In the event that the law contains merely a general clause authorising compensatory measures under conditions that are not specified sufficiently precisely the law is not in line with the constitution.

2.1.5.1 Non-pecuniary and pecuniary mitigating measures

When the individual owner is disproportionately burdened by the property regulation, a payment of compensation or non-pecuniary alleviating measures are necessary. In its Mandatory Sample decision the Federal Constitutional Court noted that some property regulations would only be proportionate if they provided for mitigating measures to soften excessive burdens on the property owner. The measure at issue obliged all publishers, including publishers of high-quality expensive art books printed to small editions, to provide

[45] See for instance BVerfGE 31, 229 (241-242).

at no cost one copy of each of their publications to the central library. The Court declared the regulation unconstitutional because, when applied to small editions of highly expensive books, the regulation violated the principles of proportionality and equality. Restrictions on the use of property stemming from legislation must be accompanied by mitigating measures when an otherwise constitutional enactment would cause a disproportionate sternness if applied to a specific owner or category of property owners. Payments provided for in such a mitigating provision are aimed at reducing the burden of the individual property holder. However, the measures equalising the disproportionate harshness of the impairment of a specific owner´s property rights must not necessarily be monetary. They encompass provisions for exemptions, transition periods, grandfathering clauses, or variances. When an equalisation payment is made, the amount of money paid is aimed at rendering proportionate and reasonable the interference with the property right. The provisions alleviating the regulatory measures must be provided for in the legislative rule itself in order to save the rule from invalidation. If the regulatory measure does not provide for a softening of the regulatory impact on the use of property, the property holder may attack the validity of the enactment on grounds of disproportionate burden. The legislature must foresee the possibility of disproportionate burden and provide for alleviating non-pecuniary and monetary measures that will have to be applied administratively ad hoc.[46]

2.1.5.2 Hierarchy of the mitigating measures

According to the Federal Constitutional Court the Article 14.1 sentence 2 of the Basic Law does not contain any general value guarantee of property rights.[47] Actually, there is a hierarchy of the measures mitigating the impact on property. The legislature´s top priority is to avoid any disproportionate interference with property, and particularly, any exces-

[46] BVerfGE 58, 137 (*Pflichtexemplar*).

[47] BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), para 38, http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html

sive limitation on the private usability of property assets. The guarantee of protection of the right holder against state interference (*Bestandsgarantie*) under Article 14.1 sentence 1 of the Basic Law requires first and foremost that a disproportionate impingement on property is avoided by means of transitional provisions, exemption clauses, derogations or variances. Pecuniary measures are only admissible when non-pecuniary mitigating measures are not possible or would only be possible with an unreasonable amount of effort and time. Apart from compensatory payments, pecuniary measures also include providing for the possibility to give the owner the right to require a takeover of the property holdings on the part of the state at their fair value.[48] On top of that, it is necessary to supplement the substantive clauses concerning the measures alleviating the impact on property with procedural provisions ensuring that the owner will really be able to choose between challenging a ruling of an administrative authority that implements the legal enactment, and accepting that ruling on the grounds that it is connected with a reasonable compensatory measure. The law must make such a choice procedurally possible.

Safeguarding (or validity protective) clauses (*salvatorische Klauseln*) that make it possible to escape the invalidity of a property regulation measure by paying a sum of money, do not constitute a linking clause in the sense of article 14.3 of the Basic Law. A compensation provision is compatible with the spirit and purpose of the linking clause only when the conditions under which such compensation could be paid are explicitly determined. However, norm validity safeguarding compensatory clauses can be interpreted (in conformity with the Article 14.1 sentence 2 of the Basic Law) as measures associating the determination of the content and limits of the right to property with the introduction of a claim for an equalisation payment for disproportionately aggrieved parties.[49]

[48] BVerfGE 100, 226, para 101.

[49] Papier, Maunz/Dürig, Grundgesetz Juli 2010 Lfg. 59, at para 378 c.

2.1.5.3 The private use test

The legislature has the duty to protect individual property holdings (Article 14.1 sentence 1) with regard to the public interest (Article 14.2). The legislature has sole competence under Article 14.1 sentence 2 to define the contents and limits of ownership, but pursuant to Article 19.2 of the Basic Law, in no case may the essence of a fundamental right be affected, and it is the Constitutional Court that, at the end of the day, defines the essence of the constitutionally protected property right. What must be still present after the legislative definition of the content and limits of the individual owner´s property rights is understood as the constitutionally safeguarded core field of the fundamental right of property that is deemed inviolable and may not be regulated away by the legislature. The essential core of property entails assets and legal positions that can be recognised as an object of property rights, as long as they are necessary to sustain a livelihood level, they have been acquired by means of the owner´s own labour and money, and they establish the expectation of continuous use in the future on the part of a reasonable owner and objective observer.[50]

The German Federal Constitutional Court developed in this context the concept of the "private usefulness and serviceability" (*Privatnützigkeit*) of the remaining core field of property rights, after the occurrence of legislative regulation.[51] The substance of the right to property finds its expression in the preeminent power to dispose and the private utility of property as the foundation of private initiative. From that point of view property is of importance for the safeguarding of the personal freedom of the owner. As long as the property of companies lacks this personal dimension the regulatory powers of the legislature are more extensive.[52] The private use-test, meaning that property must still remain privately usable after use restriction, is central for distinguishing between permissible and not permissible regula-

[50] BVerfGE 100, 226; 91, 294 (308).

[51] BVerfGE 100, 226 (241-2.)

[52] BVerfGE 102, 1 (17).

tions. This said, some vital property uses for the private owner must remain for a legal position to still deserve the name of private property. The owner must be able to select one, albeit not necessarily the most profitable use among various possible uses and to derive some, albeit not necessarily the maximum utility from his property. The private owner of a protected historical building may not be forced to take out part of the money she has been saving in order to ensure that she will bear the cost for preservation and maintenance of the property without having any benefit or receiving any emolument in exchange. The designation of a building as a monument creates an obligation for the owner to preserve and maintain that property and to obtain permits for any modified use, modification, restoration or repair.[53] Preservation requirements are proportional insofar as the expenses for them are coverable by the revenue of the property itself.

However, the private use test is not a panacea. In particular it is an open question that can only be decided ad hoc, whether what remains of the property after use restriction must refer to the private profitability of the property as a whole or to the remaining private profitability of a specific use the property has been put to.[54] This question can only be answered on a case by case basis. The answer turns practically on the point whether and what kind of pecuniary or non-pecuniary equalising measures are necessary in order to balance the burden, impact and intensity of a particular use restriction with the interests of the state or society.

2.1.5.4 Reducing property to an empty shell

Property becomes a "bare name" and it is reduced to an empty shell, when the owner can no longer obtain any reasonably estimable and worthy private use out of it. It is important to note, however, that against the backdrop of the formal expropriation concept

[53] BVerfGE 100, 226, 244 f.

[54] Papier, Maunz/Dürig, Grundgesetz Juli 2010 Lfg. 59, at para 377.

of the Federal Constitutional Court, if what is left from the right to property is a *nudum ius*, this is no longer per se an argument in favour of expropriation. The purpose of the dispossessing legal measure and the question whether the asset taken is actually used for the implementation of a specific public task are – at the latest since the decision[55] of the Federal Constitutional Court on the protection of private law-type pre-emptive rights - constitutive elements of the concept of expropriation. Therefore, in the absence of formal expropriation, if a legal measure reduces property to an empty shell, this is a problem of drawing the line between a legitimate and an illegitimate determination of the content and limits of the property right. Even though there is no formal expropriation, the level of protection granted by Article 14.3 of the Basic law in cases of formal expropriation must be taken into account, if the legislative content determination is to be held proportionate.[56] If the exposure of a land plot to noise is enhanced in such a way that it no longer meets the minimum quality and living standards for the owner, a legislative provision granting the owner a right to claim, if he so wishes, transference of property by means of expropriation and payment of compensation, would be a proportionate and appropriate response.[57]

[55] BVerfGE 83, 201 (1991).

[56] „Auch wenn eine verfassungswidrige Inhaltsbestimmung des "Eigentums nicht zugleich eine Enteignung nach Art. 14 Abs. 3 GG darstellt und wegen des unterschiedlichen Regelungsgehalts von Inhaltsbestimmung und Enteignung nicht in eine solche umgedeutet werden kann, ist das in Art. 14 Abs. 3 GG zum Ausdruck kommende Gewicht des Eigentumsschutzes bei der nach Art. 14 Abs. 1 GG vorzunehmenden Abwägung zu beachten“ (quotations omitted). BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), at para 44, http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html.

[57] BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html; Bundesverwaltungsgericht (Federal Highest Administrative Court), BVerwGE 129, 83 (89); 125, 116 (249); 87, 332 (383). See the planning approval decision providing for a right to be expropriated for specific landowners particularly exposed to aircraft noise: http://www.mil.brandenburg.de/cms/detail.php/bb1.c.155576.de and http://static.ludwigsfelde.info/content/wirtschaft/bbi/Planfeststellungsbeschluss.pdf

The problem of regulating property to nothing, is also to be seen within the context of the German system of remedies against public authorities: Firstly, it is settled case law since 1981 ("*Nassauskiesungsbeschluss*", Watershed Gravel Mining Decision of the Federal Constitutional Court) that any legislative determination of the content and limits of property pursuant to Article 14.1 sentence 2 of the Basic Law must be compatible with the principles of equality and proportionality.[58] Secondly, compensation for expropriation has no longer the function it used to have under the Article 153 of the Constitution of the Weimar Republic (*Weimarer Reichsverfassung*) as well as within the context of the case law developed first by the High Court of the Weimar Republic (*Reichsgericht*) and then by the Federal Supreme Court after the Second World War: Over that period of time claims of compensation for expropriation were practically the only legal remedy against legislative encroachments upon the right to property. Things are different now. Since legal protection for the affected owner is no longer restricted to monetary compensation, and since a legislative content determination that violates the proportionality or equality principle can be annulled by the Federal Constitutional Court, an extensive concept of expropriation is no longer necessary in order to guarantee the legal protection of the affected owner.

2.1.5.5 The right to be expropriated

The "right to be expropriated" or "claim to transference" is a legal instrument mainly in cases of partial expropriation, in the field of planning law and noise protection, and in historic preservation cases.[59] It constitutes a transfer of title claim of a landowner

[58] See on this point BVerfGE 58, 137 (147 et sequ.).

[59] See the case law of the Federal Constitutional Court with an analysis of the relevant case of the Federal Administrative Court (*Bundesverwaltungsgericht, BVerWG*): BVerfG, 1 BvR 3474/08 vom 15.10.2009, Absatz-Nr. (1 - 72), paras 50-52; http://www.bverfg.de/entscheidungen/rk20091015_1bvr347408.html; BVerfG, 1 BvR 1606/08 vom 29.7.2009, Absatz-Nr. (1 - 38), http://www.bverfg.de/entscheidungen/rk20090729_1bvr160608.html; BVerfG, 1 BvL 7/91 vom 2.3.1999, Absatz-Nr. (1 - 109), http://www.bverfg.de/entscheidungen/ls19990302_1bvl000791.html; BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html; BVerfG, 1 BvR

who can oblige the public authority to take over the title to the land and to pay compensation under application of the expropriation regulations. The Federal Administrative Court (BVerwG) coined the term of "constitutionally acceptable noise nuisance impact level" ("*verfassungsrechtliche Zumutbarkeitsschwelle*"), in determining the threshold above which the aircraft noise impact constitutes an insurmountable and untolerable disadvantage for the owner that can only be equalized, if the owner is given a right to be expropriated and the possibility to exercise it, if he/she so wishes.[60] In the event of a partial land expropriation the landowner is given the possibility to ask the expropriating authority to take over the whole of the land if the remainder after the expropriation cannot be used in an economic manner. Pursuant to section 92.3 of the Federal Building Code (*Baugesetzbuch, BauGB*)[61] the expropriation in part must pertain to a plot or a physically or economically cohesive property. The owner may demand that expropriation be broadened to cover the rest of the plot or the rest of the property where this is no longer capable of being put to building or economic use.

In planning law, when a binding land-use plan re-designates for public use a plot of land with an already existing and permitted private-type land-use, the owner may claim a transfer of title to the public authority (the municipality) as long as the re-designation leaves to her/him no reasonable economic use of the property. The owner that sees her private property rezoned for public purposes such as community use, green spaces, transport or utilities infrastructures or creation of spaces for measures for the protection, conservation and development of soil, of the natural environment and the landscape, has the possibility to claim transfer of title to these spaces to the extent that the designations make it unreasonable in

2232/10 vom 15.9.2011, Absatz-Nr. (1 - 55), http://www.bverfg.de/entscheidungen/rk20110915_1bvr223210.html.

[60] BVerwGE 125, 116.

[61] Available in english at http://www.iuscomp.org/gla/statutes/BauGB.htm.

economic terms for the owner to retain the property, or to continue to use it in the previous or some other permissible manner. This applies equally in cases where development projects are not permitted because they concern areas that are re-designated by a legally binding land-use plan for future public land-use. The rationale behind this is that, although the new public use will not be implemented immediately in the near future, it brings about a significant reduction or even the termination of the previous private-type use of the respective physical structure. Till the implementation of the new designated public use the landowner may not carry out investments that increase the value of the property unless the public authority agrees and the owner renounces in writing any rights to reparation for these investments. The land owner must show that the future implementation of the public land-use makes it economically inacceptable to continue the existing use (Section 40.2 Federal Building Code).[62]

The Federal Constitutional Court had to deal recently[63] with the question as to whether a land owner in cases of Section 40.1 of the Federal Building Code has – apart of a claim to be expropriated pursuant to Section 43.3 sentence 3 of the Federal Building Code – also a claim to compensation in money pursuant to Section 42 of the Federal Building Code following the withdrawal of a permitted use for the period until the implementation of the new building plan providing for public use spaces or until the transfer of property to the public use spaces. The Court found that the wording and purpose of Section 43.3 sentence 1 of the Federal Building Code are unambiguous. It sees the purpose in avoiding that land owners who see their land property rezoned for public purposes try to retain their land plots until

[62] Some examples: Verwaltungsgerichtshof Baden-Württemberg 23.05.2011, 8 S 282/11: claim of transference because of serious unfairness and excessive burden due to an easement; see on section 145. 5 sentence 1 of the Federal Building Code: exercise of the claim for transference of property only after denial of a development permit applying a by-law, KG Berlin Senat für Baulandsachen 09.04.2010, 9U 1/08 and BGH 3. ZS 07.07.2011, III ZR 156/10.

[63] BVerfG, 1 BvR 2232/10 vom 15.9.2011, Absatz-Nr. (1 - 55), http://www.bverfg.de/entscheidungen/rk20110915_1bvr223210.html

the definitive implementation of the new public use while receiving compensation in money for the sustained loss. The Court also found this interpretation of Section 43.3 sentence 1 of the Federal Building Code that excludes an additional compensation in money in line with Article 14.1 of the Basic Law. Regarding the question whether the transfer of title still is a proportionate compensatory measure for the removal of a private-type land use when there is no certainty whatsoever as to if and when the new building plan will ever be implemented or whether such implementation will still be by then in the public interest, the Federal Constitutional Court points out that the land owners should bring the case to the administrative courts. The Court states that it is the task of the land owners affected either to file an action to challenge the validity of the binding building plan (a by-law) whose legality can be reviewed by the Higher Administrative Court, or to file an action for mandamus to order the public authority to grant a planning permission to carry out an activity that contravenes the re-designation of the land for public use and to request, as a secondary claim, that the Administrative Court should declare unlawful and inapplicable the building plan. At any rate, the courts can neither render a disproportionate re-designation of a private-type land use proportionate nor render a building plan lawful that has become meanwhile devoid of purpose, by merely establishing ex post a duty to give compensation in money.

2.2 Examples of proportionate legislative determination of property

2.2.1 Planning and development law

The German planning law system draws a distinction between preparatory land-use plans that are prepared for a specific area of a municipality and are binding only on public authorities, and legally binding land-use plans that are developed out of preparatory plans and have the status of a municipal statute, a by-law, that constitutes a legal basis for the legitimate expectations, rights and claims of landowners.

Limitations on land property imposed by lawful planning decisions can trigger a liability for compensation pursuant to sections 39 to 44 of the Federal Building Code. Property owners are compensated for the effects of lawful interferences with their property rights.[64] Pursuant to Section 42.1 of the Federal Building Code, where the use permitted for a plot is withdrawn or changed and this triggers a not insignificant drop in the value of the property, the owner may demand financial compensation of an appropriate amount under the conditions laid down in the paragraphs 2 to 5 of this Section. Further, when land property that was initially zoned by a binding land use plan for a profitable private use is later specified for a public land use or for a less worthy private land use, landowners are affected in their property rights. The owner is to be compensated to the extent that property loss is suffered in the cases where a legally binding land-use plan comprising one or more of the fourteen public land-use classes listed in Section 40.1 of the Federal Building Code affects an existing private-type land use of the property. No liability for compensation is triggered when the designations are in the interest of the owner or for the purpose of complying with a legal obligation resting with the owner. Where the conditions contained in Section 40 are found, pursuant to 43.3 sentence 1 of the Federal Building Code, compensation is to be paid in accordance with Section 40. This section does not only include compensation in money but also the possibility of compensation by transference of title, i.e. the right of the owner to be expropriated.

Urban redevelopment law (sections 136-164b of the Federal Building Code) has an important impact on land property. Redevelopment measures serve the public interest by formally denominating the redevelopment area and specifying the general program of renovation to buildings and neighbourhoods (section 141), and by taking implementation measures that comprise the acquisition of land, the resettlement of residents and relocation of businesses, the improvement of the outward appearance and the replacement of buildings. All these measures are subject to written approval by the municipality. Owners of proper-

[64] *Gerd Schmidt-Eichstaedt,* The law on liability for reduced property values caused by planning decisions in the Federal Republic of Germany, Washington University Global Studies Law Review, Vol. 6, 2007, 75-101.

ties in the redevelopment area have to pay a countervailing levy for any increases in land value due to the redevelopment measures. On the other hand, sections 7h, 10f and 11a of the German Income Tax Act (*Einkommensteuergesetz*, *EStG*) provide for tax breaks for owners, according to which the costs for measures to be taken can be claimed as deductible expenditure. Sections 7h and 7i are subject to regulations with regard to monuments maintenance and redevelopment costs.

An example that shows the difference between those types of interference with property that must be tolerated without mitigating measures, and types of interferences that are permissible only with the payment of compensation, is the institution of the development freeze. This instrument of planning law brings about a temporary suspension of the permitted land use. It is adopted by the municipality as a statute for a first period of validity of two years with the possibility of extension by one year and, under special circumstances and with the approval of the competent authority, by another year. As building permits cannot be refused on the basis of a new or revised land-use plan that will come into force in the future, a development freeze deals with the risk that during the plan preparation procedure works that are inconsistent with the future plan are carried out. It serves the purpose of preparing a binding land-use plan by safeguarding the planning for the area to be covered by the proposed plan. For instance, it may stipulate that development projects may not be implemented or that physical structures may not be removed, and that no major or fundamental changes of a kind which could result in an increase in value may be made to plots and physical structures in respect of which changes do not require approval, permission or notification (section 14 I Federal Building Code). The development freeze expresses the social obligation of ownership to society during the first four years of its validity. In the event that a municipality needs more time for the planning process and a development freeze remains in force for a period of more than four years beyond the date originally set for expiration, this surpasses the proportionate limit of the landowner´s obligation to society. Therefore, aggrieved landowners are to be paid financial compensation of an appropriate amount in consideration of property loss which has been incurred as a consequence of this (section 18 Federal Building Code).

When a binding land-use places obligations in respect of planted areas and provided for the preservation of trees, shrubs, and other greenery and water bodies, or designates the planting of trees, shrubs or greenery, the owner may claim compensation as long as a significant drop in the value of the property ensues or the expenditures incurred go beyond the level required for the proper management of the property (section 41 II Federal Building Code).

Another example is the right to compensation of landowners for the downzoning of an already existing permitted private-type land use in accordance with the conditions of section 42 Federal Building Code. When an amended or new legally binding land-use plan withdraws a private land use or downgrades the permitted lucrative private type use of a land plot to a less profitable private-use category (below its existing use), the municipality amending the old or approving the new binding land-use plan is liable for compensation. However, this right to claim compensation has a time limit. Landowners have the right to develop their properties in accordance with the binding land-use plan´s designations for a seven-year period following the date when the plan came into effect, and only withdrawal or change of a permitted use within a period of seven years of its being permitted can trigger compensation. The level of compensation reflects the difference between the value of the property arising out of its permitted use and the value which emerges subsequent to the withdrawal or change of use. After the seven year period the land-use category of a plot may be changed without compensation under the conditions that there is no need of phasing-out the previous use, that the new private-use category is less lucrative than the previously permitted land-use, and that the latter is in accordance with the existing type of development. Making no use of existing development rights within seven years means taking the risk that permitted land-uses might be altered without any compensation. However, any town-planning decisions modifying or withdrawing previously permitted land uses cannot be based on the mere elapse of the seven-year period, rather, they must be justified by long-term town-planning principles and must also be free of balancing errors in order for them not to be challengeable on substantive grounds. Municipalities must compensate property owners even on expiration of the seven year-term when, as a result of the withdrawal or change of the permitted land-use, continuation of this use or any other possible commercial

uses arising from the actual use are rendered impossible or are severely impaired (section 42.3 sentence 1 Federal Building Code).

2.2.2 Noise protection

Proportionality of interference can be guaranteed by the provision of different policy levels. For example, the sections 41, 42, and 43 of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz, BImSchG*)[65] deal with the acceptability of adjacent public and private property uses, and especially of traffic noise, on the part of a landowner. At a first policy level, in the case of construction or major alteration of transport infrastructures (public streets or railways) "active" noise protection is required, i.e. provision must be made that the infrastructures do not involve any harmful effects on the environment caused by traffic noise which is avoidable; traffic noise could for ex. be contained through the use of noise protection barriers. If this is not possible because of technical or economic reasons, "passive" noise protection becomes necessary at a second policy level: The property owner affected by the exceeded sound-immission limits is entitled to claim adequate financial compensation covering the actual expenditure incurred for sound-proofing measures at the affected buildings, for example for the installing of double-glazed windows. If passive means of noise abatement prove insufficient and the property is no longer suitable for any use, the owner may submit a transfer of title claim against the public authority responsible for the construction of the transport infrastructure.

[65] Excerpts available in english at http://www.iuscomp.org/gla/statutes/BImSchG.htm.

The law on the protection against aircraft noise (*Gesetz zum Schutz gegen Fluglärm*)[66] provides for the establishment of noise protection areas in the surroundings of airfields which are subdivided, according to the extent of the noise impact, into two protection zones for daytime and one protection zone for night-time. Pursuant to Article 5 of the Act for protection against aircraft noise in the noise protection area no hospitals, homes for the aged, convalescent homes and similar facilities requiring equal protection may be constructed. Exceptions are permitted (Article 5.1 sentence 3 of the Act) if this is urgently required for providing the population with public institutions or for other reasons in the public interest and only if the buildings satisfy specific noise insulation requirements. Noise insulation requirements are authorised by statutory decree and must take into account the present state of noise insulation technology in building construction. Landowners are not allowed to construct houses in the defined zones of noise impact where airplanes take off and land at airfields. As far as the building restrictions with the establishment of zones of noise impact rescind the use of the property hitherto permissible and the value of the property is thereby reduced by more than an insignificant degree, the owner may raise claims for adequate monetary compensation. The owner may additionally claim compensation as far as the building restrictions reduce the value of any expenditure in the development of the property for building purposes which has been incurred by the owner trusting in the continuity of the land use (Article 8.1 of the Act). Pursuant to Article 9.1 of the Act, reimbursement of expenses incurred for structural sound insulation is provided with regard to specified sound pressure levels and military or civilian airfields. The owner of a property located in the night-time protection zone may receive reimbursement of expenses incurred for structural sound insulation for rooms which are used by more than an insignificant degree for sleeping (Article 9.2 sentence 1 of the Act). Compensation for impairment of the outside of the outside living area is equally possible (Article 9.5 of the Act).

[66] Act for Protection against Aircraft Noise (Gesetz zum Schutz gegen Fluglärm) in the version promulgated on 31 October 2007, BGBl. I p. 2550, English translation, unofficial text, Federal Ministry for the Environment,December 2007, Nature Conservation and Nuclear Safety, IG I 7, available at http://www.bmu.de/english/protection_against_noise/general_information/doc/40636.php

2.2.3 Taxation

According to the Federal Constitutional Court the Basic Law grants protection to all taxes relating to money already earned.[67] The imposition of income tax and business tax constitutes for the Court an interference with Article 14 I 1 of the Basic Law. The German income tax act (*Einkommensteuergesetz*) and the Trade Tax Act (*Gewerbesteuergesetz*) entail provisions that define the content and limits of property rights. The property guarantee does not cover the income earning process itself, but it protects its product, i.e. the increase of assets that may be recorded in the business balance sheet and the wage claims by employees or other legally protected benefits. These rights and assets that qualify as additional acquisition of property in the course of the tax period are the starting point for determining the measure of income and business tax liability. Although the tax payer has the choice to choose, from which assets and means the tax requirement will be fulfilled, this does not mitigate the fact that the acquisition of additional property rights in the course of the tax period is a prerequisite for taxation.[68]

Even though Article 14 of the Basic Law does not protect property against taxation in general, it does protect it against excessive and confiscatory taxation. A question the Federal Constitutional Court had to answer was whether a limit to taxation can be derived from the property guarantee. It is settled case law of the Court that tax payers can only invoke their right to property to protect themselves against taxation as long as an excessive tax burden with "strangulating" effects is found to be essentially equivalent to confiscation.[69] Strangulating taxation destroys the tax source and can hardly be qualified conceptu-

[67] BVerfGE 115, 97 (112-113).

[68] BVerfGE 115, 97 (111); BVerfG, 1 BvR 1031/07 vom 25.7.2007, Absatz-Nr. (1 - 68), http://www.bverfg.de/entscheidungen/rk20070725_1bvr103107.html.

[69] BVerfGE 78, 232 (243); 95, 267 (300).

ally still as tax. Beyond this unusual and extreme case two seminal rulings deal with the question of defining a constitutional limit to taxation.[70]

The Federal Constitutional Court introduced in 1995 a fifty-percent rule that was finally abandoned in 2006 by the Court itself.[71] According to this rule which was based on Article 14.2 of the Basic Law dealing with the social obligation imposed by constitutionally protected property, the tax load on assets should be limited to 50% of the yield on those assets.[72] The rule was understood as a defence of private property and a means of warding off excessive taxation by actually defining the upper limit of taxation and, at the same token, the minimum of subsistence and material welfare of an individual person that is allowed to be kept unencumbered by taxes. However, the fifty-percent rule could not be established as a general principle of tax law, let alone of all forms of public charges. In its 2006 ruling the Federal Constitutional Court abandoned the effort to find any a priori-standard for taxes and to derive any fixed limit of taxation from article 14.2 of the Basic Law.[73] By contrast, it held that limitations on the tax legislature result from the application of the proportionality-test (reasonableness). The Court adjusted the application of the principle of proportionality to taxation. According to the principle of proportionality, any state interference with the right to property must serve a legitimate purpose, must be the least intrusive means to serve this purpose, and must have a reasonable and adequate impact on the legal position of the

[70] See for ex. the reasoning of the claimant in BVerfG, 2 BvR 1387/04 vom 24.11.2009, Absatz-Nr. (1 - 98), http://www.bverfg.de/entscheidungen/rs20091124_2bvr138704.html; and further BVerfG, 1 BvR 1924/07 vom 7.4.2008, Absatz-Nr. (1 - 37), at para 35, http://www.bverfg.de/entscheidungen/rk20080407_1bvr192407.html.

[71] BVerfG, 2 BvR 2194/99 vom 18.1.2006, Absatz-Nr. (1 - 50), http://www.bverfg.de/entscheidungen/rs20060118_2bvr219499.html.

[72] *Andreas von Arnauld/Klaus W. Zimmermann*, Regulating government (´s share): The fifty-percent rule of the Federal Constitutional Court in Germany, Working paper series, No. 100, Helmut Schmidt University Hamburg, März 2010, 1-29.

[73] BVerfGE 115, 97 (114); BVerfGE 82, 159 (190).

owner. According to the Federal Constitutional Court, applying the tripartite proportionality test to taxation means that only the third part of the test is of interest. Since taxes serve a legitimate purpose (financing of state activities), and their ability to achieve that purpose as well as their necessity are deemed to be undisputed, the only issue to be considered is a balancing of interests (proportionality in the narrow sense) aimed at determining the reasonableness and fairness of the imposed tax burden.[74] The upper limit of taxation is the result of this weighing process. According to the Court adequacy of tax burden does not only depend on the rate at which a business or person is taxed on income, but it is at least also contingent upon the relation between tax rate and basis of assessment for tax. Further, the Court emphasised that the definition of different tax rates must be governed by the principle of equality of treatment with regard to public burdens and measured against standards of fairness in taxation. Both the principle of vertical fairness in taxation and the prohibition of excessive tax burden provide the legislature with no more than guidelines for defining tax rates and upper limits or favouring progressive or linear taxation as tool to redistribute wealth. The Court did not take into account any assessment from the point of view of economic science.[75]

Therefore the Court, in its 2006 ruling, derived from article 14.1 of the Basic Law - at least in cases of taxation relating to legal positions qualifying as property in constitutional sense - a limit prohibiting an excessive overall tax burden. Even high-income earners must be able to derive a private utility of particular and high profitability to them from their remaining income after taxes.[76] The Court also combined the idea of proportionality with a comparative perspective and distributive justice. It found that in the context of equality (Article 3.1 of the Basic Law) particular justifying reasons are necessary for the legislature

[74] Taxation must reach "a constitutional ceiling of an unbearable encumbrance" BVerfG, 2 BvL 1/00 vom 12.5.2009, Absatz-Nr. (1 - 52), at para 51, http://www.bverfg.de/entscheidungen/ls20090512_2bvl000100.html.

[75] BVerfGE 115, 97 (113 et seq.).

[76] BVerfGE 115, 97 (117).

to impose a tax burden on a majority of tax payers, if this tax burden is unusually high from the point of view of an international comparison and globalised tax competition.[77]

2.2.4 Bank levy against financial systemic risk

This case law became relevant in the aftermath of the financial crisis of 2007. In an expert opinion delivered on the constitutionality of the obligation on the German banks to contribute to the costs of future bank crises a violation of article 14 of the Basic Law by the German Restructuring Act (*Restrukturierungsfondsgesetz*) was discussed. That act entered into force in December 2010 and provides for the establishment of a restructuring fund, a public body managed by the Federal Agency for Financial Market Stabilisation (*Bundesanstalt für Finanzmarktstabilisierung*). The act introduces a bank levy that is technically not a tax and must be paid by all credit institutions with a German banking licence. They will pay the levy in the form of an annual contribution to the Restructuring Fund which will be financed that way and will be used as a reserve for the purposes of financing measures in order to deal with the restructuring of systematically relevant banks facing financial stress, and in particular when the very existence of such credit institutions is at risk. Details are regulated in the Ordinance on Contributions to the Restructuring Fund for Credit Institutions passed by the German Parliament and ratified (with amendments) on 8 July 2011 by the German *Bundesrat*. The obligation on banks to pay a bank levy is an interference with the scope of protection of the property guarantee (Article 14 of the Basic Law) in as much as the level of the levy is contingent on the extent of the liabilities of the credit institution liable to the levy and on the quantity and quality of the derivative instruments used by it. According to the case law of the Federal Constitutional Court the bank levy encroaches upon rights and assets that qualify as property in the sense of Article 14 of the Basic Law.

[77] BVerfG, 2 BvR 2194/99 vom 18.1.2006, Absatz-Nr. (1 - 50), at para 46, http://www.bverfg.de/entscheidungen/rs20060118_2bvr219499.html.

Since the Federal Constitutional Court rejects any ex ante fixed limit of taxation, the bank levy must be measured against the principle of proportionality and especially the proportionality in the narrow sense which implies an overall weighing of interests.[78] The bank levy serves a legitimate purpose: it is used to finance the Restructuring Fund which is the response to the financial problem that came to be known under the name "too big to fail". If the collapse of some credit institutions of systemic importance (very large credit institutions or relatively small institutions that are nevertheless considered to be of systemic importance because of their financial obligations and connections in the financial markets) would trigger a systemic risk for the financial system, establishing a self financed bank rescue fund is a legitimate aim in the public interest. The bank levy is able to serve this legitimate purpose. The establishment of bridge banks by the Restructuring Fund which is financed by the bank levy, and the possibility for systemically relevant banks to transfer their business in whole or in part to such bridge banks, are measures able to address, counter, and minimise systemic financial risks. Moral hazard is not enhanced but rather reduced through the establishment of the Restructuring Fund. Banks can no longer speculate that they will be rescued in a case of default. Rather, although they will not be exposed to a disorderly default that would pose a systemic risk and a domino effect on the market as a result of interdependencies, they know that their stakeholders and creditors are not set to be relieved from the costs and consequences of an orderly bankruptcy. The bank levy is also necessary in the sense that there is no less intrusive means equally serving the purpose of financing the restructuring of systemically relevant credit institutions by stabilizing their systemically relevant parts and assets. A voluntary self-regulation of the banking sector (instead of the obligation to pay a bank levy) would be less intrusive but would miss the target. While private banks have an interest to protect themselves against default, they are not

[78] See the discussion in the experts opinion: *Wolfgang Schön/ Alexander Hellgardt/Christine Osterloh-Konrad*, Rechtsgutachten zur verfassungsrechtlichen Bewertung einer Bankenabgabe nach dem Regierungsentwurf eines Restrukturierungsgesetzes, Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht, Abteilung für Rechnungslegung und Steuern, München available at http://www.tax.mpg.de/files/pdf1/bankenabgabe-gutachten.pdf.

interested in paying the costs for saving the financial system as such. The banking sector would not endogenize those costs without state intervention.

3. OLD EXPROPRIATION DOCTRINES AND THE NEW NARROW EXPROPRIATION CONCEPT

3.1 The role of the German judicial system

The public-private law divide that characterises the German legal order has had an impact on the evolution of the case law and the conceptual framework in the realm of property law. The judicial review of administrative regulatory measures and actions pertaining to expropriation fall within the jurisdiction of administrative courts. In case of dispute respecting the amount of compensation for expropriation, however, recourse is had to the civil courts (Article 14.3 sentence 3 of the Basic Law). Both courts have to deal with property law and to consider when a legal violates the fundamental right to property and when compensation must be paid. Additionally, as the Federal Constitutional Court has jurisdiction on questions about whether statutes, court decisions and administrative measures are consistent and in conformity with the Basic Law, the Federal Constitutional Court has to deal in particular with the constitutional concept of property and the function of private property as an indispensable legal institution. The obligation incumbent on the Federal Constitutional Court to act as a guardian over the Basic Law exists vis-à-vis all measures of German public authority, in principle also to those which give rise to the domestic application of Community and Union law[79] transpose[80] or perform Community and Union law. Therefore, all three jurisdictions have had to develop their own interpretation of the consti-

[79] See BVerfGE 89, 155 <171>; 123, 267 <329>),

[80] See BVerfGE 113, 273 <292>; 118, 79 <94>; BVerfG, judgment of the First Senate of 2 March 2010 - 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 -, NJW 2010, p. 833 <835>.

tutional property guarantee and to present their own definition of expropriation. The Federal Constitutional Court defines expropriation in a formal way: An expropriation may not take place accidentally, unintentionally, but rather, the state act must be especially intended to remove a property right from its owner. A partial or total removal of property from the hands of the owner, a transfer of property, must take place.

3.2 Old expropriation doctrines and their present day relevance

Apart from the private use doctrine (private use test) outlined above, the doctrine of individual sacrifice, the doctrine of a situation-specific approach to property limitation, and the doctrine of the intensity of the interference with property have been used by the Courts in order to draw the line between expropriation and non-compensable general limits on property.

The doctrine of individual sacrifice is based on the idea of the sacrifice of the individual for the public good. It qualifies expropriation as a breach of the principle of equality of all in relation to the discharge of public burdens, since it compels the individual property owner to make a special sacrifice by inflicting a special burden (*Sonderopfer*) on him/her. A measure going beyond general limits imposes such a special burden on the person concerned and constitutes, according to the Federal Supreme Court (*BGH*) the gist of expropriation.

The doctrine of a situation-specific approach to real estate ownership rested upon the limitations on the property resulting from the location and social context of the property object (*Situationsgebundenheit*). Some land plots or buildings were considered to be by nature burdened with a particular social obligation. Every land plot was considered to be characterised by its location, composition as well as inclusion in the landscape and the environment. This expressed the general limits imposed on ownership within the social context and an immanent limitation of the rights of the owner linked with the “situation” of the

object of property. Nowadays, however, "*Situationsgebundenheit*" is considered as a circular concept "*Zirkelbegriff*".[81] "*`Situation´ ist Beurteilungsgegenstand nicht Beurteilungskriterium*". "Situation" is the subject, not the criterion of the assessment. The norms are not inherent in the situation. In order to find out where the limits on the power of using and disposing of the property asset are to be set, an assessment of the conflict between the affected public interests and the relevant private property interests of the owner is necessary.[82]

The doctrine of the intensity of the encroachment or the severity of the burden imposed upon property (*Schweretheorie*) has been developed by the Federal Administrative Court: When the burden placed upon the property is so onerous that it goes beyond the border of the general reasonable limits on property, it is no longer bearable and should be considered as a material expropriation, and this without regard to the number of the affected owners and without the need of any comparison with other owners.[83]

In the wake of the abandonment of a wide ranging concept of expropriation by the Federal Constitutional Court these theories of distinction between expropriation and legislative determination of property have become irrelevant for defining expropriation. Nevertheless, they have not become obsolete, but they have found a new area of application in so far as they provide guidance in evaluating the permissibility and constitutionality of the legislative determination of property under Article 14.1 sentence 2 of the Basic Law. Although it is true that according to the case law of the Federal Constitutional Court a content determination of property rights can never turn into expropriation, such content determinations are

[81] *Walter Leisner*, Eigentum, in: Isensee/Kirchhof (eds), Handbuch des Staatsrechts, 3. Auflage, Band VIII, C.F. Müller, Heidelberg 2010, p. 370, para 176, 178.

[82] Walter Leisner, Situationsgebundenheit Des Eigentums: Eine Uberholte Rechtssituation, de Gruyter, Berlin, 1990.

[83] See for instance BVerwGE 32, 173 (179).

subject to limitation. The old expropriation doctrines are used to help distinguishing the cases in which a content determination of property rights expresses a non-compensable social obligation on property, from those cases in which a content determination is only proportional if equalisation payments or other non-pecuniary mitigating transitional arrangements are provided for. The range and degree of state intervention is an indispensable criterion in order to single out the cases in which a content determination of property rights is an expression of a social obligation on property and does not require any compensatory measures.

4. EXPROPRIATION

4.1 Requirements of Article 14.3 of the Basic Law

Article 14.3 requires that expropriation must be authorised by a valid law that makes provision for and determines the nature and extent of the compensation; additionally, the expropriation must take place in the common weal for a public purpose which is explicitly stated in the authorising law.[84]

The corresponding compensation must be provided for in the same statute authorising the expropriation. If these requirements are not met, then the legislative regulation does not amount to expropriation. If the law does not conform to Article 14.3 it will have to be declared unconstitutional. If a regulation imposes upon the owner a substantial cost or burden with little or no offsetting benefit, in other words, if the regulation has an expropriatory effect, because the owner cannot benefit from any of the advantages of a private use of her property, it is the validity of the legal rule as a whole, not just the lack and want of a compensation provision, that must be attacked. There is no room for courts to remedy the failure of the legislature to provide for compensation, the expropriation measure must be

[84] BVerfG, 1 BvR 2187/07 vom 8.7.2009, Absatz-Nr. (1 - 30), para 8-10 http://www.bverfg.de/entscheidungen/rk20090708_1bvr218707.html with further references to the case law on the standard of judicial scrutiny of expropriatory legal measures.

annulled. The question is whether the intention of the rule was to remove an asset from the owner or not. Expropriation must from the outset aim at and finally result in the total or partial deprivation of concrete property rights.

4.2 Compensation for expropriation and the linking clause

A statute of expropriatory nature that does not comprise an explicit compensation provision is unconstitutional. The courts may not complement the missing compensation provision. Rather, they have to refer the case to the Federal Constitutional Court pursuant to Article 100 of the Basic Law. In this way, both the Constitutional Court´s exclusive power to dismiss an unconstitutional statute and parliament´s budget autonomy are respected. The budget is not burdened with the costs of unforeseen compensation payments that are associated with the implementation of a prima facie constitutional statute, and the Federal Constitutional Court´s exclusive competence of rejection is not undermined by a judicial amendment of laws. As soon as the expropriatory measure becomes final and is no longer subject to appeal any compensation claim on the part of the affected owner will be dismissed. If the affected owner makes no use of her/his right to ensure a return to constitutional rule, she/he is not entitled to demand monetary compensation for a loss she/he could have averted by simply challenging the act of interference upon her/his right to property. As much as the violation of the linking clause, the breach of the constitutional commitment to serve the public interest makes the expropriation unconstitutional. That means that the aggrieved party is not entitled to compensation. Rather, the only possibility for her/him is to challenge the constitutionality of expropriation. The same is true when the principle of balancing the public and private interests involved is violated by the legal enactment determining the amount of fair compensation to be paid, no matter if that enactment performs the expropriation itself or empowers the executive to perform it.[85] The requirement that expropriatory laws must be linked to complementary compensatory measures, i.e. that expropria-

[85] See for a summary Pieroth/Schlink, Staatsrechte II, 2010, para 1023.

tion may only occur if compensation is provided for, does not apply to pre-constitutional laws.

The linking clause (*Junktimklausel*) requires that expropriation must be authorised by a law providing for compensation ex ante. This reverses the ordinary course of things usually valid in dealing with compensation in the context of a decision on a damages claim: In the field of liability proceedings the indicated course is to determine the amount of damages once the origin and quantum of damage have been assessed or, at least, the actual existence of damage has been proven. In expropriation matters the linking clause guarantees that expropriation will only take place once the nature and extent of the compensation has been determined in the authorising law. This has the function of protecting the expropriatee and promoting budget discipline by obliging the legislature to stipulate the compensation amount or the way of ascertaining, quantifying and liquidating that amount. This also has the meaning that expropriation cannot be an unintended result of state activity. Not only must the interference with the property right have been foreseen by the statute, the statute must in addition anticipate the qualification of the interference as expropriation and link it to an amount or a specific method for the calculation of compensation. The Federal Building Code, for example, sets out the legal requirements for expropriation, i.e. the purpose and subject of expropriation, the requirements for the admissibility of expropriation, the prerequisites for expropriation on urgent urban development grounds as well as the scope, limits and extent of expropriation (sections 85-92). The principles governing compensation are also specified; compensation can be determined on the date on which the expropriation authority applies for the expropriation or on the date on which possession of the asset is taken (sections 93-103). Recourse is had to market value.

4.3 Necessity of expropriation

The reason for expropriation must be legislatively determined through laws on federal or state level and not created by the executive.[86] For example, the Federal Building Code regulates expropriations for the purpose of urban development. Expropriation presupposes that an individual is deprived of her/his specific legal positions. The expropriation must be necessary for the attainment of an exactly defined public purpose. If the purpose of the expropriation is not fulfilled the expropriatee has a claim for restitution of the asset.[87] The requirements for the admissibility of expropriation are briefly and succinctly expressed in Section 87.1 of the Federal Building Code: "Expropriation is only admissible in individual cases where this is required for the general good and the purpose to be served by expropriation cannot reasonably be achieved by any other means."[88]

No expropriation is necessary if a purchase in the open market can reasonably be required, when the public project can be carried out equally well on public land, or when partial instead of total deprivation of property, for instance by creating a right *in rem* on real property, would be sufficient for the attainment of the public purpose. When the expropriation is performed on the basis of an executive act (*Administrativenteignung*)[89] there are more legal remedies available to the aggrieved party against the legal measure than in the cases when expropriation is performed on the basis of a legislative act which is only challengeable by making use of the extraordinary remedy of the constitutional complaint before the Federal Constitutional Court. That means that expropriation on the basis of a legislative

[86] BVerfG, 1 BvR 2187/07 vom 8.7.2009, Absatz-Nr. (1 - 30), para 9 http://www.bverfg.de/entscheidungen/rk20090708_1bvr218707.html

[87] BVerfGE 38, 175 (179).

[88] See BVerfG, 1 BvR 2187/07 vom 8.7.2009, Absatz-Nr. (1 - 30), para 12 et sequ. http://www.bverfg.de/entscheidungen/rk20090708_1bvr218707.html for a constitutional review of the application of this section.

[89] BVerfGE 100, 226 (239); 102, 1 (15) settled case law. BVerfG, 1 BvR 242/91 vom 16.2.2000, Absatz-Nr. (1 - 69), paras 41-43, http://www.bverfg.de/entscheidungen/rs20000216_1bvr024291.html.

act is not necessary if an "administrative expropriation" is feasible, unless the latter would be connected with extensive and significant disadvantages for the common good which could only be countered and resolved by a legislative enactment.[90]

Expropriation is held as a measure of last resort that may not occur if the state can go for other less extreme measures that are still available to serve the public purpose. Although no expropriation can take place exclusively for the benefit of a third party, it can advantage private persons while serving the public weal. If a property asset was expropriated for a public purpose but it comes out later that the expropriated asset has not actually been used for the purpose stated in the authorising law, it must be returned to the expropriatee even if compensation was paid. The expropriatee has to pay compensation to the state that may not exceed the market value at the time of the initial expropriation.

4.4 Expropriation for the public good

The purpose of expropriation is to fulfil certain public tasks. However, not every deprivation is expropriation within the meaning of the Article 14.3 of the Basic Law. "If by depriving an individual of her/his legal position the legislature intends to settle private interests, then its legislative enactment will be a determination of the content and limits of property".[91] Expropriation is not deemed promoting private interests if public authorities are availing themselves of private law tools to fulfil their public duties, or when a private person is making use of private forms of organisation to fulfil a public task.[92] The deprivation of property assets is not deemed to serve to promote private interests alone, when it of-

[90] BVerfGE 95, 1 (22).

[91] see BVerfGE 101, 239 (259); 104, 1 (10). BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 – 77, 53), http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

[92] BVerfGE 66, 248 (257).

fers new potential for profit-making and innovation in order to ensure the improvement of economic structures and employment situation within the country. The Federal Constitutional Court requires that these aspects of public welfare be explicitly differentiated and mentioned as part and parcel of such structural policies as well as objectives of the relevant legislative expropriatory enactment.[93]

4.5 Amount of the compensation

The amount of the compensation for expropriation must be determined by establishing an equitable balance between the public interest and the interests of those affected and involved. The legislature will have to set limits on the amount of compensation payable to the aggrieved person in accordance with the request of balancing the public and private interests involved, whereas the executive will have to implement and fulfil the legal framework by specifying the compensation amount within the limits laid down by the legislature. In case of dispute regarding the amount of compensation recourse may be had, pursuant to Article 14.3 sentence 4 of the Basic Law, to the ordinary courts which will also have to observe the requirement of a fair balancing between the public and private interests involved. Under the weighing of interests principle no payment of a token compensation would be allowed, and no full compensation at a fair market value would be necessary.[94] Between these two extremes, the courts, in determining the amount of compensation, will have to take into account to what extent the expropriated property has been achieved or acquired through the owner´s own work or, rather, it was due to a series of lucky coincidences and governmental arrangements and measures. The significance of an owner´s own investment of work or money in a property use is illustrated by § 154 I Federal Building Code. If benefits accrue to the owner of a property situated within a formally designated redevelopment area, without any exertion on her/his side, merely from the enactment of a zoning regula-

[93] BVerfGE 74, 267 (287 et sequ.).

[94] BGHZ 67, 190(192).

tion that substantially raises the market value of her/his property from one day to another by improving the infrastructure of the redevelopment district in the public interest, then an elimination of this windfall, of the planning profit, is held legitimate.[95]

Pursuant to Article 14.3 sentence 2 of the Basic Law the compensation for expropriation must be determined by a statute establishing an equitable balance between the public interest and the interests of those affected, i.e. the owners. The Federal Constitutional Court does not adopt an exclusively market value oriented approach in the calculation of compensation. The owner must not receive an amount of compensation commensurate with the full market value of the asset which is expropriated. Section 194 of the Federal Building Code provides that market value is the price that would be paid in a usual transaction at the time when the assessment is made, taking into account the existing legal circumstances, and the condition and location of the property, without having regard to any extraordinary or personal circumstances. Characteristics pertaining to the person of the owner are only exceptionally taken into account, as compensation concentrates on the removed property asset and not on personal factors.

Expropriation remains a measure of last resort: For example, in areas designated by municipalities as protected social environments, the demolition of a building is allowed if its preservation would impose costs that cannot be covered from the current income. If the municipality excludes demolition of the building, then owner expropriation is possible under section 85.1 sentence 6 of the Federal Building Code. In cases when a municipality claims land for public purposes it will take the property from the owner by purchase, after negotiations, or, if there is dissension, by expropriation.

5. CASE LAW ON THE DISTINCTION BETWEEN CONTENT DETERMINATION AND EXPROPRIATION

[95] See for ex. section 154.1 BauGB.

The distinction between **partial expropriation** and extensive limitation of use through legislative determination of the content and limits of property is not always easy. A legal position can be an object of expropriation if it is susceptible of legal independence and severance. If an asset is legally not susceptible of severance and independence, a necessary prerequisite for the performance of a sovereign purchase of goods, and hence for expropriation within the meaning of Article 14.3 of the Basic Law, is missing. The encumbering of land property with a right *in rem* constitutes a partial deprivation of property rights. The mandatory legal measure fulfils here the function of a private agreement creating the rights in rem. A partial expropriation can only withdraw those rights *in rem* that could also be object of a private agreement.[96] In the same way, the deprivation of granted hunting rights through reduction of a hunting district by reason of highway construction is deemed to be an expropriation.[97]

Reparcelling and land consolidation constitutes an expropriation as long as this process deprives people from their land in order to improve and reshape agricultural structures in the public interest in procedures under the **Law on land consolidation** (*Flurbereinigungsgesetz*). If the reshaping of large agricultural areas is viewed to serve the private interest of farmers, it is to be considered as a content determination of property. The Federal Constitutional Court left this question open in a first decision. In a further decision it noted that the qualification or reparcelling as expropriation or content determination play no role in determining the nature and extent of compensation (*in natura*) which must be paid in this case anyway. The plots and parcels that are given to the owner must be of the same agricultural utilisation value (and not of the same market value) as those taken.[98]

[96] BVerfGE 45, 297 (339).

[97] BGH, NJW 2000, 3638 et seq.

[98] BVerfGE 74, 264 (279); BVerfG, 1 BvR 851/87 vom 8.7.1998, Absatz-Nr. (1 - 13), http://www.bverfg.de/entscheidungen/rk19980708_1bvr085187.html

The **Federal Water Resources Act** (*Wasserhaushaltsgesetz, WHG*) did not expropriate land owners when it introduced the obligation to obtain a permit for the use of ground water.[99] The legal measure did not take concrete and individualised aim at removing the right to use ground water from the sphere of influence of a specific land owner. Rather, the Federal Constitutional Court understood the measure as a general and abstract determination of the content and limits of land ownership so as to exclude in general ground water. The constitutional guarantee of the legal institution of property is not encroached upon, when the use of resources that are essential to the common weal, like water, is regulated and placed under the authority of the public legal order, rather, than left completely to the market forces to allocate. For that reason, a legislative act does not take from landowners any right that includes ownership of water below the ground surface and that they ever had under the Article 14, in subjecting to a permit system the individual landowner´s ability to exploit groundwater. As the individual use of groundwater affects the whole community, subjecting the landowner´s right to use groundwater to regulatory censure or approval is compatible with the guarantee of the legal institution of property. Pursuant to § 905 BGB, the right of the owner of a parcel of land extends to the space above the surface and to the resources below the surface. While the Federal Constitutional Court does not question that this is true for private law purposes, it takes another view from the perspective of public and constitutional law, by focussing on the constitutionally safeguarded core field of property and by putting the relation of individual freedom to common weal in the limelight.

The Federal Administrative Court took the same stance on the removal of the right to extract specific mineral resources from the bundle of rights concerning surface land ownership pursuant to the **Federal Mining Act** (*Bundesberggesetz*).[100] Similarly, the virtual impossibility for **small garden plot owners** to cancel the lease agreements under which the plots were held by residents of urban communities for recreational reasons is not

[99] BVerfGE 58, 300 (332 et seq.)

[100] BVerwGE 94, 23 (27).

an expropriation of the garden plot owners but a re-adjustment of the determination of the content and limits of their property.[101]

Equally, a law prohibiting the **raising of rents** more than 30% in order to protect lessees of residential property in view of the shortage of living space does not constitute a partial deprivation but a legislative determination of the content and limits of property.[102]

The **reallocation procedure of property rights** which is codified in Part Four of the Federal Building Code and aims at creating plots suitable in terms of location, shape and size for built development or for other uses, is not considered a "taking", but rather a legislative definition of property rights - despite the fact that this zoning instrument is also explicitly (section 61 of the Federal Building Code) associated with the withdrawing of real property rights – on account of a lack of public interest: the reallocation serves the interest of the land owners.[103]

The **slaughtering** of a herd of infected (or suspected of being infected) animals, for example pigs found infected with swine fever, might be held to correspond to an expropriation at first sight as the owner suffers a total deprivation of a specific ownership position. Yet, notwithstanding the total withdrawal of property rights, the duty on the part of the owner to slaughter a whole herd of infected bovine animals is an expression of the social obligation of property owners to avert hazardous situations stemming from their property holdings. The establishment of this duty did nothing more than to put the owner in her/his place within the legal restrictions associated with police responsibility. This is also true for

[101] BVerfGE 52, 1 (26 et seq.); 87, 114 et sequ. *Jarass*, Inhalts- und Schrankenbestimmung oder Enteignung? - Grundfragen der Struktur der Eigentumsgarantie, Neue Juristische Wochenschrift (NJW) 2000, 2841, 2845.

[102] BVerfGE 71, 230 (247).

[103] BVerfGE 104, 1 (9 et seq.); *Evelyn Haas*, Die Baulandumlegung - Inhalts- und Schrankenbestimmung des Eigentums, NVwZ 2002, 272; BVerfG, 1 BvR 1512/97 vom 22.5.2001, Absatz-Nr. (1 - 39), at para 31, http://www.bverfg.de/entscheidungen/rs20010522_1bvr151297.html; see also BVerwGE 3, 246 (249).

the slaughtering of animals simply suspected of being infected, in that police responsibility of owners is directly linked with a danger or risk, not with its materialisation.[104] Under section 66 of the **German Contagious Animal Diseases Act** (*Tierseuchengesetz*) compensation is paid to owners for their losses due to the slaughter or culling of animals.

Similarly, the following interferences with the right to property have been considered by the Federal Constitutional Court as determinations of the content and limits of the affected property rights, and not as expropriation: Steps that are taken to minimise the **impact of noise emissions** on affected neighbouring properties[105], measures taken to modernise, renew, regenerate and revitalise urban real estate[106], property use restrictions or prohibitions based on legal requirements on environmental protection[107], the establishment or expansion of protected nature conservation areas[108], and the pooling of forestry plots to create a hunting area unit[109]. The level of noise and exhaust fumes emitted by the traffic that a land owner must tolerate[110] is also a question of property use limitation.

When a person is responsible for an dangerous object in her/his ownership the police are entitled pursuant to the German police laws to take measures against the legal owner or the person exercising physical control over the dangerous object. The land use re-

[104] BVerfG NJW 1999, 2877; BVerwGE 94, 1 (4).

[105] BVerfGE 72, 66 (76).

[106] BVerwG NJW 1996, 2807.

[107] BVerwG NJW 1996, 409.

[108] BVerwG DVBl. 2001, 931.

[109] BVerfG, 1 BvR 2084/05 vom 13.12.2006, Absatz-Nr. (1 - 43), http://www.bverfg.de/entscheidungen/rk20061213_1bvr208405.html

[110] BVerfGE 79, 174 (191).

strictions under the **Federal Legislation on Soil Conservation** (*Bundes-Bodenschutzgestz, BBodSchG*) regarding the police responsibility of land owners, tenants, lessees or usufructuaries do not amount to expropriation. Rather, they establish the duty on the land owner to safeguard public security by preventing or averting a danger emanating from her/his land ownership.[111] The seizure of goods belonging to a sentenced person cannot be an expropriation since the legal measure is not aimed at the procurement of goods but at the prevention and avoidance of indictable offences.

When a public law regulation provides for the exclusion of civil law rebuttal claims against restrictions on the right to property the exclusion of those rights is deemed to be a content determination of the right to property. For example, under the **German Air Traffic Act** (*Luftverkehrsgesetz, LuftVG*), section 11 in conjunction with the **Federal Immission Control Act** (*Bundesimmissionsschutzgesetz, BImSchG*), section 14, local residents do not have the right to request cessation of operation at any installation on grounds of civil-law claims to protection against the detrimental impacts emanating from a piece of land on neighbouring premises. Civil-law claims are not excluded if they are based on specific titles and the licence for the plant or installation has become final. Otherwise, it is only admissible to insist on precautionary measures to prevent the detrimental impacts. If such measures are not technically feasible according to the best available techniques or not economically viable, only compensation may be claimed. Local residents tried to stop the extension of an airport runway by questioning the compatibility of this public law rule with Article 14 of the Basic Law. The Federal Constitutional Court held that this rule was a content determination of the right to property, and that it was in line with Article 14.1 sentence 2 of the Basic Law.[112]

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[111] BVerfG, 1 BvR 242/91 vom 16.2.2000, Absatz-Nr. (1 - 69), http://www.bverfg.de/entscheidungen/rs20000216_1bvr024291.html case annotation *Sachs*, Juristische Schulung (JuS) 2000, 1219.

[112] BVerfG, 1 BvR 218/99 vom 11.11.2002, Absatz-Nr. (1 - 23), http://www.bverfg.de/entscheidungen/rk20021111_1bvr021899.html; see case annotation by *Oberrath*, in Juristi-

Under the **Federal Telecommunications Act** (*Telekommunikationsgesetz*, TKG), section 76, the owner of property which is not a traffic way within the meaning of the act cannot prohibit the setting-up, operation and renewal of telecommunications lines on his property insofar as a line or installation on the property which is secured by a right is also used for the setting-up, operation and renewal of a telecommunications line and the usability of the property is not thereby additionally restricted on a lasting basis, or the property is not or is only insignificantly affected by such use. This provision is also regarded as a determination of the content of the right to property in line with Article 14.1 sentence 2 of the Basic Law.[113] This is so especially as subsection 2 of the same section guarantees the proportionality of the impingement on property by providing for appropriate pecuniary compensation from the operator of the telecommunications line if the use of the property or the income therefrom is affected to an extent more than can be reasonably expected by the setting-up or renewal or by maintenance or repair work of the telecommunications line. In addition, with regard to extended use for telecommunications purposes, non-recurrent pecuniary compensation may be claimed, provided that there were hitherto no lines that could be used for telecommunications purposes. In the event of damage to the property and its accessories caused by exercise of the operator´s rights, the latter shall remedy the damage at his expense.

As far as **intellectual property** is concerned, the legislature, in the framework of the regulation requirement under 14(1) sentence 2 GG, "has the obligation to define appropriate standards which ensure that its use and appropriate exploitation correspond to the na-

sche Arbeitsblätter 2003, 373; see also BVerfG, 1 BvR 1502/08 vom 4.5.2011, Absatz-Nr. (1 - 61), http://www.bverfg.de/entscheidungen/rk20110504_1bvr150208.html.

[113] BVerfG, 1 BvR 142/02 vom 26.8.2002, Absatz-Nr. (1 - 36), http://www.bverfg.de/entscheidungen/rk20020826_1bvr014202.html; for a case annotation see *Sellmann*, Die eigentumsrechtliche Inhalts- und Schrankenbestimmung - Entwicklungstendenzen, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2003, 1417, 1422; *Kischel*, Wann ist die Inhaltsbestimmung ausgleichspflichtig?, Juristenzeitung (JZ) 2003, 604 – 613.

ture and the social significance of this right". The Federal Constitutional Court considers that this also applies "accordingly to the patent right".[114] The interpretation and application of copyright law must, in particular in view of the large number of technological innovations in this area, guarantee the property rights of authors under Article 14.1 of the Basic Law.[115] It is the duty of the legislature, in establishing the extent of copyright under Article 14.1 sentence 2 of the Basic Law, to lay down appropriate standards which ensure use and exploitation of the right in conformity with its general nature and social significance.[116] In this regard, the legislature is afforded a relatively wide margin of discretion,[117] while interferences with the author's right of exploitation may be justified only by significant public interest.[118]

In the proceedings for constitutional review of the **Act on the Regulation of Genetic Engineering** (*Gesetz zur Regelung der Gentechnik* - Genetik Engineering Act - GenTG) amended by Article 12 of the **Act on the Reform of the Law of the Protection of Nature and Landscape Conservation** (*Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege*) of 29 July 2009, BGBl I p.2542) the Federal Constitutional Court found that section 36a GenTG is compatible with Article 14 of the Basic Law. Apart from the aim to prevent risks to environment and health, the German Genetic Engineering Act also pursues the aim to ensure the co-existence of the cultivation of genetically

[114] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 13 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.html with reference to BVerfGE 36, 281 <290-291> concerning the inventor's technical intellectual property right which has not yet gained patent right status.

[115] BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1 - 69), para 64 http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html

[116] See BVerfGE 31, 229 (240-241); 79, 1 (25)

[117] See BVerfGE 21, 73 (83); 79, 29 (40)

[118] See BVerfGE 31, 229 (243); 49, 382 (400); 79, 29 (41)

modified and non-genetically modified crops side by side. § 36a GenTG ensures that a defensive claim and claim for compensation under the law relating to neighbours exists in the cases in which introductions of genetically modified organisms (GMOs), in particular in the form of unintended cross-pollination, materially interfere with the use of another person's land (§ 36a.1 to 36a.3 GenTG). The Court noted that section 36a GenTG governs the legal relations between neighbours with neighbouring plots in conjunction with section 906 and section 1004 of the Civil Code (BGB). Section 906 BGB deals with the introduction of imponderable substances and 1004 provides for a claim of the owner to require the disturber to remove the interference with the ownership and a claim to seek a prohibitory injunction. Sections 906, 1004 BGB are considered as part of the provisions on the content and limits of property under Article 14.1 sentence 2 of the Basic Law.[119] Like sections 906, 1004 BGB, section 36a GenTG lays down rights and duties of the landowners in general abstract terms and is thus a provision determining the content and limits of ownership under Article 14.1 sentence 2 GG.

The Court held that the provision complies with the constitutional requirements to which any provision determining content and limits of property is subject. The provision was found to be sufficiently specific, and the legislature made all the material decisions itself. The Court also found "unobjectionable" the legislative reference to provisions on the labelling of products which are promulgated by the European legislature and may be amended by it. There were no objections to section 36a GenTG as a content and limits determination of property, with regard to the constitutional requirement of certainty despite the fact that the “groups of cases of material interference have not been exhaustively laid down”, as this takes account “of the large number of conceivable sets of circumstance”, and it would be impossible "at present" to foresee and conceive of the "complete range" of these groups of cases.

[119] See BVerfGE 72, 66 (75-76).

6. IS EXPROPRIATION AN OBSTACLE TO REFORM?

6.1 Stability and dynamism through legislative content determination

The legislature embarks on the task of determining the content and limits of property rights in a dynamic manner, i.e. in adapting the scope of protection of the property guarantee to the evolution of the social and economic context while taking into consideration the relevant constitutional values. Therefore, legislatively defined property rights can be re-determined under new circumstances. Every time an area of law is to be regulated anew, the legislature is not limited to the alternative of either preserving old property interests or taking them away in exchange for compensation. The constitutional guarantee of property does not imply that a property interest, once recognised, would have to be preserved in perpetuity or that it could be taken away only by way of expropriation with compensation. Thus, a limitation of property rights that has historically been considered as justified by the social obligation and common good in Article 14.2 of the Basic Law can appear as no longer justifiable as a reasonable social obligation against the backdrop of new economic, social or demographic circumstances. The burden on the private owners and lessors of small garden plots can become disproportionate, if the social conditions that made necessary the severe limitation of their right to terminate the garden lease change and the garden plots lose their original social purpose, as they are no longer used for economic, but only for recreational reasons.

The Federal Constitutional Court examines whether an intended encroachment upon property rights constitutes a legislative determination of the content and limits of the right to property or an expropriation, on the basis of the subject matter, the purpose, scope and object to which the legislative enactment refers.

When the rights and obligations of property owners are affected abstractly and at a general level, not in a concrete and specific manner, by a measure serving the public interest without thereby depriving the owners of their affected property rights, the Federal Constitutional Court qualifies this as a limitation on property, not as an expropriation because the latter necessitates a formal property transfer and a removal of the asset from the sphere of influence of the owner. The fact, for example, that the nuclear energy providers are hit

very hard by the impingement on their property rights still does nothing to alter the legal qualification of the infringement.

Some scholars have expressed the concern that under the guise of a general reform the legislature would actually pursue another specific policy goal, a hidden agenda as it were, aimed not at re-determining an already existing property system as a whole, but, rather, at removing concrete property rights from the sphere of influence of specific energy companies.[120] The legislature could simulate an overall regulation or arrangement of the property order, in order to deprive specific companies and their shareholders of their assets.

It is further possible to maintain that in the case of a reform project the legislature should not confine itself to restating the content and limits of property, but it should additionally flank this re-determination of an already settled property order with a formal expropriation: this should be particularly the case, the argument goes, in order to avert the bypassing of the constitutional guarantee for property, when the reform impinges on "old" vested property rights which are not simply restated, but removed altogether.[121] Some of the elements of a reform, if regarded in isolation, i.e. taken separately from the whole body of the reform, might be regarded as expropriation of pre-existing property rights.

The case-law of the Federal Constitutional Court does not support this view, however. A determination of the content and limits of property does not turn into expropriation, not even if the effects of the interference with the property rights equate to a dispossession of the owners. A legislative determination of the content and limits of property must avoid imposing a burden to the owner contrary to the principles of proportionality and equality, and must take into account the legitimate expectations of the owner. A determination of the content and limits of property rights will not alter its legal nature if it induces effects

[120] *Udo Di Fabio*, Der Ausstieg aus der wirtschaftlichen Nutzung der Kernenergie, 1999, 136.

[121] *Fritz Ossenbühl,* Verfassungsrechtliche Fragen eines Ausstiegs aus der friedlichen Nutzung der Kernenergie, in: Archiv für Öffentliches Recht (AöR) 1999, 1, 27.

equivalent to or even more serious than formal expropriation. While it is true that expropriation does require the removal of a legal position protected by article 14.1 sentence 1 of the Basic Law, the reverse is not the case: not every removal of property rights constitutes an expropriation in the sense of the Federal Constitutional Court´s case-law.[122] Additionally, the Court pointed out that the deprivation of old property rights is in line with the constitution when taking place in the course of a reform and redetermination of the existing property order. The Court also confirms the right of the legislature to withdraw legal protection from a subject matter that used to be legally protected as part and parcel of a hitherto valid system of property ownership which can be reshaped and delimited anew as a result of a reform. This does not make the deprivation of old property rights much easier for the legislature: It should take place within the framework of a redetermination of the content and limits of an existing system of property ownership and be compatible with the principle of proportionality and equality.

6.2 Reliability and protection of previous vested rights

The right to property includes the protection of reliance upon vested rights. The question for the Federal Constitutional Court is whether the property owner could legitimately place reliance upon the continuation and maintenance of a legal situation or legislation. The property owner is only protected, if she/he has contributed labour or capital to set legally permitted and intended use in motion: a legally authorised possibility of property use must have undergone consolidation by already being carried into effect. The special reasons of public interest that argue in favour of the impingement upon vested property rights must be so significant that they claim clear priority before the reliance of the owner on the continuing application of her/his existing property rights. The permissibility of the

[122] BVerfGE 102, 1 (15); 104, 1 (9); *Papier*, Maunz/Dürig, Grundgesetz, Art. 14, para 361.

state intervention depends on the significance of the legitimate public interest and objective.[123]

The Federal Constitutional Court stated in 1991 that expropriation does not come into play when previous vested property rights are abolished through a new law as part of a general reform of an entire legal field even though the abolished rights have no corresponding legal positions in the new system. *„Art. 14 Abs. 3 GG ist jedoch dann nicht unmittelbar anwendbar, wenn der Gesetzgeber im Zuge der generellen Neugestaltung eines Rechtsgebiets bestehende Rechte abschafft, für die es im neuen Recht keine Entsprechung gibt.“*[124] Yet the Court nonetheless also admits that in such particular cases the general sense of the Article 14.3 of the Basic Law must be taken into consideration by the legislature. The high constitutional significance of the right to property that is reflected in Article 14.3 of the Basic Law must, according to the Court, be taken into account in the balancing process between public and private interests. This is even truer if the legislative determination of the content and limits of the property rights is tantamount, with regard to its effects, to a partial or total disappropriation.[125]

6.3 A debate on ownership unbundling

Against this backdrop it did not come as a surprise that the German discussion on ownership unbundling in energy sector was focused on property rights.[126] Ownership unbundling was thought to be by the European Commission in its 2006 legislative proposals set-up the most efficient way to achieve an open and equal access to networks and an effec-

[123] BVerfGE 83, 201 para 49.

[124] BVerfGE 83, 201, BVerfG vom 09.01.1991 - 1 BvR 929/89, para 45.

[125] BVerfGE 83, 201 para 50.

[126] See on regulation and grids from a German, European and comparative point of view *Michael Fehling/Matthias Ruffert* (eds), Regulierungsrecht, Mohr Siebeck 2010.

tive competition in the European energy markets. It was thought to be the optimal resolution of the conflict between commercial incentives of vertically integrated energy companies and the emergence of a level playing field that has not been yet established in Europe. However, the German view considered property guarantee under article 14 of the Basic Law as a major legal obstacle to imposing ownership unbundling in Germany. It was not seen as the appropriate means to achieve competitive energy markets. Similarly, the compulsory sale of shares or company capital was thought to affect share ownership to such an extent that the right to property is emptied of any private utility for the owner. In such cases, according to German understanding not just a regulatory measure with an expropriatory side-effect, but a direct formal expropriation would be necessary and should be provided for in a legal rule satisfying the requirements mentioned in article 14.3 of the Basic Law.[127]

The expropriation thesis was deemed to be also supported by the ECJ case law, which considers the substance of the right to property as protected if compensation is provided for as long as the value of the investments made are taken into consideration. The inviolable substance of the right to property seems to be encroached upon, if there is no economic utility, no appreciable economic value of the asset left behind after the encroachment. Further it was argued that strict ownership unbundling would have been a deprivation of property in the sense of article 1 of the First Protocol of the European Convention of Human Rights. In the event that the formal ownership position of a network owner would be left untouched, but the owner would lose every chance of disposing of the network and of deciding about investing in it, this would amount to a de facto expropriation.[128] Besides, according to this reasoning, energy network operators are entitled to a larger protection under German law. German constitutional law protects apart from the right to property of the

[127] *Johann-Christian Pielow/Eckart Ehlers*, Ownership unbundling and constitutional conflict: a typical German debate?, European Review of Energy Markets- volume 2, issue 3, May 2008, 1-34, 22-6, 24.

[128] *Pielow/Ehlers*, 21-22, 26.

vertically integrated energy supply company also the right to property of private shareholders of such companies. By contrast, the Strasbourg Court has only exceptionally recognised the right to property of shareholders by "piercing the corporate veil".[129]

As a reply to this reasoning it was pointed out that the ECHR does not provide for the protection of the freedom to pursue an economic activity.[130] With regard to the right to pursue trade or professional activities, as long as the right bearer can continue to pursue her/his previous economic activity despite the regulation of that activity, the substance of that right is deemed to be protected.[131] Applying this to the situation of ownership unbundling would mean that the unbundling would simply affect the possibility of the energy producers pursuing network activities. Hence, the argument goes, companies, which are active in both production and transmission, would not be forced to give up all of their previous economic activities.

It must be noted that two more aspects, complementary to the expressed opinions, should be addressed: The first is that the Federal Constitutional Court can use Article 14.1 sentence 2 of the Basic Law to review property regulations inducing reforms (see below 6.4.3). The second is that the intensity and degree of interference and the value of what is left unregulated are related to a problem labelled "conceptual severance" in U.S. takings law (see below 7.3.4).

6.4 Is the German nuclear phase-out decision an expropriation? Some remarks

[129] *Pielow/Ehlers*, 20.

[130] *Kim Talus/Angus Johnston*, Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling', Journal of World Energy Law & Business, 2009, Vol. 2, No. 2, 149-154, 153.

[131] Joined Cases C-184 and 223/02, Kingdom of Spain and Republic of Finland v European Parliament and Council of the EuropeanUnion.

The Federal Constitutional Court´s narrow view of expropriation is focussed on the deprivation of the property rights of a single person for the common weal. The act must have an individual and concrete effect. Whether the withdrawal of unlimited legally binding operating licences for nuclear power plants amounts to an expropriation has been a highly controversial and debatable question.[132] At present, the nuclear phase out decision revives the old discussion and opens up a debate revolving around the question whether the legislative enactment must be measured according to the standards set for expropriation in Article 14.3 of the Basic Law. Expropriation presupposes that an individual is deprived of his or her specific legal positions; however not every deprivation is expropriation within the meaning of the Article.[133]

[132] The discussion was based on legal experts opinions: *Stefan Soost,* Salz statt Atommüll. Von der Instrumentalisierung des Bergrechts im Fall Gorleben, in: Forum Recht (FoR) 1997, 94; *Udo Di Fabio*, Der Ausstieg aus der wirtschaftlichen Nutzung der Kernenergie, 1999 (Legal expertise on behalf of the Bayernwerke); *Gerhard Roller*, Die Vereinbarkeit der nachträglichen Befristung atomrechtlicher Genehmigung mit Art. 14 GG, in: Zeitschrift für Umweltrecht (ZUR) 1999, 244; *Fritz Ossenbühl,* Verfassungsrechtliche Fragen eines Ausstiegs aus der friedlichen Nutzung der Kernenergie, in: Archiv für Öffentliches Recht (AöR) 1999, 1 (Legal expertise on behalf of the German federal government of the time); *Alexander Roßnagel*, Zur verfassungsrechtlichen Zulässigkeit eines Gesetzes zur Beendigung der Kernenergienutzung, in: Roßnagel, Alexander / Roller, Gerhard, Die Beendigung der Kernenergienutzung durch Gesetz, 1998 (Legal expertise on behalf of the Hessian state government of the time); *Bernhard Stüer / Sandra Loges,* Ausstieg aus der Atomenergie zum Nulltarif?, in: Neue Zeitung für Verwaltungsrecht (NVwZ) 2000, 9; *Erhard Denninger*, Befristung von Genehmigungen und das Grundrecht auf Eigentum, in: Hans-Joachim Koch / Alexander Roßnagel, (eds.), 10. Deutsches Atomrechtssymposium, 2000, 167; *Hans-Joachim Koch*, / *Alexander Roßnagel*, Neue Energiepolitik und Ausstieg aus der Kernenergie, in: Neue Zeitung für Verwaltungsrecht (NVwZ) 2000, 1; *Matthias Schmidt-Preuß*, Die Befristung von atomrechtlichen Genehmigungen und das Grundrecht auf Eigentum, in: Hans-Joachim Koch, / Alexander Roßnagel, (eds.): 10. Deutsches Atomrechtssymposium, 2000,153; *Frank Schorkopf*, Die „vereinbarte" Novellierung des Atomgesetzes, in: Neue Zeitung für Verwaltungsrecht (NVwZ) 2000, 1111; *H. Wagner*, Atomkompromiss und Ausstiegsgesetz, in: NVwZ 2001, 1089; *Matthias Ruffert*, Entformalisierung und Entparlamentalisierung politischer Entscheidungen, in: Deutsches Verwaltungsblatt (DVBl.) 2002, 1145.

[133] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 53 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

6.4.1 The amendment of the Atomic Energy Act

Pursuant to section 1 of the Act on the peaceful utilisation of nuclear energy and the protection against its hazards (Atomic Energy Act), last amendment of 8 November 2011[134], the purpose of the Act is "to phase out the use of nuclear energy for the commercial generation of electricity in controlled manner, and to ensure orderly operation up until the date of termination." Pursuant to section 7.1b, the electricity volumes "may be wholly or partially transferred to another installation"; they can be transferred from the nuclear power plants "also after their authorisation for power operation has expired".

However, before the last amendment of 8 November 2011, in December 2010 the amount of electricity allowed for production was extended by amendment of the Atomic Energy Act: Further electricity production rights equalling additional 12 years on average were granted. As a result, the Atomic Energy Act in its currently valid version has the following impact on nuclear industry: The additional electricity production rights granted in December 2010 are withdrawn: The electricity volumes are cut to the size of those granted in the Atomic Energy Act in 2002.[135] The seven oldest reactors and the nuclear power plant *Krümmel* are immediately shut down permanently. The three most recent nuclear power plants will be shut down by the end of 2022, and all other nuclear power plants will be shut down until the end of 2021 in a stepwise programme.[136] The Act finally reintroduced the

[134] English translations available of the Atomic Energy Act and Ordinances as well as of other safety codes and guides are documented for download at: http://www.bfs.de/en/bfs/recht/rsh/englisch.html; see further OECD, Nuclear Legislation in OECD Countries, Regulatory and Institutional Framework for Nuclear Activities, Germany, 2011, 4-31.

[135] *Axel Vorwerk*, The 2002 Amendment to the German Atomic Energy Act Concerning the Phase-out of Nuclear Power, Nuclear Law Bulletin No. 69, available at http://www.oecd-nea.org/cgi-bin/nlbsearch.cgi?wf=3251&q=Vorwerk&submit=Search&m=phrase

[136] On the several changes that took place in the policy of using nuclear energy in Germany during the last couple of years see BMU, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety/BfS, Federal

expropriation provisions which were deleted without replacement in 2002. These provisions allow the expropriation for public purposes of "erection and operation of installations for the disposal of radioactive waste as well for purposes of carrying out essential modifications of such installations or their operation" (section 9d of the Atomic Energy Act). The Federal Office for Radiation Protection is enabled to initiate an expropriation procedure for these purposes insofar as the expropriation is necessary.

6.4.2 Electricity production rights as property

Energy companies want reportedly to have the Atomic Energy Act declared unconstitutional or to sue with the International Center for Settlement of Investment Disputes (ICSID) in Washington D.C.[137] From the point of view of the constitutional property guarantee, the first question would be whether the amount of electricity from nuclear power which nuclear power plants are allowed to generate before they are permanently shut down, constitutes a property right in the sense of Article 14.1 of the Basic Law. The second question would be whether the additional electricity production rights granted in December 2010 and withdrawn in 2011 are an expropriation within the meaning of Article 14.3 of the Basic Law or a determination of the content and limits of the right to property of the power plants affected pursuant to Article 14.1 of the Basic Law. A dispossession law should, anyway, contain provisions for compensating those affected by the withdrawal of property rights. And, at any rate, the distinction between expropriation and content determination of property could not be based solely on the number of the property owners aggrieved. The Atomic Energy Act could not be deemed expropriatory simply because the nuclear energy industry in Germany consists of a relatively small number of power plants.

Office for Radiation Protection, Nuclear Regulatory Issues and Main Developments in Germany, 30 September 2011, pp. 1-11, available at http://www.bfs.de/en/kerntechnik/papiere/Germany_Nuclear_Reg_Issues_0911.pdf.

[137] Energiekonzerne ziehen vor Gericht, Frankfurter Allgemeine Zeitung, 02.11.2011, Wirtschaft.

Is the German phase out of nuclear energy and the limiting of the period of use of the (remaining) nuclear power stations a disproportionate impingement on the property rights of energy companies and their shareholders? On the one hand the legislature is required to define the content and limits of property rights in accordance with the proportionality test that is to be applied to all state interference; on the other hand it must be careful not to disproportionately disregard or leave out of consideration the social obligation-dimension of ownership. The impingement by the state upon the property of the power plants is proportionate if the legislature provides for an implementation of the exit strategy that contains transitional arrangements, hardship clauses, and a provision for variances or for exemptions making an appropriately differentiated application of the statute in certain circumstances due to specific pre-existing facts possible. Equalisation payments might also be necessary. However, the latter would not be a compensation for expropriation calculated according to the economic value of the property use or asset. Rather, it would be determined by a balancing test that weighs private investment and property use against the new perception of the general good.

6.4.3 Reform through proportionate regulation

The electricity production rights are not withdrawn in order to be used for implementing a specific project in the public interest. On the contrary, they are protected up until termination. After termination, they will not be needed to fulfil any public task, and will not be used for implementing any specific project in the public interest which is the distinctive feature of the Federal Constitutional Court´s formal expropriation concept. That means that the legal protection of the affected owners will have to revolve around the question of whether the revised Atomic Energy Act is a legitimate determination of the content and limits of property. They could first express doubts about the justification for treating similar nuclear power plants differently or about the safety-related relevance of the distinction between old and new nuclear power plants. Then, they could contend that the Act has only a veneer of proportionality as it destroys the economic value of their property: they could argue that the Act does away irreversibly with the rights necessary for the enjoyment of their property and deprives them of the benefits they could have expected from their investment without providing for any sufficiently long phasing-out period and mitigating measures ca-

pable of absorbing and compensating for the annihilating impact of the Act on the business operations associated with their power plants. They could further affirm that by their shutdown on the designated date the power plants will not have produced their allotted residual electricity quantity.

6.4.4 Protection of vested rights, investment risk, and mitigating measures

The compelling reasons for limiting the life spans of nuclear power plants or shutting them down would be evaluated in the light of the legislature´s assessment prerogative. In the light of the nuclear accident at the power plant Fukushima-Daichii, the German government decided to re-evaluate the risk of the use of nuclear power. Beforehand, the Reactor Safety Commission, an advisory body to the Federal Ministry for the Environment, had reviewed the safety of all German reactors. The review "indicated weaknesses for some plants regarding protection against some identified natural hazards as well as against airplane crashes". Further, a specific commission on "reliable energy supply" gave advice to the Government on ecological, economic and societal questions of a phase out of nuclear power in Germany.[138] Against this backdrop a challenge of the Atomic Energy Act would have the task to prove these commissions wrong, to show that the safety standards in German nuclear power plants are high and that no compelling reasons for abridging the life-spans of German nuclear power plants are discernible.

The nuclear power plants could claim protection for their vested rights. In particular they could claim protection of their legitimate expectations based on the amount of electricity allowed for production before their abridgment by the last version of the Atomic Energy Act. They could avail themselves of the Article 14.1 of the Basic Law to claim protection for reasonable reliance on the legal situation created by the German government´s pre-

[138] BMU, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety/BfS, Federal Office for Radiation Protection, Nuclear Regulatory Issues and Main Developments in Germany, 30 September 2011, p. 3.

vious extension of nuclear power production rights. They could claim protection of their legitimate expectations and safety of their investment against a "capricious" regulatory power including U turns: agreement signed in 2001, the coalition government´s commitment in 2009 to rescinding the country´s nuclear phase-out, and the recent agreement reached in September 2010 to give eight-year licence extensions for power plants built before 1980 and fourteen-year extensions for newer ones which was combined with the introduction of a nuclear fuel tax. The nuclear plant owners could claim compensatory measures for both cancelled upgrades and decommissioning costs following the subsequent contradictory policy changes in September 2010 and in March-May 2011. On the other hand, the government could argue that although such a quick change in the energy policy of the Federal Republic of Germany might have not been foreseeable, changes in this field had already become likely through political, social and cultural discourse in the country. Under these circumstances it could be deemed predictable that the occurrence of a nuclear accident would trigger at least a revision of safety standards and a state of regulatory flux and uncertainty. The question whether this should have necessarily culminated to the declaration of a three-month moratorium on nuclear power and the decision to close all reactors by 2022 is a matter of assessment within the context of a proportionality test.

The Atomic Energy Act provides that residual electricity production rights may be transferred - partially or in total - from one nuclear power plant to another, normally from an older and smaller plant to a more recent one. The utilities affected might argue that the Atomic Energy Act is designed to cause them to sell the electricity production rights at a distress price. The question for the Federal Constitutional Court would then be whether this mitigating measure, combined with a transition period, can suffice to render the impact on property proportionate or whether additional, more flexible, measures or even "equalising" compensatory payments are necessary to balance out the industry´s losses.

7. COMPARATIVE ASPECTS

7.1 Comparison with some aspects of European law

7.1.1Court of Justice of the European Union

In the case law of the ECJ, the justification of an interference with the right to property rests upon a balancing test which is very much alike that used by the German Federal Constitutional Court. ECJ has repeatedly noted that the right of property does not constitute an absolute prerogative. It may, on the contrary, in view of its social function, be subject to "appreciable restrictions". The similarity with the social obligation dimension in Article 14 of the Basic Law is evident. The ECJ applies a means-end proportionality test: the restriction on property cannot, with respect to the aim pursued by the authority applying them, constitute "a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right of property".[139]

Both the ECJ and the German Federal Constitutional Court acknowledge that not any restriction on the right to property must necessarily be accompanied by compensation. One reason for not paying compensation is, for instance, that the measures adopted do not deprive the owners of their property. In *Booker*[140], for ex. there was no expropriation of the fish tanks but an obligation to destroy the fish already infected or highly likely to be infected by the disease. The immediate destruction and slaughter of all the fish enabled the farm owners to continue to carry on their activities and to restock the affected farms as soon as possible.

Another reason for not paying compensation is when the property good has no market value. This is the case when, even in the absence of any intervention by public authorities, the owners would, in any case, have suffered a loss, given the loss of a large part or of all of the property asset´s commercial value for reasons that lie beyond the responsibility of the public authorities that adopted the property affecting measures. For example, the loss of value is triggered by the outbreak of a disease on the owner´s farm. When a

[139] ECJ, Nold v. Commission, Case 4/73 [1974] ECR 491; Case 44/79 Hauer [1979] ECR 3727; Joined Cases 41/79, 121/79 and 796/79 Testa [1980] ECR 1979; Case 265/87 Schräder [1989] ECR 2237; and Case C-84/95 Bosphorus [1996] ECR I-3953.

[140] ECJ, C-20/00 and C-64/00, 10 July 2003, para 85.

property asset becomes a danger, even if it may possibly still hold some market value, it is one of the tasks of public authorities to take measures against it or to eliminate it. In such cases there is no transfer of ownership in property of definite economic value to satisfy a need in the general interest.[141]

The first main difference between the ECJ and the German Federal Constitutional Court in matters of property protection is that the ECJ uses a rather reduced proportionality concept. The other one is that compensation, under German law, is not only paid in connection with expropriation but also as part of compensatory pecuniary and non-pecuniary measures that are taken in order to render proportionate an otherwise disproportionate regulation of property.[142]

7.1.2 European Court of Human Rights

The distinction between reparation due for an illegal act and compensation for lawful expropriation is of major importance for both the German Federal Constitutional Court and the ECtHR. The latter requires, in accordance with general international law that reparation must, as far as possible, eliminate all the consequences of the (impugned) illegal act (principle of *restitutio in integrum*). Against this backdrop the Court notes that it is impossible to equate lawful expropriation and the so called "constructive expropriation" (*occupazione acquisitiva* or *accessione invertita*)[143] because the latter seeks to confirm a fac-

[141] ECJ, *Booker*, C-20/00 and C-64/00, 10 July 2003, para 84. See an analysis of the relevant case-law of the ECJ on the right of property in the opinion of AG Mischo, delivered on 20 September 2001 on the abovementioned Booker case, paras 60 et sequ.

[142] See on this point *Inigo del Guayo, Gunther Kühne, and Martha Roggenkamp*, Ownership unbundling and propert rights in the EU Energy sector, in: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds),Property and the law in energy and natural resources, Oxford University Press, 2010, 326, 347.

[143] See for ex. case of *Belvedere Albeghiera S.r.l. v. ITALY* (Application no. 31524/96) Judgment,30 May 2000, at para 21.

tual situation arising from unlawful acts committed by the authorities and thus permits (the authorities) to profit from their illegal conduct.

The difference between formal expropriation under German law and the case law of the European Court of Human Rights is that the linking clause in Article 14.3 of the Basic Law requires compensation in all cases of expropriation. By contrast, the Strasbourg Court applies here a proportionality test: On the one hand, it has already said that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference. On the other hand, a total lack of compensation can well be deemed justifiable under Article 1, but "only in exceptional circumstances".[144]

The cases when the ECtHR looks "behind the appearances" and investigates "the realities of the situation" complained of, with the intention to ascertain whether the situation amounted to a "de facto expropriation",[145] correspond to the cases when under German law the affected owner is granted a "right to expropriation" (*Übernahmeanspruch*).

In the case of measures controlling the use of goods (Article 1 of Protocol No.1 ECHR) compensation is only one element amongst all those taken into consideration in determining whether the extent of the restriction imposed upon the use of the property can be considered justified in the light of the public interest. Therefore, absence of compensation will not automatically tilt the balance towards the conclusion that the measure controlling the use of the property good is not permissible. It is settled case law that an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The German equivalent for this rule is Article 14.1 sentence 2 of the Basic Law, i.e. the legislative

[144] *Holy Monasteries v Greece*, 1994, Series A, No 301-A, p. 35, para 71; *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, § 54.

[145] See for ex. *Brumărescu v. Romania* [GC], no. 28342/95, § 76, ECHR 1999-VII, and *Sporrong and Lönnroth v. Sweden,* 23 September 1982, §§ 63 and 69-74, Series A no. 52.

determination of the content and limits of property which similarly requires a balancing of interests.

Both the German Federal Constitutional Court and the ECtHR take into account the particular status of reform: As regards the amount of compensation the ECtHR ruled that in the event of "economic reform or measures designed to achieve greater social justice", a compensation that is "less than reimbursement of the full market value" is enough.[146]

7.2 Indirect expropriation in international investment law

Foreign investors have the option to introduce proceedings against Germany in an international tribunal. It has been said that it was not by chance that the Swedish energy utility *Vattenfall* brought in 2009 the German government to international arbitration rather than to German courts.[147] Does the protection provided in investment treaties give international investors guarantees not available to domestic investors? This question makes the interrelation between national expropriation law and international investment law obvious. In what follows, the focus is on some salient differences.

While the German Federal Constitutional Court uses a narrow formal concept of expropriation that covers intentional dispossessions for the fulfilment of a specific public task, international law recognises next to "direct" expropriation also a broad concept of "indirect expropriation". The criteria used by tribunals to determine when a legal measure amounts to indirect expropriation in international investment treaty law focus, traditionally, on the adverse effects of governmental action on the use and enjoyment of the foreign investment. In applying the judicially well established "sole effects standard" tribunals first

[146] James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, at para 54.

[147] *Nathalie Bernasconi*, Background paper on Vattenfall v. Germany arbitration, International Institute for Sustainable Development, Foreign Investment for Sustainable Development Program, July 2009, p.4.

determine the relevant investment which in some cases might be only a part of a whole bunch of investments, and then go on to look at the degree to which a significant part of the investment has been affected and reduced in its value as well as the degree to which the investors have been deprived of their right to use and enjoy their investment, for example of the control or of the reasonably to be expected benefit of the investment. „Creeping" expropriation is a special form of indirect expropriation with a temporal quality.

By contrast, the German Federal Constitutional Court uses a mixed standard in determining when governmental action constitutes an expropriation. Under German law, both expropriation and content determination by or pursuant to law are for a public police power purpose. The question is whether the authorising statute is aimed at a transfer of ownership or benefit to another person (mostly a public authority) for the public good, or whether the statute is of a general character and scope. On the one hand the Court looks at the effects of the legal measure: a dispossession must take place. On the other hand the court considers the purpose of the measure and looks at an overt intention to use the property for the fulfilment of a specific public task. In international investment law, in determining whether a state measure is tantamount to expropriation, some tribunals have relativated the sole effect doctrine by looking "at the real interests involved and the purpose and effect of the government measure", [148] or by examining the purpose behind the measure and applying a proportionality test in accordance with the ECtHR.[149] The main difference with German constitutional law is, however, that the Federal Constitutional Court can use a narrow, formal expropriation concept, because Article 14.1 sentence 2 of the Basic Law provides for complementary protection: Between valid non compensable regulations on the one hand and compensable expropriations on the other, *tertium datur.* This third option is regulations that are made

[148] S.D. Myers, Inc. v. Canada First Partial Award UNCITRAL, Partial Award on the Merits, Nov. 13, 2000 , at para 285. 40 I.L.M. 1408 (2001) (NAFTA Ch. 11 Arb. Trib. 2000), http://www.naftaclaims.com/disputes_canada_sdmyers.htm

[149] Técnicas Medioambientaleas Tecmed S.A. v. United Mexican States ICSID Case No. ARB(AF)/00/2, Award May 29, 2003, paras 122, 129.

proportionate through mitigating non-pecuniary and pecuniary measures. Hence, factors such as the degree and duration of the interference, the purpose of the governmental measure, or the investor´s legitimate expectations are balancing factors in determining the proportionality of the determination of property by or pursuant to a law.

In addition, under the linking clause of Article 14.3 of the Basic Law, compensation is due for lawful expropriation. Unlawful expropriations cannot be made judicially lawful. In international investment law, the distinction between lawful and unlawful expropriation[150] associates the first with the payment of compensation for expropriation and the latter with the award of damages for unlawful conduct. From this point of view, the lawful/unlawful division makes no difference if both lawful and unlawful expropriations trigger the same legal effects, e.g. the payment of the market value of the investment prior to the taking. The distinction would only make a difference, if the standard of compensation would be different: if the standard of compensation for lawful expropriation is determined in the relevant BIT, whereas the standard for unlawful expropriation is identical with the general international law standard as expressed in the Factory at Chorzow judgment of the Permanent Court of International Justice (*13 September 1928, Germany v. Poland*) which requires full reparation, and in particular, the elimination of all the consequences of illegal acts. By contrary, under German law, the unlawful conduct of public authorities must be invalidated, and if the negative effects cannot be wiped out, damages (not compensation) must be paid.

7.3 Comparison with some aspects of US regulatory takings law

Under US constitutional law, a government measure may effect a "taking" not only by physically appropriating the property. Government is equally held to be "taking" property by regulating or limiting the use thereof under the government´s police power authority in such a way as to do away with one or more of the essential components inherent

[150] ADC Affiliate et al. v. The Republic of Hungary, ICSID Case No. ARB/03/16, at para 481.

in ownership, i.e. the right to possess excluding others and the right to dispose of property. Such "regulatory takings" are government regulations that are deemed to go too far so as to produce the same effect as if the government had actually physically taken away the property. The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking (*Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).* In US takings law there are three inquiries for ascertaining when and which regulatory actions are functionally equivalent to a direct appropriation of or ouster from private property: the *Loretto* permanent physical invasion test, the *Lucas* deprivation of all economically beneficial use test and the *Penn Central* balancing test.

7.3.1 Social obligation and police power

The lawful exercise of the state´s so called "police power" that serves the general public good in the United States could be considered to a certain extent as an equivalent of the German theory of social obligation of property.[151] In the US an economic or physical loss of property is not a compensable taking if the interference is an action of the police power. In Germany, the social obligation of property is not natural law or norm emanating from "society". Rather, it is the legislature that has the power to set the limits on private property by taking into account the public good. However, this legislative balancing act places limitations on the definition of property (Article 14.2 Basic Law), not on the definition of a taking (Article 14.3 Basic Law).

7.3.2 Inverse condemnation

The Fifth Amendment to the U.S. Constitution requires the government to provide just compensation to the owner of the private property to be taken. Government has the power of eminent domain or condemnation, i.e. the authority to conduct a compulsory sale

[151] See the debate on the social-obligation norm in American property law in: Cornell Law Review, Volume 94, Number 4, May 2009, special issue, Property and Obligation.

of private property for the common welfare. The choice of remedy against unlawful expropriation depends on the reason for the unlawfulness of the expropriation. Inverse condemnation actions are to a certain extent comparable to the right to be expropriated or the claim for transference of property by means of expropriation in German planning law, because, here too, there is an inversion of the typical expropriation situation. The difference is that, under German law, the right to be expropriated must be based on a statute. Additionally, under German law, there is a primacy of the so called primary legal protection, i.e. of claims for invalidation over claims for compensation or damages. That means that an unconstitutional regulation of property cannot become a lawful expropriation by means of the payment of compensation ex post, it must be invalidated. Although a clear distinction of different remedies is crucial in both legal orders, the interrelation between them is different due to different institutional contexts.

The distinction between a claim for compensation and a means-end test which is very important for German law, has been emphasized, for instance, in *Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)* where the US Supreme Court repudiated the test outlined in *Agins v. City of Tiburon, 447 U.S. 255, 260* . Applying the *Agins´* formula means that government regulation of private property effects a taking if it does not "substantially advance legitimate state interests". This test, the US Supreme Court said, is actually an inquiry in the nature of a due process test, i.e. a means-ends test, asking, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. However, the US Supreme Court adds that a heightened means-ends review of government regulations of private property by the courts is a task for which the courts are not well suited.

Similarly, the difference between just compensation and damages is equally important in both jurisdictions. In *City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999)*, for instance, a permit application by a property owner to develop a parcel of land was denied because of environmental impacts. The US Supreme Court stressed the fundamental differences between a section 1983 tort action to redress an uncompensated taking (which is about liability), and a condemnation proceeding (which deals with conceding the owner´s right to receive just compensation and seeks determination of the amount of compensation

due) where liability simply is not an issue. The Court specified that since the owner was denied not just his property but also just compensation or even an adequate forum for seeking it, the cause of action sounds in tort and is analogous to common law actions that seek damages for interference with property interests. When the government repudiates its duty to provide just compensation, it violates the Constitution, and its conduct is unlawful and tortious.

Another similarity is the use of a balancing test. The difference is that it is used to define proportionate restrictions on property in Germany, while it is applied in determining the occurrence of a taking in the American context. The reasoning in *Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)* is similar to the German doctrine of the intensity of interference and the private use test, with the difference that, in the German context, these tests serve to assess the proportionality of a legislative determination of property. Under the three-factor balancing test in Penn Central the owner still keeps some property use after regulation. In *Penn Central* the U.S. Supreme Court held that, to determine whether a regulatory taking has occurred, one has to look at the character of the regulation, the economic impact on the property owner, and the extent of interference with investment-backed expectations, rather than to focus upon distinct segments of the affected property.

Another example is *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning, 535 U.S. 302 (2002)*. The US Supreme Court held here that two moratoria (totaling 32 months) imposed by a regional planning agency on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area do not constitute a per se taking in the sense of the *Lucas* categorical rule. The *Lucas* test, being a categorical rule, does not answer the question whether a regulation prohibiting any economic use of land for 32 months must be compensated. Resisting the application of a categorical rule, and adopting a reasonableness test, the US Supreme Court makes an assessment which is also inherent in the German institute of development freeze outlined above. The difference is that under German law the imposition of a development freeze on property is considered as a determination of the content and limits of property pursuant to law. If the development freeze is not proportionate, it will be subject to judicial review and invalidated.

Finally, in cases where conditions are imposed to development permits, a balancing test is applied that is quite similar to the German proportionality test. In *Nollan v. California Coastal Commission, 483 U.S. 825 (1987)* the Court held that governmental power to forbid particular land uses (e.g., the granting of a permit to replace a small bungalow on the beachfront with a larger beachfront house) in order to advance some legitimate police power purpose includes the power to condition such use upon a concession of property rights (e.g., physical invasion of private property through dedication of easement), so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. In *Dolan v. City of Tigard, 512 U.S. 374 (1994)* the U.S. Supreme Court held that, if the approval of a development permit to expand the property owner´s store is made conditional on the owner dedicating part of the land for storm drainage and for a pedestrian and bicycle pathway to relieve traffic congestion, such dedication of property must be roughly proportional to the impact of a proposed development. There must be an essential nexus between the legitimate public interest (congestion reduction, diminution of overflow from the pavement) and the development permit requirements. Under German law both cases would be viewed as problems of content determination (Article 14.1 sentence 2 of the Basic Law) and a proportionality test would be applied.

7.3.3 Categorical takings and institutional guarantee

Under US takings law there are forms of government action that are qualified as "categorical" or "per se" takings. In *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)* the Court ruled a state law unconstitutional, finding that, when the character of the governmental action is a permanent physical occupation of real property (installation of cable television on rental buildings without the owner´s permission), there is a taking to the extent that the occupation effectively destroys the owner´s rights to possess, use, and dispose of the property. Regard was not had to whether the action achieved an important public benefit or whether it had only minimal economic impact on the owner, since it was considered that constitutional protection cannot be made to depend on the size of the area permanently occupied. Rather, the focus was on the right to exclude others as essential component of property irrespectively of the public purpose that the regulation might serve. This focus precludes any balancing between the infringement upon the property and the

public purpose that it serves. It is a strict test applying when the government physically occupies the property. The elimination of the owner´s right to exclude others is presumptively classified as a violation of the core of property, i.e. as so substantial that it always constitutes a taking. Under German law an interference with property would amount to a destruction of the core of property only if it would constitute a violation of the "institutional guarantee" of property which includes the private use test as well as the requirement for the legislature to assign the property right to a right holder who also stands to enjoy and effectively dispose of that right. A restriction of the right to exclude as in Loretto could be viewed as a partial expropriation (in case of removal of an independent right *in rem*), or a legislative content determination requiring a balancing of interests and mitigating, compensatory measures. As already outlined above, section 76 of the German Federal Telecommunications Act opted for the solution of a proportionate content determination.

The second form of categorical taking is the "Lucas taking". In *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)* the US Supreme Court held that it is not consistent with the historical compact embodied in the Takings Clause if a regulation has the effect of eliminating all economically beneficial use pressing private property into some form of public service. In such cases the owner has suffered a per se taking. In the event of a Lucas taking the property owner is entitled to the undiminished value the property had before all the use was taken away. It is permitted to regulate all economic value only if the regulation prohibits uses that would not be permitted under background principles of nuisance and property law. Under German law the legal act reducing property to an empty shell without providing for mitigating measures equivalent to a compensation for expropriation (by analogy to Article 14.3 Basic Law) or without granting the right to get expropriated, should be invalidated and could not be transformed to a lawful expropriation ex post.

7.3.4 Partial expropriation and totality rule

Under US takings law the so called totality rule was set in *Penn Central*. According to this rule an owner´s property may not first be divided into discrete segments, and especially, into the particular segment that was taken and what was left after the taking for the

purpose of demonstrating the withdrawal of a distinct segment to be complete and hence compensable. One may not divide the whole property into segments and then treat what was taken as the entire property. Under German law, this problem of "conceptual severance" or "denominator problem" presents itself in three ways: Firstly, partial expropriation is deemed possible, when what is taken (the regulated piece of property) could also be the object of a private agreement (see above section 5). Secondly, in development law, as outlined above, if the unregulated piece of property becomes useless due to the regulation, the owner can avail himself of a right to be expropriated that is granted to him by the regulation (see above section 2.1.5.5). Thirdly, a parallelism of the "denominator problem" can also be found in the context of the application of the German private use test (see above section 2.1.5.3).

8. WEB SITES

www.bundesverfassungsgericht.net – Federal Constitutional Court (BVerfG)
www.bverwg.de – Federal Administrative Court (BVerwG)
www.bundesgerichtshof.de – Federal Court of Justice (BGH)
http://www.bundestag.de – Deutscher Bundestag
www.bmu.de – Federal Ministry for the Environment
www.iuscomp.org – German Statutes in English