

Christine Godt\*

# “Regulatory Property Rights”: New Insights from Private Property Theory for the Takings Doctrine

DOI 10.1515/eplj-2017-0009

**Abstract:** This paper explores the rationale of novel regulatory property rights under takings law (compensation for the expropriation of property). It is interested in their hybrid public-private quality. It reiterates the history of how the notion of ‘private’ property has come about, explores the theory of takings and its restructuring of property. Interesting perspectives on mid-nineteenth-century concepts for remuneration shed new light on what exactly has to be compensated for when property rights are regulated to the detriment of the owner. Based on this analysis, three examples of modern regulatory property rights are explored in more detail, emission rights, CSR labels and derivatives. The article submits that the more nuanced older schemes for compensation provide a better model for distinguishing the reasons for compensation and non-compensation, and are better suited for the modern property setting.

---

The present paper is one part of a double paper which emerged from a one-year fellowship at the University of Constance, Center of Excellence “Kulturelle Grundlagen von Integration”, Institute for Advanced Studies “Kulturwissenschaftliches Kolleg” in 2015. It was first presented at the Workshop “The Core of Property”, in Königswinter (Germany), Oct. 9–10, 2015, organized by Dan Wielsch and Bertram Lomfeld. It is complementary to C. Godt, ‘Regulatory Property Rights’ – A Challenge to Property Theory, in: C. Godt (ed.), *Regulatory Property Rights*, Leiden: Brill Pub., 2016, pp. 13–43. While the former paper develops a typology of the multifaceted rights labelled “regulatory property rights”, and is more technically oriented towards discussing traditional property principles and novel functions, the present article focuses on the public notion of property. In German, the article is published in a slightly adapted version: C. Godt, “‘Regulative Eigentumsrechte’ und ‘regulatorische Enteignung’ – Wechselwirkungen zwischen moderner Privatrechtstheorie und der Entschädigungsdogmatik”, in: D. Wielsch/B. Lomfeld (eds), *Eigentum denken. Aktuelle Eigentumstheorien in den USA und Europa/Thinking Property. Recent Property Theories in the US and Europe*, Tübingen: Mohr Siebeck, forthcoming. For the article at hand, I owe my gratitude to my co-fellows in Constance who came from various disciplines like history and sociology for the manifold inspirations which can be traced throughout the footnotes. I am indebted to an anonymous peer reviewer for valuable hints. All errors are mine.

---

\***Corresponding author: Prof. Dr. Christine Godt**, Carl von Ossietzky University Oldenburg, Chair of European and International Economic Law, Hanse Law School, E-Mail: christine.godt@uni-oldenburg.de

“The limits of my language mean  
the limits of my world.”  
Ludwig Wittgenstein  
“Tractatus logico-philosophicus” 1922

## I. “Regulatory Property Rights”

While the definition of property seemed to be by and large settled,<sup>1</sup> the novel term of regulatory property rights re-vitalizes an old discussion anew. In the continental tradition, the standard definition departs from “*le droit le plus absolue*”, and in the common law tradition property refers to the “relationship we have with each other in respect of things”.<sup>2</sup> Property is equated with private property, and distinguished from public property<sup>3</sup> and public trust.<sup>4</sup> As such it is perceived as the fundament of market-based transactions as opposed to state regulation.<sup>5</sup> The

---

**1** Technically as a “right to exclude”, seminal: H. Demsetz, Towards a Theory of Property Rights, 57 Am. J. Econ. Rev. 1967, 347 – arguing that new property rights emerge once the advantages of resource attribution supersede the disadvantages. Recently reiterated by T.W. Merrill, Property and the Right to Exclude II, 3 Brigham-Kanner Property Rights J. 2014, pp. 2–8. Yet, the central question has remained unanswered as to how these costs are determined, discussed by T.W. Merrill, Introduction: The Demsetz’ Thesis and the Evolution of Property Rights, 31 J. Legal Studies 2002, 331.

**2** A. Clarke/P. Kohler, Property Law, Cambridge: Cambridge University Press, 2005, p. 3.

**3** The term “public property” is used for both private property in state hands and “public” (sovereign) rights in land and uses. For a good overview of different concepts and definitions see C. Rose, The Comedy of the Commons: Customs, Commerce, and Inherently Public Property, 53 U Chicago Law Rev (1986), 711. In Germany „public property” is, for historical reasons and with one exception, not a viable concept. Yet, it does exist in Hamburg with regard to dykes; see § 4a Hamburg Water Law.

**4** Thoroughly discussed in H. Kube, Eigentum an Naturgütern, Berlin: Duncker & Humblot, 1999. The concept met with resistance in continental Europe for three conceptual reasons: (1) The modern reception of the public trust doctrine, as articulated by Joseph Sax, was a variant of the “access to justice” movement of “non-organizable” interests, which was not absorbed by most European jurisdictions. They upheld the “Verbandsklage” or the ombudsperson (C. Godt, Haftung für Ökologische Schäden, Berlin: Dunker & Humblot, 1997, p. 273 et seq.). (2) The trust is embedded in a fragmented property concept, an idea which is conceived of as incommensurable with the continental idea of absolute property (G. Muffat, Trust Law, London: Butterworths, 3 ed. 1999). (3) The basic public trust idea of inalienability is incommensurate with basic property notions, H. Kube 1999 p. 148 et seq. In defense: J. Sax, Liberating the public trust doctrine from its historical shackles, 14 U of Cal Davis Law Review 1980, 185–194.

**5** J. W. Singer, Entitlement – The Paradoxes of Property, New Haven: Yale Univ. Press 2000, at 32. A concurring line of modern thought in the tradition of Karl Polanyi conceive market forces and regulation as mutually dependent, for a recent account see only the contributions in

term “regulatory property” challenges the inherent public private divide and is distinct from “new property” as coined by Charles Reich in 1964.<sup>6</sup> Phenomenologically, it circumscribes a heterogeneous group of novel property rights which can be, by an imperfect attempt to bring order to them, re-grouped in a nine-fields matrix defined by the combination of actors quality (x-axes: individual, collective, state) and the activity quality (y-axes: horizontal, collective, vertical).<sup>7</sup> The most obvious group are legislatively installed private property rights, administered by the state and intended to complement public command and control regulation, like emission rights or fishing quotas. Other rights are judicially acknowledged. The most interesting example of this is the defensive *in rem* right of holders of software sub-licenses in case of the licensor’s insolvency.<sup>8</sup> Here, property rights are not installed as instruments to exert power, but as instruments of defense. Another category are intellectual property rights deliberately used by individuals and industry to exert regulatory power (like Corporate Social Responsibility (CSR) labelling, and property claimed in body parts), usually aiming at an application of their home country rules in the guest state (“import” of rules). Distinct from these are collective property rights. These can imply a right to decide to a community with regard to natural resources, traditional knowledge, music or dances, as acknowledged by international public law. Inversely, collective rights can be attributed to a limited or unlimited group of people as to the right to use recreational land held by someone else, like the commonhold under English law or access rights in Scandinavia or Austria. More recent are commodified contractual positions like financial market instruments which have as their purpose the spread of risk. Examples are swaps, futures and derivatives. Last but not least, various proprietary positions with regard to digital content have been acknowledged (swords), dismissed (facebook accounts) or are still strongly disputed (raw digital data of machinery). All these categories escape the pure private notion of

---

C. Joerges/J. Falke (eds), Karl Polanyi: Globalisation and the Potential of Law in Transnational Markets, Oxford/Portland OR: Hart Publishing, 2011.

<sup>6</sup> C. A. Reich, *The New Property*, 73 *Yale L.J.* 1964, 733 used this term to refer to obstructive public licenses in the broadest sense. The term “regulatory property” is thus also different from Kevin Gray’s definition of “regulatory property” (K. Gray, *Regulatory Property and Jurisprudence of Quasi-Public Trust*, 32 *Sydney Law Review* 2010, 221) which uses the term for privatized public utilities. The connotation followed here was first used by R.B. Steward, *Privprop, Regprop, and Beyond*, 13 *Harv. J. L & Pub. Pol’y*, 1990, 91 and by M. Colangelo, *Creating Property Rights*, Leiden/Boston: Nijhoff, 2012.

<sup>7</sup> For a detailed typology see C. Godt, ‘Regulatory Property Rights’ – A Challenge to Property Theory, in: C. Godt (ed.), *Regulatory Property Rights*, Leiden: Brill Pub., 2016, p. 15.

<sup>8</sup> C. Godt/J. Simon, *In Rem Effects of Non-Exclusive Sub-licenses in Insolvency*, in: Godt 2016 (supra fn. 7).

property as exclusive owner control. They have in common that they are regulated; private autonomy is constrained. Individuals actively use or are passively instrumentalized for public policy goals. These features oppose the conventional ideals of property. As such, regulatory property rights seem, on first sight, peripheral to the mainland of property.

In the broader picture, these rights can be accredited to the transformative forces of two intertwined social developments.<sup>9</sup> On one hand, globalization forces markets and regulators to further internationalize, and to create institutions which transcend national boundaries. On the other hand, digitalization, financialization and dematerialization bring about immaterial assets in need of attribution. Our most basic, common and universally shared notion of attribution is "property". Although we assume that our connotation about property is largely similar, this mutually shared understanding of property has been put in question since globalization confronts us with other ideas of how property might look. This insight catches us by surprise, since the "fall of the Berlin Wall" was assumed to herald a global triumph of market orders, and property. In line with this expectation financial markets have expanded, globally utilizing commodified financial assets as a common denominator. Yet, other interests which had been formerly conceived of as public, inalienable, contractual, common or too personal to be defended in property terms, evolved as property assets. Regulatory command and control measures were complemented, partly substituted by property rights. Thus, we witness diverse forms of property and an expansion in various directions, a development which is not easily explained. The narrative of market liberalization does not fit well with the explicit collective notion of many interests framed as "property". Many novel rights are informed by regulatory enforcement deficits and market failures alike. They form part of modern institutional rules which aim to stir behaviour in line with new institutional economics. While they share some type of "power to exclude", they are neither "absolute" nor "purely private". Nation states introduce them with great flexibility *vis-à-vis* their traditional property law principles, be they inserted in standing codification or in sectorial special laws. All of these rights enshrine a notion of publicness of property which flies in the face of commonly taught conceptions of private property, as being the basis of private autonomy and market forces.

This paper argues that these rights shed light on "property" as a modern market institution which responds to the modern public-private mix. It directs this conceptual discussion towards the recent practical question of regulatory

---

<sup>9</sup> Godt 2016 (supra fn. 7).

expropriation. The argument is developed by bringing together two distinct strains of historic thought, property as foundation of market exchanges and compensation for takings. The following chapter (II.) departs from Blackstone, Tronchet and Savigny. It aims to understand how these early thinkers changed the concept of property at their time and what they wanted to achieve. In particular, central concepts of property as devised by Savigny will be questioned by referring to the modern historical analysis of classical antiquity. The exercise reveals that property as a market institution was formed, and was not a “given” concept. The next step is to explore what modern law exactly aims to protect when property is involved. This reflection directs the attention towards the modern dispute on expropriations resp. revocation of use entitlements with the culminant question of compensation (III.). The focus is on two concepts as discussed by the drafters of the Frankfurt Constitution (Paulskirchenverfassung) in around 1848. The subtle public-private differentiations of the mid-nineteenth-century debate shed light on “what property is”. Only when public debate become entangled by the social question at the end of the 19<sup>th</sup> century, these differentiations became eradicated by the ideological tensions between socialism and capitalism in the 20th century. The perspective of interlocking the private and the public in property, however, opens up a better understanding of modern mixed forms of both publicly *and* privately organized property management. The exercise advances an understanding of regulatory property as a normal complex institution which embeds modern markets and orients behavior towards horizontal coordination apt to structure market exchanges across borders. These functions are explored in more depth in three juxtaposed examples asking the question if compensation is warranted in cases of regulatory change (IV.). The article concludes with an identification of three distinct dimensions of publicness of property rights. It advocates to accept the hybrid nature of property, and draws conclusions for the reasons which might mandate compensation (V.).

## II. From “Freedom” towards “Horizontal Coordination”

### 1. Transforming Property into a “Freedom”

Our contemporary Western understanding of property has been moulded by Savigny (1779–1861),<sup>10</sup> Tronchet (1726–1806)<sup>11</sup> and Blackstone (1723–1780).<sup>12</sup> This generation of thinkers translated the social metamorphosis from feudal to market societies into a judicial language reflecting that change.<sup>13</sup> As far as property is concerned, they came up with a remarkable functional homogeneity. This is not to deny cultural differences as reflected in “the” property law of various jurisdictions. The civil law tradition is dominated by the idea of absolute property, which installs the owner with the most comprehensive power over a thing, whereas common law countries preserved a technical way of thinking around relational and fragmented property. Yet, the right to exclude has universally emerged as the technical core of the property institution which forms the base of all capitalist market orders, regardless how different the technicalities of property rules are in the countries concerned.

---

10 F. C. v. Savigny, *System des heutigen Römischen Rechts* [System of Modern Roman Law], Vol. 3, Berlin: Veit, 1840, p. 356; F. Wieacker, *Pandektenwissenschaft und die industrielle Revolution* (1966), in: F. Wieacker, *Industriegesellschaft und Privatrechtsordnung*, Frankfurt: Athenäum-Fischer, 1974, p. 60; J.-T. Füller, *Eigenständiges Sachenrecht?* Tübingen: Mohr Siebeck, 2006, p. 121.

11 F. D. Tronchet (no revolutionary, but an established lawyer under the *ancien régime*), president de la commission de rédaction du Code civil: «Le droit de propriété est celui qu'un individu peut avoir d'appliquer exclusivement à son bien-être personnel, une telle portion du sol, une telle portion des fruits qu'il produit naturellement ou artificiellement, tel ou tel effet mobilier que la nature a créé ou reproduit, ou que l'industrie de l'homme a elle-même formé avec les matériaux que la nature avait mis à sa disposition.» (5 avril 1791 : *Arch. parlem.*, 1e série, t. 24, p. 564, col. 2). Tribun Delpierre, au Tribunat, 29 frimaire an X, 10 décembre 1801: “Propriété ! propriété ! tu es, disait un orateur, la cause première de l'ordre des familles et de la force des nations; tu es le principe des mœurs, du patriotisme et du bonheur!” *Arch. parlem.*, 2e série, t. 3, p. 204, col. 1.

12 W. Blackstone, *Commentaries*, Book II, Chapter 1, p. 2; for more discussion about this passage see Clarke/Kohler 1995 (*supra* fn. 2), pp. 183 et seq.

13 L. Bauer/H. Matis, *Geburt der Neuzeit – Vom Feudalsystem zur Marktgesellschaft*, DTV München 1988, p. 369–413.

The writings of the early thinkers were conceptual, not descriptive. The individual and the will of a person came to be installed as central elements.<sup>14</sup> Property evolved as a universally approved asset. Previously, in the times of Diderot, who in 1765 prominently wrote: “C’est la propriété qui fait le citoyen”, property was not yet installed as isolated autonomy. Instead, it was conceived as a source of both power *and* social responsibility.<sup>15</sup> The property of the “citoyen”, defined by the *trias* of free transferability between living persons, the right to bequest and exemption from seizure,<sup>16</sup> was not yet in existence.<sup>17</sup> Most land was not alienable, because it was bound to the superior estate and therefore neither alienable nor devisable. Modern industrial and merchant activities however needed credit in order to invest, and therefore land for the sake of security. Only when bounds to land were stripped off could bourgeois property become a basis for market exchange. Property only slowly emerged in the course of the so-called “long saddle time”,<sup>18</sup> first in England<sup>19</sup> and later on the continent instigated by the French revolution, imposed by or in reception of the Code Napoléon across

---

**14** In combination with the capacity to decide and the virtue to judge morally and with reason, *ibid.*, p. 374ff; also M. Schermaier, “Gibt es ein ‘absolutes Eigentum’ im klassischen Recht?” Lecture at the Universität Konstanz, 1. Dez. 2015.

**15** C. Bohn, Individuen und Personen, in: C. Bohn, Inklusion, Exklusion und die Person, Konstanz: UVK 2006, 49–70 (at 58 referring to J.G.A. Pocock, *The Mobility of Property and the Rise of Eighteenth-Century Sociology*, in: A. Parel/T. Flanagan (eds), *Theories of Property: Aristotle to the Present*, Waterloo/Ontario Can. 1979, 141–166.

**16** J.-D. Kühne, Die Genese des Eigentumsschutzes in der Weimarer Reichsverfassung, in: F. J. Peine/H.A. Wolff (eds), *Nachdenken über Eigentum – Festschrift für Alexander v. Brünneck*, Nomos 2011, 37–51, p. 50; in more depth J.-D. Kühne, *Die Reichsverfassung der Paulskirche*, Neuwied: Luchterhand, 2. ed. 1998, S. 252 ff; For a historical analysis see S. Brakensiek, *Agrarreform und Ländliche Gesellschaft*, Paderborn: F. Schöningh, 1991, p. 7.

**17** Yet, the *trias* and its elements were contested in two directions: Parts of the aristocracy wished for transferability and the right to bequeath since most land was bound to common entailed estate (so called *fideicomiss*). In contrast, the right to bequeath was discussed in late-eighteenth-century France as a principle which was in violation of everyone’s equality and the pursuit of revolutionary virtues; see A. Bürge, *Das Französische Privatrecht im 19. Jahrhundert*, Frankfurt a.M.: Vittorio Klostermann, 1991, p. 124.

**18** In German “Sattelzeit” (ca. 1750–1850/1870); the term was coined by R. Koselleck: *Über die Theoriebedürftigkeit der Geschichtswissenschaft*, in: Werner Conze (Hrsg.), *Theorie der Geschichtswissenschaft und Praxis des Geschichtsunterrichts*, Klett Cotta, Stuttgart 1972, 10–28, at 14; it was adapted by J. Osterhammel, *Die Verwandlung der Welt – Eine Geschichte des 19. Jahrhunderts*, München: Beck, 5. ed., 2010.

**19** The early English rural efficiency and industrialization were not only caused by the well-known “enclosures” but were embedded in various mercantile protectionist public policies against France, and broad investments into public infrastructure, S. C. A. Pincus/J. A. Robinson, *What Really Happened During the Glorious Revolution?*, in: S. Galiani/I. Sened (eds), *Institu-*

Europe. Philosophers and jurists took part in the broad transformative undertaking of redefining society and the property therein,<sup>20</sup> detaching the individual from the collective, power from responsibility, and installing an idea of property as a right to which everyone could potentially have access, a universal human right enshrined in the nature of mankind.<sup>21</sup> Enlightenment ideas were instrumental in the redefinition of property as a right which guarantees personal freedom.

Whereas in France *liberté et égalité* became the driving concepts, German scholars turned to classical antiquity for devising concepts and in search of legitimacy (“system”, “history”) hoping to avert developments similar to those in the wake of the French Revolution.<sup>22</sup> Savigny, the founder of the historical school, carved out the “equal” Greek and “free” Roman citizen as the ideal model. He advocated a scientific method of *private* law as a body of law of its own right and as the law of the free and equal, opposed to public law. Savigny had a strong influence in France<sup>23</sup> and the Anglo-American world.<sup>24</sup> However, modern historians today point out that in Ancient Greece, the wealthy person was not free to do with his wealth as he pleased. The individual had to “give something back to the community” in the form of “euergetism”.<sup>25</sup> Personal wealth was conceived as depending on a well-ordered community. The position of the individual in ancient

---

tions, Property Rights and Economic Growth, Cambridge: Cambridge University Press, 2010, 192, at p. 201.

**20** F. Wieacker, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft (1953), in: F. Wieacker, Industriegesellschaft und Privatrechtsordnung, Frankfurt/M.: Athenäum-Fischer, 1974, 9–35, at p. 11 et seq. He argues that the liberal reforms not only stripped off feudal bounds privileging the possessing class of citizens, but disadvantaged craftsmen and farmers (pp. 16 et seq.).

**21** For a critical account for both, reform impulses as well as restorative, conservative functions of natural law see E. Bloch, Naturrecht und Menschliche Würde, Frankfurt: Suhrkamp, 1983.

**22** Enshrined in the famous codification dispute between F.C.v. Savigny and Thibaut, S.F. Fortunato, Vom römisch-gemeinen Recht zum Bürgerlichen Gesetzbuch, Zeitschrift für das Juristische Studium (ZJS) 2009, 327–338; also M. Reimann, Wer vieles bringt – wird manchem etwas bringen, in: J. Rückert/Th. Duve (eds), Savigny International?, Frankfurt: Vittorio Klostermann, 2015, 49–91.

**23** A. Bürge 1991 (supra fn. 17), p. 496–520.

**24** M.A. Hoeflich, Savigny and his Anglo-American Disciples, 37 The American Journal of Comparative Law 1989, pp. 17–37.

**25** The classical reading for this modern description of classic society is Paul Veyne 1976, *Le pain et le cirque – Sociologie historique d’un pluralisme politique* [Bread and circuses: historical sociology and political pluralism]. Point Histoire. Éditions du Seuil, 1976, who drew on a term introduced by André Boulanger in 1923. Veyne strongly influenced further generations of historians like E. Flaig, *Mit Kapitalismus keine antike Stadtkultur – Überlegungen zum Euergetismus*, in: W. Reinhard u. J. Stagl (eds), *Menschen und Märkte. Studien zur historischen Wirtschaftsanthropologie*, Wien /Köln/ Weimar 2007, 133–157; Yet, the social obligations of the wealthy are

Rome was only slightly more independent. Savigny had construed the Roman citizen's free right to bequeath as the core of private property and citizenship. He interpreted the Roman system's marginal restrictions on the testator (one quarter of the citizen's wealth goes to the surviving children) as absolute freedom, and modelled private sovereignty on the *potestas patria*.<sup>26</sup> Modern historians today, however, interpret the surviving sources differently and describe the Roman citizen as an individual with certain freedoms but who is firmly bound to society. The numerous legacies the citizen can make are not understood as an indicator of unbound freedom but as financial precautions for the sake of the children's future advancement. The bequeather invests in the "social capital" (Bourdieu<sup>27</sup>) of his children. Historians also contradict the idea of a *potestas patriae* as indicating unrestricted power on the part of the male head of the family.<sup>28</sup>

In retrospect, Savigny's idea of absolute and abstract property emerges as a construct in search of a notion of property which suits the social and commercial needs of the nineteenth century.<sup>29</sup> By referring to Rome, he could avoid the parallel between private property on the one hand and (public) *dominium* and sovereignty on the other hand.<sup>30</sup> The power of the individual is rooted in the

---

strong even today in spearhead capitalist countries like the US; see F. Ostrower, *Why the Wealthy Give: The Culture of Elite Philanthropy*, Princeton, Princeton Univ Press 1995.

**26** M. Kaser, *Römisches Recht*, München, Beck, 12. ed. 1981, pp. 60 f.; P. Jörs/ W. Kunkel/ L. Wengler, *Römisches Privatrecht*, Berlin, Göttingen, Heidelberg: Springer, 3. ed. 1949, p. 6; an idea perpetuated until today, see H. Dedek, Zur "Legalisierung des Natürlichen": Gewalt und subjektives Recht, in: A. Fischer-Lescano (ed.), *Kritik der Subjektiven Rechte (forthcoming)*.

**27** A concept developed by P. Bourdieu, *Ökonomisches Kapital – Kulturelles Kapital – Soziales Kapital*, in: R. Kreckel (ed.): *Soziale Ungleichheiten*, Göttingen: Schwartz, 1983, 183–198.

**28** J. F. Gardner, *Family and familia in Roman Law and Life*, Oxford: Clarendon Press, 1998; B. Rawson/P. Weaver (eds), *The Roman Family in Italy – Status, Sentiment, Space*, Oxford: Clarendon Press, 1997; R.P. Saller, *Patriarchy, Property and Death in the Roman Family*, Cambridge: Cambridge University Press, 1994.

**29** In both directions: privileges *and* obligations ("*noblesse oblige*"). This is what the historian R. Schloegl describes as a transformation from a "moral towards a political economy"; R. Schloegl, Book review of L. Bauer/H. Matis, *Geburt der Neuzeit – Vom Feudalsystem zur Marktgesellschaft*, DTV München 1988, in: *Historische Zeitschrift* 1989, at 116. He points at the diverging mindsets of feudal landholders and landowners in market economies. Feudal landlords, however badly they treated their dependents, were ideally bound to "aristocratic virtues" which bound them and formed the basis of their rule. In contrast, the modern individual is not bound and has no obligations. This is only socially acceptable when it is assumed that egoistic behavior eventually serves the public good. This is, according to Schloegl at p. 116, why Adam Smith became a central figure for societal transformation.

**30** Also M. Schermaier, "Gibt es ein "absolutes Eigentum" im klassischen Recht?" Lecture at the University of Constance, 1. Dec. 2016 (referring to M. Kaser, *Eigentum und Besitz im älteren Römischen Recht*, Weimar: Böhlau, 1943, p. V (Vorwort): "Ein 'relatives' Eigentum ist den

human being. It seems that Savigny’s concept of possession<sup>31</sup> and the abstraction principle<sup>32</sup> (the idea of two different and independent contracts for the transfer of property, which results in a delay in the actual transfer of property and thus a protection of the owner<sup>33</sup>), which he arguably sourced from ancient Roman law, are mainly inspired by the search for a suited concept of accelerated transfer of goods.

Herewith, Savigny creates the basis for the modern distinction of private property and regulation, coupled with the questions of what “public property” is and how property owners are to be compensated when affected by state regulation.<sup>34</sup> He invented the structures which keep property discourses in private and public law apart.<sup>35</sup> Private law focusses on the functions of property in markets. The interest is in its stabilizing function with regard to fluid wealth. Property assigns profits to investments and secures credits. It thereby forms the backbone of what Adam Smith (1723–1790) construed as a promise: The individual interest is a social force which raises the wealth for all. In contrast, the constitutional discourse about property circled around the limits of state power, proportionality and legitimate expectations. Yet, the background of the early thinkers was a strong state which provided order. This is why the classical thinkers could neglect the public function of property. It was the strong state which Savigny could and intended to keep out of the “private law society”. Later on, categories of “public property”, “state property”, and “public trust” became rejected for political reasons. The regulation of behavior became the domaine of public law. It is this dogma which has been challenged by the *law and economics* movement. It is again called into question by the phenomenon of regulatory property rights.

---

Klassikern fremd. Sie kennen es weder innerhalb ihrer Privatrechtsordnung noch in der Überschneidung verschiedener Rechtssysteme, etwa als ‘Obereigentum’ des öffentlichen gegenüber dem ‘Untereigentum’ des Privatrechts”.

**31** Chang, Yun-chien, *The Economy of Concept and Possession*, in: Yun-chien Chang (ed.), *Law and Economics of Possession*, Cambridge: Cambridge University Press, 2015, pp. 103–125.

**32** A stronghold of German civil legal doctrine and still defended; A. Stadler, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion – eine rechtsvergleichende Studie zur abstrakten und kausalen Gestaltung rechtsgeschäftlicher Zuwendungen anhand des deutschen, schweizerischen, österreichischen, französischen und US-amerikanischen Rechts*, Tübingen: Mohr Siebeck 1996; an opposing position is formulated e.g. by Füller (supra fn. 10).

**33** Coupled with the good faith principle, which protects the proprietary interests of the buyer, both principles in conjunction protect commercial interests in speedy transfer.

**34** Mirroring the opposition of markets and regulation, see J. W. Singer (supra fn. 5), p. 32.

**35** Which paves the way to attribute the power to execute force as a monopoly to the state, H. Gerstenberger, *Die subjektlose Gewalt: Theorie der Entstehung bürgerlicher Staatsgewalt*, Münster: Westf. Dampfboot, 2. ed., 2006. Puzzling, therefore, are recent reflections to re-install the idea of force in the conception of subjective rights, see H. Dedek, supra fn. 26.

## 2. The challenge of ‘Regulatory Property Rights’

The term “Regulatory Property Right” describes a heterogeneous group of novel property rights with characteristics and functions which are either novel or formerly outright rejected. An in-depth analysis was earlier submitted.<sup>36</sup> For the purpose of this article, only the three most interesting challenges to classical property theory shall be picked up.

First, the novel rights challenge the classic subject definition as far as collective entitlements emerge. Rights can be assigned to a collective entity (an indigenous group) or be designed as proprietary rights of individuals of a given collective. The latter group either encapsulates an individual right against a third party, *inter alia* the holder of the property title, or an individual right to participate in a collective decision making process (the management of a commons, traditional water boards). These rights are, on the surface, inconsistent with the individualistic paradigm of traditional property law.

Second, what has been consented as the functional core of property, the right to exclude, does not seem to properly describe the functional core in many cases of regulatory property rights. It is more the veto power under specific conditions or the right to have a say. To an extreme, the proprietary right might transform into a mere defense right. This shift reflects the changing nature of the object of property as being contingent in time and space, like financial market instruments and information. With regard to these objects, excludability is not easily construed. Laws which install excludability like intellectual property, corporate and financial laws, have focussed on the reasons for which these rights are installed in the first place (incentives to invest [IP and shares]; instruments which spread risk [financial instruments]). However, they neglected a more comprehensive property-like reflection about the tension of all interests involved in various circumstances (from residuary rights to information to insolvency). Also, the profound regime shift in corporate law from the former transfer paradigm of single or replaceable goods towards the irrelevance of the identity of the object coupled with the shift towards public trading was not internalized by general property theory.

Third, many novel property rights intend to stir behaviour. Emission rights or fishing quotas create a market for public policy reasons. The idea is not a more efficient allocation of goods, but a price signal which gives an incentives either to reduce emissions and fish catch or to invest in better technology. In other settings, like body parts, genetic information or personal data, property rights are

---

<sup>36</sup> C. Godt, Regulatory Property Rights, in: Godt 2016 (*supra* fn. 7).

advocated to enhance the personal control vis-à-vis medical doctors, pharmaceutical industry, insurances and the IT-industry. In other cases, regulatory property rights substitute regulation, like in CSR labeling. The challenge of these novel rights to property theory is the instrumentalisation of property which conflicts with the traditional liberal conception of property as freedom and as a right against state interference.

### 3. Horizontal Coordination and the Public Notion of Property

The earlier historical construction of property shall not obscure that the modern reflection of property and private autonomy has since long shifted to the prevalent governance discourse. The focus has shifted from property as a means to exert power towards its socio-economic function of horizontal market coordination.<sup>37</sup> System theory acknowledges property as a means to link the legal with the economic system.<sup>38</sup> Since the late 1960s the legal definitions, driven by concrete disputes in court, have been complemented by the structural perspective on market functionality of the “Law and Economics” school. Coase,<sup>39</sup> Demsetz,<sup>40</sup> Merrill and Smith<sup>41</sup> have described property as the very base of an economy which organizes itself horizontally. Technical property rules assign risks and profits. Together with costs internalizing liability rules and coordinating contract rules they provide the functional prerequisite for markets to function. Modern institutional economists like Douglas North, John H. Dales and Eleonor Ostrom,<sup>42</sup> competition lawyers like

---

37 Already Wieacker speaks about a “Gesamtbilanz” (p. 26). At page 30 the text reads as a precedent to Luhmann.

38 N. Luhmann, *Recht der Gesellschaft* 1993, p. 440: “The core of property is its commodification function. It provides the structural link [*strukturelle Kopplung*] of the functional systems of ‘the economy’ and ‘the law’.” (translation C. Godt).

39 R. H. Coase, *The Problem of Social Cost*, 3 *Journal of Law and Economics* 1960, 1–44.

40 H. Demsetz, *Towards a Theory of Property Rights*, 57 *American Economic Review* 1967, 347 (critically reflected on by A. Clarke/P. Kohler 2005 (supra fn. 2), p. 65 et seq., and p. 321 et seq.) Demsetz spells out in scientific economic terms what G. Hardin later famously called “*The Tragedy of the Commons*”, 162 *Science* 1968, 1243–1248.

41 T. W. Merrill/H. E. Smith, *Making Coasean Property more Coasean*, *Journal of Law and Economics* 2011, 77–104.

42 D. North, *Institutions, Institutional Change, and Economic Performance*, 1990, p. 54: “Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interactions”; thus “they structure incentives in human exchange, whether political, social, or economic”, S. Galiani/I. Sened, Introduction, in: S. Galiani/I. Sened (ed.) 2014 (supra fn. 19) comment (p. 5): “[The thesis about self-enforcing property rights has been disputed by research since the late ’90s]. First, it was shown that self-enforcement is unlikely in most

Möschl<sup>43</sup> and property lawyers like Josef Singer<sup>44</sup> and Michael Heller<sup>45</sup> added differentiation as to the need of some form of governance. They share the conviction that property is not a given institution, but that it depends on governmentally organized structures which secure horizontal exchange, provide the “right scope of rights” and conditions of fairness, trust and reliability – largely through transparency and a functioning court system, thereby keeping transaction costs to the necessary minimum. Ostrom<sup>46</sup> showed that the market and the state is not a binary scheme of either/or, but two ideal types between which collective arrangements might function equally effectively and efficiently if specific conditions are met. Dales<sup>47</sup> argued that property rights might even be installed as regulatory means, thus complementing and substituting command and control.

On the same lines, legal comparatists today acknowledge legal differences in property rules as cultural differences,<sup>48</sup> and deliberate democratic decisions.<sup>49</sup> Critical property theorists like G. Alexander, J. W. Singer, H. Dagan, and E.M. Peñalver<sup>50</sup> have strengthened the idea that community and the human rights of

---

realistic environments [...]. Second, governments are rather reliable enforcers of property rights under a wide range of conditions. This established a clear role for governments as protectors of the property rights of their constituents to allow free markets to function and economies to prosper”, are likely to be rather reliable enforcers of property rights of their constituents to allow free markets to function”; E. Ostrom, *Governing the Commons*, Cambridge: Cambridge University Press 1990; J. H. Dales, *Pollution, property and prices: An essay in policy-making and economics*. University of Toronto Press, Toronto 1968.

**43** W. Möschl, Competition as a Basic Element of the Social Market Economy, in: T. Einhorn (ed.), *Spontaneous order, organization and the law : roads to a European civil society – Liber Amicorum E.-J. Mestmäcker*, The Hague: Asser, 2003, p. 286: “Well-defined property rights, the rule of law enabling the enforcement of individual rights, and not least a stable currency, are issues requiring regulation.”

**44** J. W. Singer 2000 (supra fn. 5).

**45** M. Heller, *The Tragedy of the Anticommons*, *Harvard Law Review* 1998, 621–688.

**46** E. Ostrom (supra fn. 42): the famous „design principles” are defined on pp. 89–102; for a concise introduction to Ostrom for property scholars see A. Clarke, *How Property Works: The Complex World View*, *Nottingham Law Journal* 2013, 143–154.

**47** J. H. Dales 1968 (supra fn. 42). Recently, the idea has been attributed to a Ph.D. thesis by Thomas Crocker at the University of Wisconsin-Milwaukee in 1966; *The Washington Independent*, 1. Nov. 2010.

**48** C. von Bar, *Eigentum – Europäische Betrachtungen zu einem unverzichtbaren Sachenrecht*, M. Wandt (ed.), *Versicherungsrecht, Haftungs- und Schadensrecht – Festschrift für Lorenz*, Verlag Versicherungswirtschaft, Karlsruhe, 2014, 741–767.

**49** C. Godt/G.v.Overwalle/L. Guibault/D. Beyleveld, *Boundaries to Information Property*, CUP (under review).

**50** G. S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 *Columbia Law Review* (1982) 1545–1599; J. W. Singer 2000

those affected by property are intrinsically linked to property legitimacy. The core of these modern strands of thought is the embeddedness of property, rooted in society and the freedom of others. Consequently, property effects are not automatically justified by the property entitlement, but need to be justified in the light of other human rights as well. This perspective is common to both dominant modernity theories: discourse theory in the tradition of Foucault<sup>51</sup> and Ewald,<sup>52</sup> and the deliberative theory of Habermas in the tradition of Kant. Discourse theory departs from the notion that the "change of legal forms" is due to societal change driven by a "coordination of difference". According to this perspective, the individual has become more subjective and present, and at the same time more active in collaborative, societal activities.<sup>53</sup> This is why the individual has absorbed multiple functions in society. In contrast, Habermas puts the *Wechselbezüglichkeit* [engl. mutual interrelation] of individual freedoms and regulation at the centre of his reasoning and considers each to be dependent on the other.<sup>54</sup> What he means is that regulation is a precondition of freedom, and upholds the conditions in which modern liberal societies can thrive.

While societies today are changing through globalization and digitalization, the perception of the individual and its relation to the state is also changing. Thus, the public-private interface has been changing, along with the coordination between individuals. The common ground of philosophers as different as Habermas and Foucault is, that despite the individualization of modern industrial societies, the connection between the individual and the collective has re-emerged. In the course of the conversion of the industrialized nation state into internationally integrated compounds of regulatory orders, the binary simple juxtaposition of the state and the individual has become questionable. One consequence is that the public notion re-emerges in property rights. The state installs private disposition rights for regulatory purposes, and individuals use property to pursue regulatory goals. Individuals re-conceptualize themselves not

---

(supra fn. 5), 41 ("equality"); H. Dagan/A. Dorfman, The Human Rights to Private property, SSRN, download: [http://www.law.tau.ac.il/Heb/\\_Uploads/dbsAttachedFiles/Dagan\\_Dorfman.pdf](http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/Dagan_Dorfman.pdf) (9.9.15); E. M. Peñalver, Property as Entrance, 91 Virginia Law Review (2005) 1889.

51 M. Foucault, *L'archéologie du savoir*. Gallimard, Paris 1969/1981 [translated: *Archäologie des Wissens*. Suhrkamp, Frankfurt am Main], p. 58 speaks about „diskursive Formationsregeln". See also D. Schweitzer, *Diskursanalyse, Wahrheit und Recht: Methodologische Probleme einer Diskursanalyse des Rechts*, *Zeitschrift für Soziologie* 2015 (upcoming).

52 F. Ewald, *Der Vorsorgestaat*, Frankfurt am Main: Suhrkamp 1993, 16.

53 U. Bröckling, *Das unternehmerische Selbst. Soziologie einer Subjektivierungsform*, Frankfurt/M.: Suhrkamp Verlag (original 2007), 5. ed. 2013.

54 J. Habermas, *Faktizität und Geltung*, Frankfurt/M.: Suhrkamp, 1992, p. 51; a perspective now widely adopted, see J.W. Singer 2000 (supra fn. 5), p. 32.

as being “isolated and free” only, but as embedded in family, friends, and like-minded communities.<sup>55</sup> Both, modern urban and traditional indigenous communities reject the equation with the state.<sup>56</sup> These collectives claim “property” as a means of self-governance by which individuals collaborate in large-scale collective property arrangements to meet their needs. These observations are more than surprising considering that private property rights are commonly understood as the core of market orders. But in fact, the more states give away regulatory competences to private ordering systems, the more these reinstall public order principles.

All in all, today’s property is an institution of capitalist market order which embeds the power of property in a regulatory and institutional net. This structure secures the functioning of property and limits proprietary power and control at the same time.<sup>57</sup> Modern property is not an unfettered liberal right of power and control anymore. The right to exclude is a functional right which was in the first place granted for the sake of horizontal coordination. The concrete shape of proprietary interests differs across sectors. They are protected and justified as far as they create transparency, attribution and fairness. Property is required to signal proper control, and once put on the market its market price is expected to signal the reasonable use value. The universal reference to “property” does not denote absolute control, but the right to decide. This is why collectives claim “property” over a resource, whilst at the same time watering down the idea of private property. Property that takes the form of information about others, be it in information technology or in biochemistry, has brought about self-evident obligations on the part of property-holders towards other individuals. These developments highlight that property is public in nature,<sup>58</sup> and that it is under-conceptualized in bifurcate opposition to regulation.

---

**55** A shift described by K. Gracz, ‘You wouldn’t steel a car’ vs. ‘Information wants to be free’ – Regulatory failure of copyright law through the prism of Systems Theory, Florence: EUI PhD thesis, manuscript of 1.5.2016.

**56** A. Clarke/R. Malcolm, The Role of Property in Water Regulation: Locating Communal and Regulatory Property Rights on the Property Rights Spectrum, in: C. Godt 2016 (supra fn. 7), pp. 121–140; very similar earlier C. M. Rose, Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances, in: E. Ostrom/T. Dietz/N. Dolšak/P. C. Stern/S. Stonich, /E. U. Weber (eds), *The Drama of the Commons*, Washington DC: National Academy Press, 2002, pp. 233–258.

**57** J. W. Singer 2000 (supra fn. 5), p. 32 “property is itself a form of regulation”.

**58** Already J.W. Singer 2000 (supra fn. 5) p. 32.

### III. “Regulatory Takings”: Conditions for Compensation

#### 1. Expropriation versus Regulation

The overlap of public and private functions of property becomes evident in the law of takings, especially in compensation rules. Once the state takes private property for a public purpose and the requirements for expropriation are met,<sup>59</sup> the protection of property is transformed into a right to compensation. This rule seems evident and simple. However, the distinction between intended expropriation [with mandatory compensation], accidental damage and regulation [both not always in need of full compensation]<sup>60</sup> has always been contested. The debates date back to the reforms of the early nineteenth century,<sup>61</sup> when constitutions

---

**59** Under German law, the prerequisite for a legal taking, and the conditions for appropriate compensations are strictly separated. The essence is that an illegal taking cannot be compensated for and rendered “legal”; see B. Hoops, Taking Possession of Vacant Buildings to House Refugees in Germany: Is the Constitutional Property Clause an Insurmountable Hurdle, 5 *European Property Law Journal* (EPLJ) 2016, pp. 26–50 (infra “2016a”)

**60** The rules for compensation across Europe are dispersed. They depend on national traditions, and are heavily dependent on the circumstances. The FIAMM-decision of the European Court of Justice (2008) did not brought about harmonization, see: J.H. Jans/A. Outhuijse, Balancing Property and Environment in the EU, in: G. Winter (Hrsg.), *Property and Environmental Protection in Europe*, Groningen: Europa Law Publishing, 2016, 41–54 (S. 53). In FIAMM, the court resisted the proposition of the Advocate General Maduro to accept a general state liability for illegal *and* legal acts. It limited the duty to compensate to “illegal” violations of property and left wide discretion to member states to accept state liability for non-illegal accidents. its caution has a double constitutional rationale: First, the court aimed to preserve precautions in member states laws that damaged property owners cannot enrich themselves by illegal state behavior (inversely, the state (resp. administrators) may not be allowed to simply buy itself out (on this aspect Hoops 2016a (supra fn. 59). Second, legislative action shall not be impeded by future damage claims (thus securing against “regulatory chill”, infra).

**61** As early as the nineteenth century, the abolition of slavery and labour servitudes (“Leibeigenschaft”) and the land reforms of that time gave rise to the debate about compensation. However, in most states compensation was paid. For the US and UK see: F. Klose, *Humanitäre Intervention und internationale Gerichtsbarkeit*, 72 *Militär-geschichtliche Zeitschrift* [2013] 1–21, at p. 2. On the continent, compensation was paid in most European states between 1793 and 1817; a famous exception (inter alia) was the state Württemberg, which abolished labour servitudes in 1807 without compensation. The Prussian Land Reform of 1807 provided compensation for all types of lost rights, also feudal rights (J.-D. Kühne 1998, [supra fn. 16], at 293), privileges (like the mill privilege) and use rights to commons; see P. Cancik, *Verwaltung und Öffentlichkeit in Preußen*, Mohr 2007, at 273 et seq. (for mill privileges), pp. 319 et seq. (commons and natural obligations).

were drafted;<sup>62</sup> they re-emerged in the era of US deregulation in the 1980s and 1990s, and returned to Europe in the context of carbon transformation,<sup>63</sup> large scale infrastructure projects,<sup>64</sup> and international investor protection (CETA, TTIP, NAFTA).<sup>65</sup> The idea that takings are, as a matter of principle, bound to the double condition of a just cause and compensation goes back to Grotius in 1625, when it formed a building block of natural law and became standing law, though different in form, all over Europe.<sup>66</sup> On the continent, the two elements were first stipulated in the Codex Maximilianus of 1756 and the Prussian General Law (Preußisches Allgemeines Landrecht, PrALR) of 1794. They were implemented in all continental constitutions,<sup>67</sup> and are today indispensable for human rights

**62** J.-D. Kühne 2011 (supra fn. 16), pp. 37–51 provides a detailed analysis of the drafting process for the compensatory takings clause of the constitution of Weimar in 1918. It is telling that the French constitution renounced a respective claim; R. Alterman, *Takings International – A Comparative Perspective on Land Use Regulations and Compensation Rights*, Chicago: ABA, 2010, p. 30.

**63** In Germany discussed for the examples of cut back operation terms for nuclear power plants and the revocation of airport slots. For the first example see C. Gliński, *Regulatory Expropriation*, German Constitutional Law and International Investment Law – the case of Vattenfall, in: B. Hoops, E.J. Marais, H. Mostert, J.A.M.A. Sluysmans, L.C.A. Verstappen (eds), *Rethinking Expropriation Law II, Context, Criteria, and Consequences of Expropriation*, The Hague: eleven publishing, 2015, 193–222; and recently: German Constitutional Court, combined decision of 6.12.2016 (1 BvR 2821/11, 1 BvR 1456/12, 1 BvR 321/12). For the second example (airport slots) see T. Glemser, *Slotvergabe an deutschen und europäischen Flughäfen*, Berlin: Duncker & Humblot, 2012, p. 196.

**64** E.g. test courses for the automobile industry or opencast coal mining: German Federal Constitutional Court of 8. Juli 1998, 1 BvR 851/87 – BVerfGE 74, 264 – *Boxberg*; German Federal Constitutional Court of 17.12.2013 – 1 BvR 3139/08, 1 BvR 3386/08 – *Garzweiler II*.

**65** F. Abbott, *NAFTA-Dispute Settlement*, Max Planck Encyclopedia of Public International Law, Vol. VII, 2010, p. 791; for more detail with regard to the renowned disputes concerning Methanex and Metalclad, C. Wold/S. Gaines/G. Block, *Trade and Environment*, Durham, NC: Carolina Academic, 2. ed. 2011, 720 et seq.

**66** D. Grimm, *Die Entwicklung des Enteignungsrechts unter dem Einfluss der Industrialisierung*, in: H. Coing, *Wissenschaft und Kodifikation des Privatrechts im 19. Jh.*, Band IV: *Eigentum und industrielle Entwicklung, Wettbewerbsordnung und Wettbewerbsrecht*, Klostermann, 1979, 121–141, at 121, fn. 2; H. Ridder, *Enteignung und Sozialisierung*, 10 *Verh. Dt. Staatsrechtslehrer* 1952, 124 (p 136 and 140). In England, a parliamentary decision was required for each single project; see Grimm 1979 (ibid), p. 128. This model was adopted in the form of an enumeration of causes in Bavaria, and survived in Art. 14 GG as a general statutory preservation (*Gesetzesvorbehalt*). Grimm 1979 (ibid), at 131; also J.-D. Kühne 2011 (supra fn. 16), 37–51.

**67** Listed by Grimm 1979 (supra fn. 68), p. 124 note 12, although he neglects France which did not stipulate property expropriation in its constitution and where the absence of compensation for land use regulation is an “entrenched doctrine”, R. Alterman 2010 (supra fn. 62), p. 30.

protection.<sup>68</sup> All distinguish final taking from police measures which re-install public security.<sup>69</sup>

However, the way in which compensation is determined is still vague. There are two reasons for this indeterminacy which are distinct on the surface, but do overlap. First, property can be taken or modified for different reasons, for specific or for general ones. Expropriation for specific purposes (e.g. the taking of land for classic infrastructure projects<sup>70</sup>) is compensated, in principle, by market value. In contrast, general reforms and regulatory modifications only give rise to compensatory relief or nothing. The second reason for indeterminacy is the nature of the property right taken which can be more private or more public. Three categories can be distinguished: (a) The classic model is the expropriation of a private land title to ownership. (b) The taken property can also be a right bound to a property title, such as a privilege, or a burden to land which either privileges the owner (e.g. a servitude) or a third party. These rights can either be a matter of principle (e.g. non-alienability) or an available property institution (e.g. fideicomiss;<sup>71</sup> fee tail<sup>72</sup>). In the nineteenth century the nature of these rights was in some countries perceived as “public” in nature (“feudal order”) with compensation due to the public. In other countries they were perceived as “private” in nature with compensation due to the “superiour-property-holder”. (c) A distinct category is that of commons, which became rare in industrial countries but still exist as assets with rights of identifiable users<sup>73</sup> and with rights of non-identifiable users.<sup>74</sup> If the

---

**68** Art. 1 First Protocol of the European Convention on Human Rights (ECHR); Art. 17 European Charter of Fundamental Rights, Fifth Amendment US Constitution, in France installed judicially by the Conseil d’Etat in 1998 in reference to the ECHR.

**69** Grimm 1979 (supra fn. 66), p. 129.

**70** Streets, canals, fortifications (Grimm 1979, supra fn. 66), but also mining (Winkler, Bergbaurecht und Grundeigentum, in: H. Coing, Wissenschaft und Kodifikation des Privatrechts im 19. Jh, Band IV: Eigentum und industrielle Entwicklung, Wettbewerbsordnung und Wettbewerbsrecht, Klostermann, 1979, 79).

**71** Kühne 1998 (supra fn. 16), p. 299.

**72** This is the dominant perception; see J. W. Singer 2000 (supra fn. 5), pp. 48 et seq.

**73** Examples include alpine pastures; see H. van Gils/G. Siegl/R.M. Bennett, The living commons of West Tyrol, Austria: Lessons for land policy and land administration, Land Use Policy 38 (2014) 16–25. Conceptually, compensation is due to those who lose use rights: S. Brakensiek (1991, supra fn. 16), p. 437 (but the “who” might not be so evident).

**74** Examples of this include the Scandinavian use rights to stay overnight or to pick berries (A. Sténs/C. Sandström, Divergent interests and ideas around property rights: The case of berry harvesting in Sweden, Journal of Forest Policy and Economics 2012, 56–62) and the English Commonholds, see: A. Clarke/C. Godt, Comparative Property Law: Collective Rights within Common law and Civil Law Systems’, in: C. Godt (ed.) Cross Border Research and Transnational Teaching under the Treaty of Lisbon (2013) Hanse Law School Series Vol 1, 2013, pp. 61–82.

privilege of use is uplifted, compensation is due to those who lose out. As far as the users are known and their number is limited, bilateral compensation is due. If right holders are unlimited, compensation is due in the form of public payment.

Depending on how property was conceived, procedures were designed as either “more private” (by installing court procedures) or “more public” (installing state commissions with payments due to a public fund).<sup>75</sup> In the middle of the nineteenth century, discussions of why, what and how to compensate were still vibrant. By the turn of the twentieth century the distinction between the various natures of property types had been abandoned,<sup>76</sup> and (public) state expropriation had come to be conceptualized as the antagonist to private property.<sup>77</sup>

German law may serve as an example. Today, the German constitution distinguishes, like most other constitutions, between four forms of property restriction: “takings of property” (Art. 14 sec. 3 GG), “regulation” (*Inhaltsbestimmung*, Art. 14 sec. 1 sentence 2 GG), “social obligation” (Art. 14 sec. 2 GG),<sup>78</sup> and “socialization” (Art. 15 GG). While the two latter forms have remained meaningless (conceptualized as relicts of socialist thought in the early Federal republic<sup>79</sup>), the first two are distinguished by “intended withdrawal for a public purpose” versus “content-wise re-definition” of property. The first form, expropriation, is strictly bound to compensation, whilst the latter, regulation, *might* involve compensation [sic “regulatory taking”] based on proportionality, esp. predictability. The founders of the constitution were at variance over the political connotations. Moderate social liberals at the time aspired to a clear delineation between categories with and without compensation.<sup>80</sup> The constitution sought a compromise leaving the problem unresolved, as shown by the split rulings by the German Federal Adminis-

---

<sup>75</sup> Default rules, however, shifted over time from private settlements to public procedures, P. Cancik 2007 (supra fn. 61), p. 332. Grimm 1979 (supra fn. 66) is highly instructive on this, see 133 about the contentious question of judicial review at the time (resulting in the peculiar solution of contemporary Art. 14 sec. 3 GG for the judicial review of expropriations by civil courts).

<sup>76</sup> The notion of unity and absoluteness prevailed, and became codified in the BGB 1900. A counter-position was formulated by H. Roesler, *Das Sociale Verwaltungsrecht* [engl. *Social Administrative Law*], Erlangen: Verlag A. Deichert, 1872, p. 312.

<sup>77</sup> “Das Expropriationsrecht des bürgerlichen Rechtsstaats ist nur das Korrelat der verfassungsmäßig sanktionierten Herrschaft des Privateigentums”, Kirchheimer, *Die Grenzen der Enteignung*, 1930: cited by D. Grimm 1979 (supra fn. 66), p. 123; J. W. Singer 2000 (supra fn. 5), p. 3/4 formulates: “We presume that most uses of property are *self-regarding*” (italics in the original).

<sup>78</sup> Maunz/Dürig-Papier, *Grundgesetz*, Art. 14, No. 30 et seq.

<sup>79</sup> Diminished to an “Auslegungsaspekt für die vorhandenen Bestimmungen” and “ethischer Appell”, T. Regenfus, *Vorgaben des Grundgesetzes für die Lösung sachenrechtlicher Zuordnungs- und Nutzungskonflikte*, Berlin: Duncker & Humblot, 2013, p. 102.

<sup>80</sup> Both when negotiating and drafting the Frankfurt Constitution of 1848 and the later Constitution of Weimar in 1918, see Kühne 2011 (supra fn. 16).

trative Court and the German Federal Supreme Court until the late 1990s.<sup>81</sup> Under the takings clause of Art. 14 sec. 3 GG, today’s debate revolves around the one requirement of what a “public” purpose is. The proportionality test under Art. 14 sec. 1 sentence 2 GG has come center stage which takes overarching concepts like the principle of separation of power on board. In a striking contrast to US case law,<sup>82</sup> the German Constitutional Court rejects the notion of a taking in favour of one single private undertaking as a “public” purpose (Boxberg<sup>83</sup>/Garzweiler II<sup>84</sup>)<sup>85</sup>. While the jurisdiction revolves around the “purpose”, courts do not distinguish between the different natures of property entitlements. Due to the broad notion of property protection under Art. 14 GG, all types of secured financial prospects are considered as protected under this article.

## 2. A lost category “Entwährung”: Publicness differentiated

In the mid-nineteenth century, jurisprudence differentiated between two types of takings, expropriation (*Enteignung*) and dispatching (*Entwährung*). Expropriation withdraws or changes the private utility of property entitlements<sup>86</sup>, dispatching –

---

**81** Given the labels *Sonderopfertheorie* by the Federal Supreme Court (Bundesgerichtshof), and *Schweretheorie* by the Federal Administrative Court (Bundesverwaltungsgericht), see F. Ossenbühl/M. Cornelis, *Staatshaftungsrecht*, München, Beck, 6. ed. 2013, p. 192 et seq.; Regenfus 2013 (supra fn. 79), pp. 145 ff; J. Lege, 30 Jahre Naßauskiesung, *Juristische Zeitung (JZ)* 2011, 1084.

**82** *KELO V. NEW LONDON* (04–108) 545 U.S. 469 (2005), 268 Conn. 1, 843 A. 2d 500, affirmed; for an in-depth discussion: B. Hoops, More Safeguards instead of a Ban of Economic Development Takings: The Kelo Case from a German Perspective, in: B. Hoops, E.J. Marais, H. Mostert, J.A. M.A. Sluysmans, L.C.A. Verstappen (eds), *Rethinking Expropriation Law II, Context, Criteria, and Consequences of Expropriation*, The Hague: eleven publishing, 2015, pp. 137–191.

**83** Federal Constitutional Court of 8. Juli 1998, 1 BvR 851/87 – BVerfGE 74, 264 – *Boxberg*; for references to reflections on the very same problem in the nineteenth century, D. Grimm 1979 (supra fn. 66) at 135.

**84** Federal Constitutional Court of 17.12.2013 – 1 BvR 3139/08, 1 BvR 3386/08 – *Garzweiler II*.

**85** For a comparative legal account directed towards legal reform in South Africa but taking account of jurisdiction in the US and Germany, see B. Hoops, Specificity of Expropriation Statutes as a Safeguard Against Third Party Transfers for Economic Development: Lessons from German Law for New Expropriation Legislation in South Africa? 133 *The South African Law Journal* 2016, pp. 788–819 (“2016b”).

**86** Early on, takings (esp. for the construction of roads and railroads) with compensation included *restrictions* to land property but distinguished those from „public policing” carried out for reasons of construction security, sanitation and fire without compensation, Grimm 1979 (supra fn. 66), at 129. The detriments to non-land-title-owners were not taken into account.

a term largely forgotten today<sup>87</sup> – refers to the taking of a privileging right of public nature.<sup>88</sup> Both forms demand compensation, but the former requires full, the latter equitable compensation. The distinction became instrumental to the drafters of Frankfurt's Constitution (the "Paulskirchenverfassung") in 1848. They favoured the so called *Ablösemodell*, as opposed to the so-called "regulation model" of the preceding land reform in Prussia. Following the English example, the Prussian model provided full compensation to the feudal owner,<sup>89</sup> and a settlement *inter partes*.<sup>90</sup> While these land reforms were driven by the goal of increasing agricultural efficiency,<sup>91</sup> the Paulskirchenverfassung had been inspired by the liberal democratic values of 1848/49.<sup>92</sup> It distinguished between private and public rights bound to property,<sup>93</sup> and installed public institutions to moderate the process. The sub-owner who was installed as owner was required to pay a sum for the dispatched "public" obligation to a state commission (not to the former title-holder), and an equitable compensation for the private utility loss was to be payed to the feudal owner. In sum, the indemnity amounted to

---

**87** J.-D. Kühne 1998 (supra fn. 16), pp. 287–304 (at 299) 267; and G. Winter, Über Pflöcke im wandernden Rechtsboden, *Kritische Justiz* 1986, 459–470 (at 463).

**88** J.-D. Kühne 1998 (supra fn. 16, at 287) ascribes the concept of *Entwährung* to Lorenz von Stein, *Die Verwaltungslehre, Teil 7: Die Entwährung. Grundentlastung, Ablösung, Gemeinheitsteilung, Enteignung und Staatsnothrecht in England, Frankreich und Deutschland* (1868), Neudruck Aalen 1962.

**89** J.-D. Kühne 1998 (supra fn. 16), at 293 describes the model as blatantly favouring the upper class ("kraß Oberschicht begünstigend"). For a description of procedures see P. Cancik 2007 (supra fn. 61), at 371.

**90** France and Germany followed the early English model, which sought to find consensus moderated by a jury, Grimm 1979 (supra fn. 66), p. 124 (with a critical note about the superficial nature of the (private) judiciary control over the executive). Later, the determination of the amount of compensation shifted to public (in Prussia) or communal (left-Rhine-territories) administrations; P. Cancik 2007 (supra fn. 61), at 312.

**91** Both reforms were justified by agricultural efficiency. Today, historians argue that the early English rural efficiency and industrialization were not brought about by the "enclosure" model but were embedded in various public mercantile protectionist policies against France, and broad investment in the public infrastructure, S. C. A. Pincus/J. A. Robinson, What really Happened During the Glorious Revolution?, in: S. Galiani/I. Sened 2010 (supra fn. 19), 192 (p. 201).

**92** H.-J. Kühne 1998 (supra fn. 16), at 282.

**93** J.-D. Kühne 1998 (supra fn. 16) at 299 refers only to the extinction of „feudal“ entitlements bound to property. However, also commons, being collective in nature and not feudal, became extinct through the same procedure (Cancik 2007, supra fn. 61), at 312. In principle, they were equally conceptualized as rights which deserved compensation when abolished. However, the available procedures were limited to an earlier private mutually agreed arrangement (such as the PrAL, Cancik 2007, at 317, or by the law of 1816, Cancik 2007, at p 321). Thus, collective use rights to open commons remained uncompensated.

compensation that was significantly less than full-value.<sup>94</sup> The rationale was that the abolition of feudalism as a social reform should not give rise to full market value compensation. All reforms of that time distinguished between the abolition of bonds between over- and under-proprietor on one hand, and the abolition of third-party rights of others (commons) on the other. Both were indemnified as far as the use right holder was a designated person. However, two groups depended on more sophisticated rules. In cases where a public fund was installed, compensation for the loss of user rights of a group of identifiable people, was possible, but in fact seldom enforced. Use rights to open commons, although in theory worth to be compensated, remained in practice without refund. Later, when courts conceptualized “property” as a unitary, all-encompassing private interest serving right which absorbs all public rights and privileges as “proprietary”,<sup>95</sup> any distinction between the private and public nature of rights to property fell into oblivion.<sup>96</sup> *Entwährung* was declared not to be a “legal institution”.<sup>97</sup> Also common law academics like Hohfeld<sup>98</sup> and Honoré<sup>99</sup> did not integrate the public notion when conceptualizing the modern variations of proprietary relations. Only recently have historians reassessed nineteenth-century land privatization as having had two faces, the abolition of feudal titles *and* of use rights of the commons. These modern studies in history have occurred in parallel to the works of Ostrom. Historians across Europe agree that the reform took so long because of the (growing) resistance from all sections of society to the simplified privatization of the commons (*Gemeinheitsteilung und Verkopplung*); the historical background appears to be different but comparable all across Europe.<sup>100</sup> The politicized early

**94** J.-D. Kühne 1998 (supra fn. 16), at 287; Kühne 2011 (supra fn. 16), at 43.

**95** H.-J. Kühne 2011 (supra fn. 16), p. 50; H.-J. Kühne 1998 (supra fn. 16), p. 299 identifies the decisions of the Reichsgericht as a watershed with regard to the special private aristocracy law, e.g. *Lipper Domanium*, RGZ 136, 211 (222). He writes (1998, supra fn. 16, p. 299): “Das Bewusstsein für die verfassungsrechtliche Ausgliederung feudaler Besitzstände aus dem bürgerlichen Eigentum der liberalen, inzwischen demokratischen und sozialen Verfassung wurde damit verdrängt”. He gives credit to the Reichsgericht for acknowledging the difference in 1932 (p. 50).

**96** H. Roesler 1872 (supra fn. 76) did not distinguish any more expropriation (discussed in §§ 195–200) from dispatching.

**97** H. Ridder 1952 (supra fn. 66), p. 142 (“[...] Sozialentwährung [ist] im Gegensatz zur Enteignung kein Rechtsinstitut [...] sondern, wie die Grundentlastung es war, eine Rechtsreform [...].”

**98** W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale Law Journal* (1913) 16.

**99** A. M. Honoré: *Ownership*, in: A. G. Guest: *Oxford Essays in Jurisprudence* 1961, pp. 107–147.

**100** For a comparative overview (Germany, France, Britain, Sweden & Denmark) see the edition compiled by S. Brakensiek, in: *Jahrbuch für Wirtschaftsgeschichte* 2000, Heft 2: “Gemeinheitsteilungen in Europa. Die Privatisierung der kollektiven Nutzung des Bodens im 18. und 19. Jahrhundert” (German language articles all with English abstracts).

twentieth century, as well as the post-war era struggled with the extremes of socialization and capitalism<sup>101</sup> and thus fostered a simplified state-market antagonism.

The central learning for the current article is that the notion of “publicness” was more nuanced in the nineteenth century. Apart of what today is the vertical public law relationship between the state and the citizen, two other “public” relationships were still present, the feudal relationship and the collective relationship constituted by non-contractual use rights. Both forms were held incommensurate with the new liberal order, and were therefore abolished by the same process. Yet, academics already in 1872 questioned the equation, and advocated a distinction between “feudal” and “social”.<sup>102</sup> By the end of the nineteenth century, theory lost its interest in the distinction of public, collective and state interests,<sup>103</sup> thereby fostering the bifurcate scheme of the “private-public” distinction. Feudal entitlements came to be attributed to the owner,<sup>104</sup> the understanding of the multifaceted nature of publicness with regard to entitlements and their economic values to a set of different people paled.<sup>105</sup>

A differentiated reflection about forms of publicness, however, remained vibrant in Italian<sup>106</sup> and Brazilian<sup>107</sup> jurisprudence, although their impact has remained limited. Only recently have the modern network theories and concepts of access<sup>108</sup> re-vitalized the reflection about “publicness”.

---

**101** Ridder 1952 (supra fn. 66), p. 140, footnote 60.

**102** Roesler 1872 (supra fn. 76), p. 395 (there footnote 2) suggested a distinction between „feudal” and „social”. However, these reflections came too late. Even in remote areas of Prussia like Minden (today Westphalia), the land reform was terminated by 1870, see S. Brakensiek 1991 (supra fn. 16), p. 289.

**103** D. Grimm 1979 (supra fn. 66), p. 135.

**104** Kühne 1998 (supra fn. 16), p. 267.

**105** While it seems to have been a common belief that land had to be transferred to private property in order to be freed from feudal bonds and collective use rights alike, academic doubts about the outright abolition of the commons – for example as formulated by H. Roesler 1872 (supra fn. 76), p. 395, footnote 2 – were raised too late and too vaguely to reverse that part of the reform (even in remote areas of Prussia like Minden, the land reform was completed in 1870, S. Brakensiek 1991 (supra fn. 16), p. 289).

**106** M. Cappelletti. Access to Justice, 40 RabelsZ 1976, 669–717; H. Mattei, Beni Comuni, Un manifesto, Rom: Laterza, 9. ed. 2011.

**107** R. Mancuso, Interesses Diffusos. Conceito e legitimação para agir, São Paulo: Revista dos Tribunais, 8. ed. 2013. The concept has become enforced by means of the powerful *ação civil pública* executed by public attorneys, H. N. Mazilli, A Defesa dos Interesses Diffusos em Juízo – meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses, São Paulo: Saraiva, 29. ed. 2015.

### 3. Consequences for Modern Takings Law

The metamorphosis towards a unitary, unbound and pure conception of private property<sup>109</sup> changed the relationship between the owner and the state. The state and property became juxtaposed. Social and public interests became attributed to the state, regardless of its nature. Property became stripped off of any social obligations. These were transformed into a tax duty (sic. “tariffed”)<sup>110</sup> or became regulated by public law.<sup>111</sup> The mechanism of tariffing re-emerged in the mid-1940s in form of the principle of fixed tariffs in international trade law, which eventually became the GATT-Treaty. This principle means that any barriers to trade like import quota are to be quantified as tariffs. Transposed to property, the rationale means that the state, responsible for public policies, is to accomplish its social goals by the means of tax levies, but not by obliging individual proprietors directly.<sup>112</sup> The pressures on tariffs echo the pressures on income taxes, by some articulated as “expropriation”.<sup>113</sup>

The binary simplification became perpetuated in our reasoning about ‘just purpose’ in takings law. Full compensation is due in case of direct takings (mostly infrastructure); reasonable indemnity is due in case of regulation – but only if the property is substantially reduced in value and the owner could not expect or had not sufficient time to adapt to the legal change, *tertium non datur*.

The object of constitutional property in the twentieth century changed as well. At least on the European continent, protection turned into a sub-form of the more general personality right,<sup>114</sup> rejecting a protection as wealth per se.<sup>115</sup> Most

---

**108** See only D. Wielsch, *Zugangsregeln: Die Rechtsverfassung der Wissensteilung*, Tübingen: Mohr Siebeck, 2008; C. Godt, *Eigentum an Information*, Tübingen: Mohr Siebeck, 2007, pp. 646 et seq.

**109** An early treatment of this can be found in J. W. Hedemann, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert*, Zweiter Teil, 1. Halbband, Berlin 1930, Neudruck Frankfurt a.M. 1968, at 127; later U. Floßmann, *Eigentumsbegriff und Bodenordnung im historischen Wandel. Ein Beitrag zum Rechtsverständnis der konstitutionellen Eigentumsgewährleistungen im 19. Jahrhundert*, Linz 1976, at 85; cited by Kühne 1998 (supra fn. 16), p. 247.

**110** As reflected by Art. 14 GG-protection (supra II.2.b). Historically: Kühne 1998 (supra fn. 16), p. 284. Yet, rationales for taxing can be very varied; see M. Xifaras, *Philosophie de l’impôt*, 2006.

**111** This is the true reason why property taxes cannot be viewed as takings. The idea was discussed by the German Constitutional Court in BVerfGE 93 (1995), 121 (Vermögenswerte-Einheitswerte), but later rejected in BVerfGE 151 (2006), 97 (Halbteilungsgrundsatz). As regards Art. 14 sec. 2 German Constitution (Grundgesetz, GG), it seems that American literature tends to overestimate the mute black-letter law.

**112** For the recent example of coping with the housing needs of refugees, see Hoops 2016a (supra fn. 59).

**113** This argument was criticized in Ridder 1952 (supra fn. 66), p. 128.

outspoken was the German Constitutional Court which construed property protection under Art. 14 of the German Constitution as a freedom in respect to patrimony which secures the means of the individual to organize one's life according to one's own preferences.<sup>116</sup> The rationale is based on a conception of a state in which citizens manage themselves.<sup>117</sup> Property is conceived as the basis for the enabling of private initiative. State responsibility for individual economic well-being is reduced to a minimum. The modern state has the task to provide for the respective economic structures which make individual self-subsistence possible.<sup>118</sup> As a consequence, private usefulness (*Privatnützigkeit*) had emerged by the end of the twentieth century as the central characteristic of property protection under Art. 14 Basic Law (*Grundgesetz*).<sup>119</sup> The proposition of this article is that modern regulatory property rights are again absorbing some of the public functions. Property holders *and* regulators “instrumentalize” property rights to pursue specific goals not limited to profit maximization. Regulators install property rights in order to create markets for public policy reasons thus substituting or complementing public command and control regulation. For governance reasons, states recognize “proprietary” public use rights or accept rights to decide of collective entities. Industry imports regulation by way of property rights in states with weak governmental structures. Here, property rights obtain a double function, private control *and* public policy regulation. Thereby, classic principles, like security and stability, recede in importance. Inversely, mechanisms constitutive for the transparent and controlled functioning of – global – markets gain impor-

---

**114** BVerfGE 6, 32 (36); O. Depenheuer, Der Eigentumsbegriff zwischen absoluter Verfügungsbefugnis und Sozialgebundenheit, in: J. Isensee/H. Lecheler (eds), *Freiheit und Eigentum – FS W. Leisner*, Berlin 1999, 277 (at 228); “Privatrechtsautonomie auf vermögensrechtlichem Gebiet”: H.-J. Papier, *Durchleitung und Eigentum*, BB 1997, 1213 (at 1214); A. v. Brünneck, *Eigentumsgarantie des Grundgesetzes*, Nomos 1984, p. 386 et seq. This implies protection of property held by corporations. The strong reference to personal well-being is, in fact, questionable; J. Lege, *Besitz-Eigentum-Kapital-Vermögen*, GreifRecht 2015, 23–35 (p. 28).

**115** In other words, the monetary value of property is not protected, BVerfG, decision of 18. Jan 2006, BVerfGE 115, 97 (p. 100).

**116** “Freiheitsraum im vermögensrechtlichen Bereich”, um die „eigenverantwortliche Gestaltung des Lebens“ zu ermöglichen, “Sicherung der materiellen Grundlagen der Freiheit”, VerfGE 24, 367 (400); 31, 229 (239); 42, 64 (76); 46, 325 (334); 50, 290 (339); 53, 257 (290); 68, 193 (222); 83, 201 (208); 88, 366 (377); 91, 294 (307); 97, 350 (370); 102, 1 (15); 104, 1 (8); 105, 252 (277); 115, 97 (110); A. Peukert, *Güterzuordnung als Rechtsprinzip*, Tübingen: Mohr Siebeck, at 690.

**117** BVerfGE 50, 290 (339); 52, 1 (30); 81, 29 (32); 100, 226 (241); 102, 1 (15), 104, 1 (9).

**118** Regenfus 2013 (supra fn. 79), at 69. This dogma, though, will not simply disappear with recent propositions to introduce a basic minimum income for everyone.

**119** Conceptualised as “prior to the law” [German original: “Vorrechtlich vorhanden”], Regenfus 2013 (supra fn. 79), at 70.

tance. This reasoning has repercussions on the current debate on regulatory takings, and the revocation of permits and commodified use rights: What exactly is assigned, and what is to be compensated for in the case of a taking, revocation or regulation?<sup>120</sup> This is the pressing question for modern rights, as discussed in national courts and international state-investor-dispute settlements.<sup>121</sup>

Before exploring three examples in more depth (IV.), three general conclusions for takings law shall be drawn. (1) The term “property” is not confined to a monolithic *private* right to exclude. Other collective forms of assignment may well deserve a conception as “property” if fairness in global market transactions is enhanced and/or individual freedom is served. Compensation for the taking of those entitlements cannot be denied by reference to publicness. (2) Regulation is required to shape the contingent boundaries of property entitlements. Three goals are to be pursued: Individuals shall be able to manage their societal needs by contracts horizontally. Property entitlements find their limits in the freedoms of others. Market mechanisms are to be protected. Regulation which calibrates all three goals does not interfere with property and requires no compensation as such. (3) The duty to compensate under modern law depends not only on the purpose, but also on the nature of the property type taken. The distinction to be made, however, is neither between private versus public, nor property versus regulation, nor property versus mere economic chances. Regulatory change must be possible for democratic reasons, without compensation. Inversely, the revocation of a public position deserves compensation, if the trust in it deserves protection. The central question is thus two-dimensional: What was granted for which reason? This question moves the property design to the centre, and the amount of existing trust. It allows to distinguish secured economic prospects from non-secured entitlements. The former can be bound to a person, may not be transferable, and may have no transfer value. The latter might be a tradable allowance to a maximal yield with non-protected prospects. The termination might be “priced in” to the acquisition value; what is assigned is an allowance, not an economic asset.<sup>122</sup>

---

**120** Apart of trustworthy expectations and *therefore* frustrated investments as discussed by the German BVerfG in its decision of 17.12.2013, *supra* fn. 64.

**121** A famous example is the NAFTA-dispute between Merck and Canada with regard to a Canadian patent reform, H. Grosse Ruse-Kahn, *Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation*, Max Planck Institute for Innovation & Competition Research Paper No. 14–13, 2014.

**122** That does not mean that economic damages for unlawful behavior is not possible, see the *Giordano case*, *infra* IV. b)

## IV. Testing the Re-conceptualization

In the following, three examples from the larger group of regulatory property rights shall be explored in more depth. They are chosen for being opposites. The first example, use rights like emission rights and fish quota, originates in the public system. Two others, CSR labels and derivatives, stem from private autonomous regulation. CSR labels aim at importing regulation and at control of the supply chain. Derivatives aim at spreading risk and have a financing function. The analytic interest is in the public-private interface of these novel rights.

### 1. Tradable Use Rights

Modern tradable use rights are emission allowances and fish quota of which emission rights are the most popular example. First devised by economist J. H. Dales in 1968,<sup>123</sup> the first tradable use rights were established in the US as tradable construction rights<sup>124</sup> and state limited emission right concepts involving netting, offsets, bubbles and banking in the 1970s.<sup>125</sup> After influential environmental lawyers had advocated a national implementation,<sup>126</sup> the breakthrough occurred in 1990 with the amendment of the US Clean Air Act which established tradable sulphur dioxide emission rights in order to combat acid rain.<sup>127</sup> It's by and large unequivocal success<sup>128</sup> led the UN Framework Convention on Climate Change of 1992 to introduce under the Kyoto Protocol 1997/2005 a potentially world-encompassing scheme of tradable emission rights for greenhouse gases (simplified as "carbon") in order to fight climate change.<sup>129</sup> The EU followed suit in 2005.<sup>130</sup> The strength of the concept is attributed to the public-private collabora-

---

**123** J. H. Dales 1968 (supra fn. 42).

**124** C. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 *Minnesota Law Review* 1998, 129–182 (at p. 165, fn. 116).

**125** D. H. Cole, *New Forms of Private Property: Property Rights in Environmental Goods*, in: B. Bouckaert (ed.), *Property Law and Economics*, Edgar Elgar, Cheltenham/Northampton, 2010, 225–269, at p. 239–243.

**126** B.A. Ackerman/R.B. Steward, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 *Columbia J. Environm. Law* 171 (1988); R.B. Steward, *Environmental Regulation and International Competitiveness*, 102 *Yale L.J.* 2039 (1993).

**127** Rose 1998 (supra fn. 124), p. 165; Cole 2010 (supra fn. 125), p. 243 et seq.

**128** Cole 2010 (supra fn. 125), p. 246.

**129** With the two mechanisms 'Clean Development Mechanism' (implemented with CER [certified emission reductions]) and 'Joint Implementation' (implemented with 'ERU' [emission reduction units]), P.-M. Dupuy, *International Environmental Law*, Cambridge: Cambridge University

tion of governments and highly visible scientists, with industry involvement, at the Intergovernmental Panel on Climate Change (IPCC) which agreed on temperature limits, carbon caps and the amount of tradable emission rights.<sup>131</sup> States re-gearred the agreement in Paris 2015 from a system based on fixed national reduction limits towards a general reduction target, which became lowered to of the global temperature increase from 2°C to 1,5° C by the year 2025 and grants nation states leeway to set their own reduction limits.<sup>132</sup> Tradable quotas for fishing have mimicked the idea.<sup>133</sup> Water privatization has been discussed for a while, but has encountered much more public opposition in European countries.<sup>134</sup>

As of today, carbon trade has grown out of its infancy. It became an integral part of the European electricity market,<sup>135</sup> aligned with modern financial and monetary policies.<sup>136</sup> Larger firms have integrated it into their financial plans.<sup>137</sup> Bureaucracies have grown and internationalized.<sup>138</sup> However, beha-

---

Press, 2015, pp. 151 et seq.; D. Freestone/C. Streck, *Legal Aspects of Carbon Trading*, Oxford: Oxford University Press, 2009.

**130** Dir. 2003/87, Off J. 2003 L 275/32; concisely described by M. Colangelo 2012 (supra fn. 6), p. 130 et seq.; for a more normative focus on the function market conditions (“trust”) and the EU-process as a process of “second order” see M. Hartmann, *Europäisierung und Verbundvertrauen – Die Verwaltungspraxis des Emissionshandelssystems der EU*, Mohr Siebeck 2015, J. Jans/H. Vedder, *European Environmental Law*, 4. ed. 2012, pp. 385 et seq.; L. Krämer, *EU Environmental Law*, Sweet & Maxwell, 7. ed. 2011, pp. 317 et seq.

**131** U. Bolle, *Das Intergovernmental Panel on Climate Change*, Tübingen: Mohr Siebeck, 2011.

**132** It went into effect on 4 November 2016 (<http://unfccc.int/2860.php>).

**133** The first country to adopt individual transferable quotas as a national policy was New Zealand in 1986; see K. Lock/S. Leslie, Stefan, *New Zealand’s Quota Management System: A History of the First 20 Years*, *Motu Working Paper No. 07–02*, April 2007, last retrieved 3.9.2015. Europe followed suit in 2002 (Reg. EC 2371/2002 and Reg. EC Reg. 40/2008, *infra*), and the US in 2010 (Reg. based on the Magnuson-Stevens Fishery Conservation and Management Act [MSFCMA]).

**134** U. Mattei, *Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance*, 112 *South Atlantic Quarterly* 2013, 366–376.

**135** S. Konar, *Wettbewerbskonforme Stromgroßhandelspreise*, Beck: München, 2014, pp. 267 et seq.; J. H. Keppler, *The interaction between EU ETS and European electricity markets (Annex)*, in: A. D. Ellerman/F.J. Convery/C de Perthuis (eds), *Pricing Carbon – the European Union Emissions Trading Scheme*, Cambridge: Cambridge University Press 2010, 293–328.

**136** The trading platforms for futures to emission rights (Emission Reduction Units, ERU) was opened in 2013; C. de Perthuis and R. Trotignon design a mandate for an Independent Carbon Market Authority. C. de Perthuis/R. Trotignon, *Governance of CO2 markets: Lessons from the EU ETS*, 75 (C) *IDEAS* 2014, pp. 100–106,

**137** This is in line with the far more problematic observation that monetary and financial regulation-oriented regulation is more costly for smaller firms, but easy to handle for larger ones; see A. D. Ellerman/F.J. Convery/C de Perthuis (eds) 2010 (supra fn. 135), p. 259.

vioural incentives have remained limited due to low prices. In addition, various scandals in the banking sector related to fraud and tax evasion by emission trading have damaged the credibility of the mechanism. Yet, the first trading periods were broadly evaluated as a success.<sup>139</sup> The EU Parliament reacted to the fall in prices by a policy of back-loading in 2014.<sup>140</sup> Overall, the carbon market has become established as a novel type of regulated market where the proper functioning of the market depends on regulation.

Yet, the legal status of these use rights is still unclear. While US and German legislators have explicitly stated that carbon emissions allowances are not “private property”,<sup>141</sup> many other European countries have defined them explicitly as “assets” (governed by corporate law).<sup>142</sup> In jurisdictions where the proprietary nature is not acknowledged as such, courts have started a cautious line of argument with regard to the financial interests involved, both horizontally between private parties and vertically between the owner and the state. The leading case in the US is *Ormet Corp. v. Ohio Power Company* from the US Court of Appeals, Fourth Circuit in 1996.<sup>143</sup> The court upheld the power of government

---

**138** For example, the trading headquarters for the energy spot market was centralized at the EPEX in Paris in 2009, while national trade platforms continue trading.

**139** A. D. Ellerman/F.J. Convery/C de Perthuis (eds) 2010 (supra fn. 135), p. 30.

**140** Reg. EU No. 176/2014, Off. J. L 56/11 (26.2.2014).

**141** US Clean Air Act, 42 U.S.C. § 7651b (f) (1995) (for more depth see C. Rose 1998 [supra fn. 124], p. 170; Cole 2010 [supra fn. 125], p. 245); in Germany the majority position (“public licence”) is taken in J. Bauer, *Der Emissionshandelsmarkt – Rechtsfragen des börslichen und außerbörslichen Handels mit Emissionsberechtigungen*, Hamburg: Kovač 2008, p. 37 und in A. Pardon, *Die Rechtsinhaberschaft an Emissionsberechtigungen und ihre Übertragung*, Berlin: Duncker & Humblot, 2012, p. 75. The minority position („preponderant private”) is argued by A. Büttner, *Zivilrechtliche Aspekte des Handels mit Emissionsberechtigungen*, Göttingen: Sierke Verlag, 2011, pp. 45/50.

**142** *UK*: Financial Market Law Committee (Working Group), *Emission Allowances: Creating Legal Certainty*, Issue Paper No. 116, London (2009), p. 11 (discusses the precise qualification as either „property right” oder „financial instrument”); *Italy*: F.L. Gambaro, *Il recepimento della direttiva Emissions Trading, Contratto e Impresa/Europa 1* (2007), 521–546 (discusses if the registration is constitutive or simply declaratory, p. 545); *Netherlands*: implemented the transfer rules for emission rights into the general environmental code which modifies [implements abstract transfer, Art. 16:42 Satz 1 Environmental Code] and otherwise refers to the general civil code; see R. Teuben, *Verhandelbare Emissierechten: Juridische aspekten van emissiehandel voor CO2 in Nederland en de Europese Unie*, Deventer: Kluwer, 2005, p. 63 ff. *France*: B. Le Bars, *La nature juridique des quotas d’émission de gaz à effet de serre après l’ordonnance du 15 avril 2004. Reflexions sur l’adaptivité du droit des biens*, JCP éd. G I (2004), p. 148; P. Devolvè, ‘La patrimonialité’ des actes administratifs: rapport de synthèse, 25 *Revue Française de Droit Administratif* 2006, 44 (p. 47).

**143** 98 F.3d 799. October 23, 1996.

to confiscate, and otherwise remained mute about the nature of the right. With regard to disputes about the allocation of these rights between companies the court upheld that substantial questions of federal law are to be settled under the judicial review standard established by the US Supreme Court.<sup>144</sup> In Europe, opposing and ambiguous cases have ensured that the legal situation remains unsettled. A single English High Court judge held in *Armstrong v Winnington* on 11 January 2012 that carbon emission rights can, at least for the purpose of damages, qualify as property rights under English law. However, the case has relatively little authority due to the fact that the High Court is a first instance court. For fishing quotas, the proprietary status was denied by English High Court Judge Cranston in the *UK Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* on 10 July 2013.<sup>145</sup> The Court of Justice of the European Union argued similarly in *Giordano v. Commission* on 14 October 2014, but avoided any technical qualification of the quota.<sup>146</sup> The case concerned a revocation of fishing rights of a total of two-weeks. The basic issue was the different treatment of vessels registered in France, Greece, Italy, Cyprus and Malta as compared to Spanish vessels, which were allowed to fish for one week longer that year. The basic emergency regulation was held partly invalid under Art. 18 TFEU for being discriminatory.<sup>147</sup> Giordano, a French fisherman, sued the European Commission for damages under Art. 340 TFEU arguing that his property had been violated. The European General Court denied the subjective right arguing that the fishing licence is limited to the maximum catch, but that it does not assign a specific quantity. The non-execution of the entirety of the allocated quota cannot, per se, lead to “actual and certain” damage under Art. 340 sec. 2 TFEU. This argument mirrors the reasoning of the English Judge Cranston. The Advocate General qualified the unlawful discrimination as issue of harm and advocated to apply the (French<sup>148</sup>) loss-of-chance doctrine.<sup>149</sup> In turn, the Court of Justice of the European Union in Grand Chamber rejected the damage claim mainly on two grounds. The discriminatory regulation did not discriminate against the French, but only (positively) in favour of the

---

**144** Phrased for the US context by D. Cole 2010 (supra fn. 125), p. 245: “The rights to possess and exclude (within limits) certainly are property rights on the allowance.”

**145** [2013] EWHC 19959 (Admin).

**146** C-611/12 P, *Giordano v European Commission* (2005) EBL Rev 511.

**147** C-221/09, *AJD Tuna Ltd* (2011) ECR I-1655.

**148** G. Brüggemeier, Revocation of Fishing Quotas, ‘Positive Discrimination’, and Loss of a Chance – A Comment on ECJ, *Giordano v Commission* 20 March 2014, *Journal of Eur Tort Law* 2015, 304. According to Brüggemeier, the loss-of-chance doctrine is not settled EU law. He convincingly argues that the *Giordano* case is not a loss-of-chance case, but a *damnum cessans* case, a settled category of economic loss in EU law on damages.

Spanish vessels. Thus, Giordano himself was not discriminated against.<sup>150</sup> The second argument picks up the General Court's argument: The right to catch fish does not give the holder the right to exhaust the quota in all circumstances, but is subject to limitations in the public interest (here overfishing).<sup>151</sup>

These arguments bring us back to those of the mid-nineteenth century, which in their indeterminacy are more precise than those available to the courts today (while we acknowledge that English courts with their orientation towards remedies enjoy more flexibility). Regulatory Property Rights are hybrids ("tradable allowances"), are at the same time both public and private. They are public in that they allocate use rights for public resources. Most of them are limited in time, thus do not grant a stable position. Similar to professional licences and intellectual property rights, they provide an option: Earnings are not secured. The risk remains with the undertaking. The price is highly volatile, and the reduction of available emission rights is part of the design. Their primary goal is to incentivize a specific behavior (reduce emissions, catch less fish). At the same time, they are private in that they are tradable. They have a value and are therefore, in this sense, proprietary. They are created for being commodities. However, in contrast to "normal" personal property, which is protected for the sake of economic self-regulation and stability, these rights are not intended to be stable. Right holders are expected to adjust to prices and availability. Thus, their regulatory function shifts centre stage.

This hybrid nature is what Wilhelmi tries to catch when he says: "Emission rights enjoy fundamental rights protection and in special cases fall within the scope of Art. 17 of the Charter of Fundamental Rights of the European Union, but only if they are based on performance".<sup>152</sup> What he means is that the rights holder holds a fungible asset, but his/her protection is limited to the invested trust.<sup>153</sup> These rights became commodified for the reason that they can be exchanged upon market terms. This is why these rights, in international language, are qualified as "property". The patrimonial interest, which instigated earlier financial investments and expectations, deserves protection. And therefore, the non-

---

**149** Brüggemeier notes that discrimination case precedents refer to the chance to be acknowledged in competition for work, and distinguishes the given case in that Giordano was acknowledged in the competition. He was (unlawfully) impeded from exercising his right.

**150** C-611/12 P, *Giordano v European Commission* (2005) EBL Rev 511, section number 46.

**151** C-611/12 P, *Giordano v European Commission* (2005) EBL Rev 511, section number 48, 49.

**152** R. Wilhelmi, *Commodification and financialisation in the energy sector*, in: C. Godt (ed.) 2016 (supra fn. 7), 191–206 at p. 204 argues that due to this fungibility an allocated emission certificate is deserves protection by "fundamental rights" only conditional on how the owner has acquired it.

**153** Similar earlier G. Winter (supra fn. 87), p. 464.

patrimonial part of its nature cannot be simply deduced from the fact that the licence only sets a maximum ceiling (the right to use  $x \text{ m}^3$  air/water, etc.), with the consequence that compensation is never due. In contrast, damage might be caused by an unlawful or unexpected administrative act. This, however, is a different rationale than “violation of property”, but “a violation of legitimate expectations”. If the holder of the right is able to react to the changed (market) situation, no compensation is due. If the administrative action is required by a public cause (in the Giordano case overfishing), compensation depends on strict terms of proportionality.

A widely discussed problem may serve as an example. At the beginning, emission allowances are allocated corresponding to the existing emissions permit (“grandfathering” or “seniority principle”).<sup>154</sup> But are grandfather rights protected as normal “property” once the number of available rights will be reduced? From the perspective of property theory, their restricted stability and security are characteristic features of the instrument. ‘Grandfathering’ is a sensible exception to the rule of acquisition at the time of introducing such an instrument. As Daniel H. Cole rightfully notes, the reduction of available rights is “priced in”.<sup>155</sup> As administrations are aware of the market dynamics, the risks of outright confiscation are remote.<sup>156</sup> But once the system is in place, grandfathering is not justifiable *ad infinitum*. The yardstick for compensation is comparable to the unlawful revocation of permits which grant the holder a basis for generating profits. These rights are not to be compensated for their market value, nor for frustrated economic losses which occurred and might occur. The yardstick is the frustration of legitimate trust only. Transition periods reduce the expectation trust to zero.

## 2. Modern Supply Chain Control: Certification and CSR-Labels

An opposing (private) type of regulatory property complements the picture. Undertakings employ trademarks not only for marketing reasons, but also in order to implement corporate social responsibility (CSR) policies. Various forms exist.<sup>157</sup> The trademark makes compliance with an invisible quality standard

---

<sup>154</sup> M. Colangelo, Control of global business transactions via property? A multi-disciplinary approach, in: C. Godt (ed.), 2016 (supra fn. 7), 44–58.

<sup>155</sup> D. H. Cole 2010 (supra fn. 127), p. 246.

<sup>156</sup> *Ibid.*

<sup>157</sup> C. Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards, Umweltrechtliche Studien, Baden-Baden: Nomos, 2011, pp. 56 et seq.; M. Herberg, Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as

visible. In most cases, undertakings join and/or outsource a separated entity which holds a label (technically a trademark) and which is charged with the supervision of compliance. It hands out licences to suppliers and producers requiring them to meet specified production standards and be certified. Usually, the required standards were agreed upon in a collective private-private mixed process, and remain technically non-binding. Often, these policies are adopted in transnational business, aiming at importing a more ambitious standard than in force in the guest country. Famous examples are the Forest Steward Council (FSC) and the Responsible and Sustainable Palm Oil (RSPO) labels.<sup>158</sup> These private labels are to be distinguished from public labels, like the European labels for certified timber or diamonds.<sup>159</sup> In contrast to most public labels which are conceived as consumer information downstream, most private labels are oriented to the supply chain upstream. While the core of CSR policies and codes of conduct (CoC) is the supply management with respective contractual obligations, the function of trademarks is ancillary. They allow visual control and enhance the enforcement of contractual violations by means of injunction.

Amstutz argues that labels serve a central function for companies active in a global and cross-linked market.<sup>160</sup> Environmental and social scandals impair the firm's label, and thus harm the core of the undertaking's property assets. Amstutz uses the language of systems theory to explain the growing importance of CSR in terms of operative closure, interpenetration and differentiation of world society.<sup>161</sup> He identifies CSR as part of the *greffe* (engl. rag rug) of global law. He distinguishes global law from national or international law as combining national/local and international law, public and private law. In this context, he describes a *greffe* as a multilayered structure with reflexive loops resulting in a operative closure which produces cognitive resources enabling undertakings to react and

---

Global Law-Making, in: O. Dilling/M. Herberg/G. Winter (eds), *Responsible Business*, Oxford: Hart Publ., 2008, 17–40.

**158** On the latter, A. Balitzki, *Werbung mit ökologischen Selbstverpflichtungen*, GRUR 2013, 670–675.

**159** C. Godt, 'Due Diligence' – Modernes Umweltmanagement oder Regulierungsverweigerung? in: E.-W. Luthe/U. Meyerholt/R. Wolf (eds), *Der Rechtsstaat zwischen Ökonomie und Ökologie*, Tübingen: Mohr Siebeck 2014, 115–132.

**160** M. Amstutz, *Globalising Speenhamland*, in: C. Joerges/J. Falke (eds) 2011 (supra fn. 7), 359–393 (German version: M. Amstutz/V. Karavas, *Weltrecht: Ein Derridasches Monster*, in: G.-P. Calliess/A. Fischer-Lescano,/D. Wielsch/P. Zumbansen (eds), *Soziologische Jurisprudenz – Festschrift G. Teubner*, Berlin: De Gruyter, 2009, 647–674 (at 648); M. Amstutz, *Die Soziale Verantwortung der Unternehmen im EU-Recht*, Zentrum für europäisches Wirtschaftsrecht, Universität Bonn, Working Paper No. 183, 2010.

**161** Amstutz 2011 (supra fn. 162), pp. 376 et seq.

respond.<sup>162</sup> He argues that this structure is able to uphold the differences of legal cultures whilst permitting them to influence each other. Differentiation mirrors the global law of civil societies, which is not created by states but emerges spontaneously. In this structure, private undertakings respond to public regulatory expectations. It is in their interest to absorb them internally. The strategic use of trademarks reflects this integration of regulatory ambitions into the business model. Property thus becomes instrumental to the learning process, a vehicle of change, and in turn loses to some extent its stability function. It retains its old-fashioned functions of the assignment and attribution of responsibility. In this case, the right to exclude is a vehicle, but not the core. For trademarks, the core is the information function, and the control and management possibilities which come with it.

Can corporations argue that "their property" is violated when standards are raised (or lowered) and additional costs occur? Is this "regulatory expropriation" giving rise to damages? So far there no attempts have become known to claim such damages, and the prospects of this occurring seem negligible. The manufacturing company usually holds a licence which authorizes the use of the label. The "property" interest is held by the organization, and this property is not violated by changing the standard. If a code of conduct refers to "international standards" set by international organizations or standardization organizations, the organization is not obliged to uphold the rules. Firms might only have a contractual claim when the standard is false or members were not duly informed, but they have no proprietary interest.

While the legal technical answer might be evident, the example aims at highlighting the question if the trade mark is a proprietary interest. The right qualifies as "property", but is any decrease of its value by regulation "expropriation"? In international communication, the term "property" is synonymous with monetary or financial interests, and "regulatory expropriation" refers to costly consequences caused by regulation. The labelling case is indicative of how the idea of property has been changing. Inversely to the prior example of emission rights, where the government instrumentalizes property for regulatory purposes, CSR labels are a means for industry to instrumentalize property in order to implement regulation in its own interest. The purpose is neither traditional stability nor immediate profit generation. The interest is in forcing a specific behaviour along the supply chain, in generating information for internal pur-

---

<sup>162</sup> *Grefe* is "a structure which works off the heterogeneity of its heterogeneous bodies and makes them disappear" (translation CG), M. Amstutz/V. Karavas, *Weltrecht: Ein Derridasches Monster*, in: G.-P. Calliess/ A. Fischer-Lescano,/ D. Wielsch/ P. Zumbansen (eds), *Soziologische Jurisprudenz – Festschrift G. Teubner*, Berlin: De Gruyter, 2009, 647–674 (at 648).

poses and in signals to the public. In the language of Bourdieu, compliance to CSR labels creates social capital in a way that allows companies to earn or invest economic capital in the (necessarily) limited market. Property serves here as a means of organization, in the sense of a third type of organization beyond horizontal contracts and vertical command.<sup>163</sup> Here, contractual arrangements are not qualified by hierarchy, command and dependency. The arrangement is much more loose and flexible. Its purpose is information and social embedding. This, again, reveals the inherent public nature of property. Any loss experienced when regulation diminishes this function has to remain uncompensated since this function is not privately assigned by property.

### 3. Spreading Risk: Derivates

A last example completes the picture: could the recently discussed prohibition of credit rating loans (German: Bonitätsanleihen) give rise to a damage claim for regulatory expropriation?<sup>164</sup> The only question of interest here is their potential proprietary nature. While in German legal academic literature, these securitized assets are qualified as pure contracts (§ 2 WpHG: German: Securities Trading Law), common lawyers discuss them as proprietary.<sup>165</sup> While the protection of investors is harmonized via European tort law and the duty to properly inform,<sup>166</sup> the legal nature of the underlying rights are still unsettled.

The common characteristic of these derivatives, as all other financial instruments, is that they spread risk. At best, they are comparable to stocks and option papers. They have become firmly established on world agricultural markets, in the energy sector, real estate, and freight shipping. Their rationality is that of a

---

**163** Similar to organizing a corporation: see J.-P. Robé, *Conflicting Sovereignities in the World Wide Web of Contracts – Property Rights and the Globalisation of the Power System*, in: G.-P. Calliess/ A. Fischer-Lescano,/ D. Wielsch/ P. Zumbansen (eds), *Soziologische Jurisprudenz – Festschrift für G. Teubner*, 2009, 857–869.

**164** Proposal prohibition for the retail sector published on 28 July 2016, download: [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Pressemitteilung/2016/pm\\_160728\\_bonitaetsanleihen\\_allgemeinverfuegung.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Pressemitteilung/2016/pm_160728_bonitaetsanleihen_allgemeinverfuegung.html).

**165** Vgl. C. Bamford, *Principles of International Financial Law*, Oxford: Oxford University Press, 2. ed. 2015, p. 98.

**166** Aktuell (2016) Richtlinie 2004/39/EG über Märkte für Finanzinstrumente ist eine Richtlinie der Europäischen Union (EU) zur Harmonisierung der Finanzmärkte im europäischen Binnenmarkt, ABIEU L 145, 30.4.2004, 1–44 (MiFID: Markets in Financial Instruments Directive). Zum 3. Januar 2018 wird die Richtlinie 2004/39/EG (MiFID I) durch die Richtlinie 2014/65/EU (MiFID II) ersetzt werden.

bet. These are, under German private law (§§ 762, 764 German Civil Code), only enforceable if the counterparty does not deserve protection (e.g. after information). Similar to emission rights, here the functions of transferability and value have become only proprietary technicalities. A coagulation of value is not intended. As a consequence, these rights might technically be qualified as “property”, however, the constitutive rationale of property protection does not cover unsubstantiated future profit chances. To be more precise: Any materialising profit is not based on property, but on external public market factors. Therefore, any future prohibition or restrictive regulation cannot give rise to a takings claim.

## V. Conclusion: Regulatory versus “Normal” Property?

The preceding exercises highlight various dimensions of publicness of property, and reveal the privacy of property as a recent conceptualization of the eighteenth century. Regulatory property rights make the public functions again more visible, after private functions of property have been emphasized during the last decades. Regulatory property rights are employed by states and companies alike to come to grips with modern challenges responding to transnational cross-border settings and to a business environment which has become structured by immaterial rights and along financial policies. This is why regulatory property rights shed a new light on property as an institution. While Singer pointed to property’s public regulatory nature already in 2000, the conventional juxtaposition of property and regulation served as a strong hermeneutic tool to conceal their profound inter-relatedness.

Which public dimensions can be identified? While the corresponding article focuses on the descriptive level on the continuum of private-public-actors and private-public modes of operandum<sup>167</sup>, the present article aims at a better conceptualization of property’s publicness. I propose to distinguish three dimensions. One dimension characterizes the socio-economic functions of property. These are not new. Property provides for a behavioral incentive, it attributes profits, decides allocation conflicts, and assigns organizational power. In these regards, regulatory property rights are not different from “normal” property.

---

<sup>167</sup> Which includes “publicness” by the allocation of parallel rights to several people of a collective or to a collective entity.

The second dimension characterizes the publicness of property rights with regard to “medias” in which they operate. Three medias can be distinguished, the environment (land, water, air), the production chain (including supply and distribution) and finance. This differentiation allows to re-integrate areas of corporate law which have become separated from “traditional” property law for their organizational specificities into property theory – and qualify different types of “public” rationales. It comes close to what has been described as “in rem” effect of property (effects beyond contract), but qualifies the effect. The allocation of use rights to public resources (environment) necessarily has effects on third parties. Publicness is induced by the interconnectedness through the medium. Rights to control the supply, production and distribution chains primarily structure social organization (organizational power, allocation of and the rights to decide about the distribution of profits). Rights include property in movables, property rights in firms and IP-rights. Publicness here is primarily effectuated by the effects of decisions (the right holders) on others.

The third dimension is qualified by its risks distributive rationale, either of economic failure (stocks) or of non-payment risks (derivatives).<sup>168</sup> This rationale derives its specific publicness from public trading (stocks and derivatives). The nature of publicness is qualified by its *modus operandum*. The immediate effects are limited to an undetermined group of people who participate. Yet, the mediate effects are exerted to the whole system in which it operates (capital wealth production).

All three dimensions reveal publicness of property rights. Their protection cannot be equated with value protection. Value protection is an important dimension with regard to immovables and movables. However, modern property rights have shifted to assign a *chance* to profits (IP-rights, stocks, resource use rights, derivatives). The primary proprietary function is assignment. The economic value is not secured. The prospects of profits depend on the (volatile) market. Any regulation of these chances cannot diminish a specific value and cannot give rise to a specific compensation. However, once a warranted expectation has grown and the trust in it was illegitimately frustrated, a claim for compensation might be possible. Then, however, the reason for possible compensation is the violation of legitimate trust, not simply the violation of the economic property interest.

This re-iteration of the public dimensions of property sheds again light of different qualities of regulation. Three qualities can be distinguished. First, since property is a legal institution, law constitutes property and defines its limits.

---

**168** Herewith the article complements in substance the more descriptive siblings article, Godt 2016 (*supra* fn. 7).

Therefore, regulation as such cannot be equated with limitations. These limits can be evident and physical (boundaries to land) or be derived from regulatory choices (number of issued emission rights, the personal quality of right holders, exhaustion principle in IP etc., the scheme to reduce the number of rights over time). Second, inherent dimensions of publicness account for residual duties. These are either due to the respect of other individuals or to the situational boundedness of property. These internal limits exist *à priori*, thus limiting the powers of the owner *ab initio*. An example is a littoral property vulnerable to flooding. Regulation of this *situativeness* can barely give rise to compensation if proportionality is safeguarded. Distinct from these two is the third category of classic public regulation which requires the expression of a democratic will by law for being legitimate. Examples are a listing as historic landmark or cultural property, or a prohibition to catch fish based on the risk of extinction. Only if the listing is compliant with the underlying law and a public interest is proportionally pursued are the respective restrictions valid. These are external public policy limits, which are equally only submitted to proportionality.

While these differentiations reveal public dimensions in property and distinct categories for regulation of property, a fundamental difference between “traditional” property rights and “novel” regulatory rights does not exist. The only difference is their transnational orientation. In contrast, regulatory property rights reveal that modern property rights do not grant absolute freedom. Regulation is ubiquitous and sets the frame. The effects of property rights, their design and the policy goals have immanent public characteristics. The analysis suggests that modern property rights are not categorically different from more traditional forms. It is to us to strip off the traditional confines of natural law theory and describe property as an institution of horizontal market ordering, in principle embedded in democratic decision making, different in each sector, and transnational – with corresponding differentiated compensation duties.