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Property and Environment:
The Social Obligation
Inherent in Ownership

A Study of the German Constitutional Setting

Rudolf Dolzer



Published with the Assistance of the Fund for Environmental Studies (FUST)

International Union for Conservation of Nature and Natural Resources
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FOREWORD

This study was prepared primarily as a guide to the legal restrictions placed upon property ownership in the Federal Republic of Germany. Analysis is made of the history of German property law, and several present day applications of that system.

It must be noted that this work has not been intended for a German audience, but has rather been aimed at a readership unfamiliar with the concept of the "social obligation of property". Therefore, it is hoped that such a study will be of relevance to scholars, policy and law makers, as well as administrators, in countries wherein much interest has recently been generated about property rights in general and land use planning in particular.

The framework of this study has been to initially identify the parameters of the concept, and then to investigate specific applications of it. Thus, after an overview of the subject matter, an analysis is made of German Building, Water and Landscape legislation. It is hoped that these uses of the theory will more fully illustrate its effectiveness.

Finally, it is not anticipated that the German legislative system can be automatically applied in other jurisdictions. Differences in social, economic and political systems will surely thwart such an attempt. Instead, it is only hoped that decision-makers in other nations may wish to implement the progressive theory underlying property ownership illustrated here. This theory has served well its purpose, and it could perhaps be as useful elsewhere.

PART I
INTRODUCTION

PRELIMINARY REMARKS

The common understanding of the concept of "property" is that the owner may handle it according to his own desires. This statement will appear novel neither to the lawyer nor to the layman; for "property" is one of those rare legal terms that is well understood by the public. One might question, then, whether the meaning of "property" is even open to a legal interpretation, for it may be argued that the legal order should merely accept the term as it is commonly used and understood by the public.

However, further reflection convinces us that by simply defining "property" as total ownership of a certain object, we fail to solve the questions which inevitably arise concerning the limits of ownership. It is obvious that powers derived from property ownership always have limitations. The owner of a rifle is not entitled, by virtue of his ownership, to shoot others without cause; the owner of a car cannot drive it so that the exhaust from his car blackens the windows of all the others; and a businessman does not have the right to sell his goods in the middle of a busy street.

These simple examples show us that ownership does not furnish absolute power over the owned object. Property rights do not include the rights to violate the ownership interests of a third person¹. It is equally true that ownership does not allow one to impede public security and order as guaranteed by the state's police power. Therefore, because property use must be accommodated within the general social and legal order, it is limited in certain ways. To state the point more generally, property cannot be used to the detriment of society.

The question then arises, at what point must we look upon the use of property as so socially intolerable that a particular use should be prohibited by law? There is a danger that if a legislature adopts an exclusively "socially centered" definition of property, those features of property which we have always assumed to be self-evident will quickly disappear. For example, if a farmer were forbidden to cultivate all agricultural products upon his field because of a government plan to restructure the agricultural industry, we might, under certain circumstances, call this prohibition "socially oriented". But we could hardly speak any longer of the farmer's "ownership rights" in relation to his field.

It follows that, although it may be simple to describe the essential features of the right of property, its limitations are far less easy to describe. There lies an area within which the right of ownership is subject to countervailing interests. On the one hand, we are pulled toward an expansion of the owner's rights; on the other, we recognize the legitimate interest of the public in limiting these rights for the public good. In this shadowy, borderline area, any legal order may resolve the conflict in a variety of ways, and still assert that the imposed limitations do not contradict the commonly understood notion of property².

Naturally, each state will not arbitrarily choose the limitations upon ownership rights. In choosing the appropriate mode of limiting individual rights, the state will be influenced by prevailing values and needs, and by dangers which are perceived to be imminent. Where land is scarce, one would expect greater government concern with land-use than in a state where vast amounts of land

are available. Furthermore, broad political concepts of the relationship between the state and the individual will be influential. Indeed one would expect less public objection to government interference with property rights in a political system where state intervention is commonly accepted.

Bearing in mind the factors raised above, the rule played by the concept of property in a modern strategy for environmental protection becomes apparent³. The more serious the environmental problems, the more they will be reflected in national laws proscribing certain property uses. Existing demands for resources will also have some effect, i. e., as a society experiences an increasing demand for clean water, it will be more prone to limit private rights on creeks and rivers.

National property laws will reflect not only technical legal considerations, but also the basic goals toward which the society and its legal order are striving. Thus, one may look at the right of ownership as a kind of microcosm of the general legal order, highlighting basic social and legal principles. And although each state will reach its own solution, adapted to its own needs and traditions, a comparison of diverse legal concepts and strategies may be useful.

This study will discuss and analyze the property law of the Federal Republic of Germany as it has developed since 1949 under the Basic Law, the West German Constitution. The main purpose will be to show how the West German legal order has determined limitations upon private ownership to meet legitimate public interests. We will examine the extent to which the legislature may constitutionally limit private property rights for the public benefit, without actually *taking* property and thus having to pay compensation for it.

Two limits on private property rights will be assumed, but not discussed here in detail. First, there are the limitations resulting from the private property rights of a third person. The law governing relations between private individuals can also extend or restrict the parameters of private property through tort law. Since such restrictions must also be in accord with the constitutional concepts to be discussed herein, they are not considered to be of primary importance for the purposes of this study. Secondly, this study will exclude consideration of the police power of the state, with its object of guarding public order and security. It is evident that, in all legal orders, the police power of the state imposes certain limitations upon private ownership⁴. As police power is expanded, greater limits may be placed on individual property. This, however, must also be exercised within the constitutional framework.

There remains the limitations placed upon private property for public purposes which do not arise from an exercise of the police power⁵. These public purposes may originate from a variety of interests. They may be of a cultural or aesthetic nature, or be related to a housing problem. In fact, the total realm of public interest can be regarded as potentially influential in this area. This study will focus upon these social limits on property. The legal order of the Federal Republic of Germany, in this perspective, deserves special attention, for it has chosen a path which is unique for Western national systems. Through a constitutional concept of the social obligations inherent in ownership, it has attempted to achieve a workable synthesis between an individualistic approach to property law and a notion of social order, co-determined by legitimate public

needs. Such a scheme, which simultaneously ascribes high priority to individual interest and prohibits socially intolerable forms of property use, may appear undesirable to different critics. The system may not appeal to those who support a theory of rigid absolute individualism, or to a legal order which attributes little priority to individual rights. But, in Germany, the present system of property law, in its basic tenets, has been accepted by all political and social groups (with the exception of the extreme left) as a constructive solution to a major social problem. The policy has generally been considered a success⁶. True, the concept of social obligation in ownership has been controversial in certain borderline cases, due to the importance of the area and the public attention which was paid to it. In a balanced analysis, however, this will be seen as a normal phenomenon which does not detract from the basic approach taken in the constitution.

The legal situation in the Federal Republic of Germany will be discussed in several chapters. First, we shall examine the general order of the Basic Law Values, into which the rules of property law (I) are embedded. Then we shall briefly look at the process by which the present constitutional concept of property was created in 1949. Possible general criteria for the demarcation between social limitations inherent in property and the constitutive elements of taking property will be analyzed. (III) A short attempt will be made to judge these various criteria from the standpoint of legal aptitude and social desirability. (IV) Then, the present structure of individual property rights and their social limitations shall be discussed in three fields of particular relevance to environmental concerns; the law regulating the construction of buildings (V), the law governing the use of water (VI), and laws which protect the integrity of the landscape (VII). Finally, from a comprehensive viewpoint, the study will turn to the general importance of the social obligation inherent in property within a modern strategy of environmental protection.

CHAPTER 1

THE GENERAL VALUES BEHIND THE CONSTITUTIONAL RIGHTS IN THE BASIC LAW

Early German Constitutions did not limit the legal sphere of state organs through a specific recognition of individual rights. This approach was drastically altered in the Basic Law of 1949. In 19 brief rules, the Basic Law set out a comprehensive system of constitutional rights which restrict the legislative capacity and activities of all government organs. One such organ is the legislature, which may alter individual rights only to the extent expressly permitted in the Basic Law. Even in the prescribed procedure for revising the Constitution, changes are permitted only within the limits stated in Article 79, section 3. Under this rule, certain specific principles of the constitutional order may never be altered^{6a}:

The dramatic re-orientation of the Basic Law toward a state built on formal rules as well as entrenched individual rights, is epitomized in Article 1 which states: "The dignity of man may never be impaired." Article 2 guarantees each individual the right to a free development of his personality. The constitutional recognition of personal rights is in accord with a liberal conception of the relationship between state and citizen. But the Constitution itself makes it clear that it is not founded upon an absolute notion of freedom. Individual freedom is limited by the constitutional order, the rights of third persons, and also by generally approved moral standards. (Article 2, Section 1) The right to equality is stated in Article 3, the wording of which suggests that this is an "equality before the law", as opposed to comprehensive equality among citizens. Accordingly, the Constitutional Court has, to date, interpreted the right to equality to mean that the substance of laws may not be arbitrary, and that comparable situations must be treated in like manner⁷.

The opening articles of the Basic Law recognize the dignity, the freedom, and the equality of men as basic principles of the Value System. Other specific rights are enumerated, including religious freedom, freedom of expression, protection of the family, the right to free association, the right of free travel, and the right not to have one's home entered by the government without urgent cause. Of further note is Article 20, which posits the Federal Republic as a democratic and social federal state. This characterization of the Republic as a "social state" is of limited constitutional relevance⁸ however; the Constitutional Court while ruling that this clause is not legally binding upon the legislature, indicated that it provides guidelines to be consulted by the government in developing its programs. When the meaning of legislation is unclear, the clause will be utilized by the court as an interpretive tool⁹.

Thus, the basic thrust of the constitution is a recognition of both liberalism and individual rights, with the additional aspect that the individualistic approach may be modified to some degree for socially oriented purposes.

CHAPTER 2 GENESIS AND WORDING OF ARTICLE 14 OF THE BASIC LAW

Article 14 states the constitutional concept of property, in harmony with a liberal, yet socially oriented, constitutional framework. It states:

"(1) Private property and the right of inheritance shall be protected. Substance and limitations are determined by the laws.

(2) Property entails obligations. Its use shall also serve the public good."

When the Basic Law was under consideration by the 1949 constitutional assembly, the clauses relating to the "social obligation inherent in ownership" were not controversial¹⁰. All speakers agreed that property must be protected as a prerequisite of personal freedom¹¹. The guaranteed, constitutional right to property was enacted in Article 1, Section 1, clause 1 with no discussion in the committee or the plenary session. There was also an agreement that the concept of property must be given substance by legislative determination¹², and not by extra-legal notions. The clause, "substance and limits are determined by the laws" is essentially the same wording as in the 1919 Weimar Constitution¹³.

It must be stressed that this does not mean that the concept of property is only to be defined by the legislature, as Article 19, Section 2 states that no individual right may ever be changed in its essence. Regarding this essence of property, there was general agreement that the Constitution should prevent unlimited damage to individual property rights caused by public demands. Throughout the discussions, the following formulation was considered most appropriate: "Ownership entails a social obligation. Its use shall find its limits in the living necessities of all citizens and in the public order essential to society¹⁴." In the final committee sessions, some doubts were expressed about this grammatical formulation which referred twice to limits on property¹⁵. It was decided to replace the second sentence with one positively phrased statement concerning the social obligation inherent in property. Recourse was taken to the 1919 Weimar Constitution: "Ownership entails a social obligation. Its use shall also be a service to the public good." Drawing upon this basic structure, the following wording was agreed upon: "Ownership entails a social obligation. Its use shall also serve the public good." The plenary session accepted this final proposal without discussion¹⁶. This reliance upon the earlier constitution in formulating Article 14 indicates that, except for the period of 1933 to 1945¹⁷, there had been a harmonious constitutional development of property law in Germany¹⁸.

An analysis of this Constitutional history illustrates the political direction which determined the constitutional framework for property law. It has followed a basically liberal approach which could be modified in certain cases when warranted by the public good. The "social obligation inherent in ownership" must be viewed from the perspective that the earlier wording¹⁹ more clearly expressed the substantive meaning of the obligation. Although the first draft, the full legislative history, and the intentions thus revealed are of limited interpretive value²⁰, they do indicate the material aims pursued by the Constitutional Assembly.

Article 14, section 3 sets forth the conditions which warrant a taking of property and the consequences thereof. A taking can be assumed only when govern-

mental intervention exceeds that permitted by the social obligation inherent in ownership. Sentence 1 explicitly states that a taking is permissible only if done "for the public good²¹."

In summary, the Constitution guarantees the right to hold property, but also permits the legislature to take account of changing societal needs by redefining the substances and limits of property rights. However, in the process of developing norms to changing social needs, the legislature must never delimit property to the extent of altering its basic substance. If this extreme step is taken, the legislature must then compensate the owner. Should the legislature attempt to infringe the basic substance of property rights without compensation, the law will be declared unconstitutional and void.

Despite the essential clarity of these basic constitutional principles, it is obvious that certain clauses in the Constitution require further interpretation. In particular, the nature of the "basic substance of property" which cannot be altered without compensation must be determined. Because the Constitution itself does not define the concept of property or the "basic substance" of property, no small task confronts the legislature and the courts which interpret the Constitution. The brevity of the Constitutional text provides no clear formula for distinguishing between the social obligation inherent in ownership and the conditions of compensable taking.

Faced with this task, it is not surprising that the various branches of the court system have frequently developed differing approaches to distinguishing between the social obligation and taking. This is true of the general, basic criteria which have evolved in different courts. Additionally, differing operative criteria have been developed within specific subject areas (for example, laws governing housing construction compared to those for landscape protection). Therefore, to truly understand the concept of "the social obligation inherent in ownership", one must be familiar with the text of the Constitution, and with the judicial approach to the matter, including criteria adopted by the courts in specific subject areas. Leading property cases of the Constitutional Court are of special significance²².

We shall hereafter outline the solutions to these tasks reached by the legislature and the courts since 1949. Attention will initially be devoted to the abstract criteria used to distinguish between the social obligation inherent in ownership and taking of property. Then, the distinction will be analyzed within three particular areas of greatest importance to environmental protection.

PART II
**THE THEORY OF THE SOCIAL
OBLIGATION INHERENT IN OWNERSHIP**

CHAPTER 3 THE GENERAL SUBSTANCE AND LIMITS OF THE SOCIAL OBLIGATION

Two doctrines have been developed by the courts in determining whether governmental regulation flows from the social obligation inherent in ownership, or is tantamount to a taking of property. We shall call these doctrines "individual sacrifice" and "intensity of regulation". An analysis of judicial rulings suggests that the use of the different doctrines does not always lead to different results; but as the implications arising from each are different, it is helpful, initially, to analyze them separately²³.

It should be noted that the conflict in judicial opinions between these two doctrinal approaches is not nearly so sharp today as at the beginning of the 1950's. The courts have become convinced that the doctrines are not mutually exclusive, but may be harmonized so that, together, they can contribute to solving disputes²⁴.

Every governmental interference imposes a burden upon an affected owner because it restricts the use of his property. On the other hand, each regulation contributes to the public good, since the Constitution requires this as a prerequisite of regulation. From this perspective comes the notion that an owner whose property rights are limited by regulation must be compensated if, and only if, he alone is subjected to the regulation, as his legal position has been altered so that he no longer enjoys equal regulation of property. Under these circumstances, the regulation confers considerably greater "costs" than "benefits" upon the owner, while bringing only "benefits" to the public. Thus, the owner has a legitimate right to be compensated for his individual sacrifice.

In contrast, when a regulation uniformly affects all owners, there seems little justification for compensation. Although an owner must give up a portion of his rights, he also receives certain "benefits" from the fact that others have been regulated, i. e., the "costs" to others are a "benefit" to him because the regulation is for the public good and he is part of the public. Evidently, the same argument does not apply when he alone is regulated, because there he will feel the public "benefit" to a minimal degree, if indeed at all.

Behind this theory of "individual sacrifice", then, stands nothing other than the rule of equal protection; burdens required for the public good shall be imposed in a fair manner upon all members of the community.

The Bundesgerichtshof has adhered to this doctrine of "individual sacrifice" since its landmark decision in 1952²⁵. It continues to follow this line of reasoning in its basic approach to distinguishing between the social obligation and taking²⁶. In applying the concept to concrete cases, the court, by necessity, had to elaborate upon the doctrine. It has always stressed that government regulation must never infringe upon the basic essence of the ownership right. This did to mean that a taking must be assumed as soon as the essence of an individual's ownership rights are detrimentally affected. The Court relies upon Article 19, Section 2 of the Constitution which requires that no governmental interference may

impair the basic substance of an individual right²⁷. The generally accepted interpretation of this clause is that a law is void only if, from the public's viewpoint, the essence of an individual right in its general application to all citizens, is impaired²⁸. If a law is not void under Article 19, Section 2, a further question is asked. Under the specific criteria of Article 14, is there a compensable taking? If the essence of ownership has been impaired, the answer is almost always yes.

To what extent has the doctrine of "individual sacrifice" been made workable in specific property cases? The Bundesgerichtshof has attempted to accomplish this by introducing, in certain areas, the notion of the "situational commitment" of property²⁹, a notion which is often decisive as to whether a taking must be assumed. According to this notion, drawing the line between social obligation and taking requires consideration of all the legal and economic circumstances relevant to the property; in the terms of the Bundesgerichtshof this consideration is called the "social commitment". The Bundesgerichtshof will apply its notion of a "potential social obligation" ("soziale Pflichtigkeit")³⁰ if, upon a comprehensive examination of all factors, it is shown that the owner must have been aware, even before the existence of the regulation, that there would be a conflict with the public interest if he exercised, unfettered, his usual property rights³¹. Once a "potential social obligation" is established, it follows that the owner can claim no vested interest in the exercise of a socially disruptive property right. Consequently, if the state limits individual property rights where there exists a "potential social obligation", the state is not obliged to compensate. Under these circumstances, the Bundesgerichtshof argues, the true cause of the sacrifice results from the situation of the property itself ("in der Natur der Sache")³². The property right is not limited due to a newly arisen public need but rather due to the *a priori* circumstances of the property and the owner's correspondingly weakened legal position³³.

The doctrine of "individual sacrifice" does not suggest that a right to compensation arises merely because property value declines as a result of regulation. Moreover, it is irrelevant that a neighbor is not subject to the same restriction, so long as the limitative measure in itself is seen as a legitimate exercise of the state's power to invoke the social obligation inherent in ownership³⁴. The doctrine of the "situational commitment of property" also explains why reduced property values do not necessarily mean compensation where only one owner (or a group of owners) is affected. Reduced property values will be compensable only if, in addition, the owner was not subject to a "potential social obligation".

The argument of the Bundesgerichtshof for this viewpoint is not only from the public's perspective. The Court also states that, given the conditions which trigger the "potential social obligation", the government's standard must not be that of a rigidly individualistic owner who ignores public needs in the exercise of his property rights. This is a legitimate approach for the Court to take. It is supported by the views of the Constitutional Court, which has said that the Constitution "founds an order which recognizes the protection of freedom and human dignity as the highest purposes of all legal spheres"; the Constitution's view of man "is not that of an egocentric individual but that of a person living within and, in many ways, dependent upon, society³⁵". From the standpoint of property law, it follows that even though an owner must address himself to his own economic advantage, this would not, "upon reasonable thought³⁶", under the conditions presupposed by the notion of "potential social obligation".

lead him to use his property in a manner contrary to public needs. This, then, is the more basic argument given by the Court to support its view that government regulation of private property does not necessarily require compensation under all circumstances.

A few further comments about the doctrine of "situational commitment" are required. The doctrine does not imply an abandonment of principled decisions in favor of case-by-case determinations. The doctrine is a tool which compels the judge to consider all concrete data relevant to the property in question. It requires an integration of all aspects of this property into the decision concerning the scope of the owner's legal protection. It establishes that the protected sphere of property rights cannot be determined by abstract reasoning; it requires that the owner's legal position be alterable, depending upon the setting and environment in which the property is located. The doctrine can only be truly understood within the context of a legal system where property law forms part of the total legal order and where the Constitution rejects rigid individualism. Thus, the exercise of any legal right which is in direct conflict with the public interest (here, the overall environment surrounding the property) is prohibited.

Another technique relied upon by the Bundesgerichtshof in distinguishing between social obligation and taking may be identified. Arguing from the perspective of the affected owner, the court has said that a potential use of property may not be taken without compensation if the owner has made economic use of the potential prior to regulation. Therefore, a compensable taking will generally be assumed if the regulation will hinder or nullify an existing lawful use in the future³⁷.

It is apparent that the latter concept may not, in certain cases, be reconcilable with the doctrine of "situational commitment", for example, if the continued or prior use of the property seems contrary to the public good. Perhaps this is why the Bundesgerichtshof has recently held³⁸, that an existing prior use may not always give rise to a right to compensation. The decision states that the issue of "potential social obligation" is logically antecedent to the question of compensation flowing from a prior use³⁹. Here, the court has obviously modified its former position, and in the post-war era, this may be one of the most significant turning-points in this field of law. Although the court has not altered its basic notion of "individual sacrifice", it has shifted the balancing of interests away from the individual, in favor of the public. However, on the basis of only one decision⁴⁰, it is difficult to predict whether a major change in the court's reasoning will follow⁴¹. The most accurate statement which can be made at the present time is that no completely developed theory can as yet be perceived.

In the same decision, the Court, for the first time has explicitly stated that the intensity of government regulation, as well as equal protection, will be relied upon in distinguishing between the social obligation and taking. If the right to equal protection can be seen as a formalized method of describing the social obligation, it is but one step further to argue that it should be complemented by a substantive element⁴². The measuring stick for such a substantive element would be not the number of people whose property is regulated, but the intensity of the burden to be borne by the affected owners. Because protection of property is an individual, constitutionally protected right, it is not surprising

that the judiciary would scrutinize the intensity of regulation when distinguishing between social obligation and taking. Historically, the primary function of individual rights has been to secure a sphere of liberty into which the government could not intrude. Even though these individual rights may have been functionally altered through positive state action (and even occasionally through actions of fellow citizens⁴³), the constitutional protection of property is still essentially an example of the negative role of individual rights vis-a-vis government regulation. This negative role evolves not only from the history of property law; the very notion that the government must compensate for taking supports the idea that the individual possesses a negative right to have his property protected.

The fundamentally negative characteristic of property rights is exemplified by the tendency to no longer speak of social obligation when government regulation reaches a certain level of intensity. Such an approach leads to clear results in extreme cases. If the ownership right is minimally limited, it is a social obligation case, while if the owner loses virtually all of his former rights, it can be assumed that his property has been taken.

In particular, the Bundesverwaltungsgericht has always relied upon this substantive analysis⁴⁴. It has established what remains of an ownership right after a governmental measure⁴⁵. Of course, the doctrine of intensity must still face the question of determining where social obligation ends and taking begins. No magic formula can be offered. Nonetheless, the Bundesverwaltungsgericht has been correct in adhering to this basic approach. It has been shown above that the very concept of social obligation comes from balancing the interests of the individual and society. The decision in any given case must be made within the framework of the balancing test, whether explicitly so or not. In the balancing test, intensity of regulation will be of decisive weight, and because of the described negative character of property rights, the individual interest must be central.

One might ask whether the degree of intensity of regulation is an appropriate method of distinguishing between social obligation and taking, since in any balancing process, the court must begin from a philosophy about the respective weight to be ascribed to individual and societal interests. But this is a familiar task for the courts, as a type of balancing test is frequently central to judicial opinions in the whole public law field.

From the standpoint of predictability and supremacy of the legislature, it could be argued that the courts should not balance these interests where the legislature has provided no guidelines for the courts to follow in weighing the respective interests⁴⁶. Such an argument is inapplicable to property law, as the constitutional assembly has implicitly said that the government may never alter essential property rights without compensation, and that in unclear cases the individual interests must also be considered. Furthermore, as is often the case where courts are required to make socially important balancing decisions, the legislature (and sometimes the courts with the tacit approval of the legislature) set increasingly specific standards for weighing interests in specific areas, thus facilitating judicial determinations in particular cases. This legal method is typical of the Anglo-American system. It is also feasible in a Code system in which the hierarchical structure of the courts guarantees a large degree of uni-

formity in decisions. The fact that, in certain cases, the balance will remain controversial is not overly troublesome. The abstract nature of modern code law necessarily leads to gaps where the judge must decide specific cases by relying upon generally accepted modes of interpretation.

The doctrine of intensity, in its focus upon individual rights, has another advantage. It facilitates the application of more general constitutional rules which have been developed to test the legality of state actions against individuals. In German law, these rules have been highly developed in the field of police law. In this respect, the proportionality test is especially relevant⁴⁷. If a regulation is very burdensome to the individual and only of minimal benefit to society, it cannot be judged lawful, or a legitimate exercise of the power to invoke the social obligation. When examining whether the measure is justified by its goal, effects upon the owner must be taken into account. Specifically, it must be shown that the Government possessed no alternative means which were less onerous to the individual. The ramifications of proportionality must also be seen in the context of the requirement that a measure be "fitted to its nature" (sachgerecht)⁴⁸. This rule examines whether the aim pursued is meaningful in itself and in accordance with the public interest as expressed in the entire statute.

In practice, it is rare to find a government regulation which is contrary to the "proportionality" or "fitted to its nature" tests. Nonetheless, the use of these tests in limiting the scope of social obligation provides an effective legal method of nullifying government actions which demand individual sacrifices greater than the public benefit.

CHAPTER 4 THE THEORETICAL VALUE OF THE POSSIBLE DISTINGUISHING DOCTRINES

The theoretical value of the doctrines of individual sacrifice and of intensity of regulation, both used to distinguish between the social obligation inherent in ownership and compensable taking of property, will now be discussed.

The individual sacrifice doctrine is based upon the notion that society will be more inclined to compensation if the property of only a few owners is regulated. An obvious difficulty with the doctrine is the fact that, generally, more than one owner will be regulated, but not an entire class of owners. In most cases, certain groups of owners will be affected, e. g. all owners of real property, or all owners of pine forests. And how shall it be decided in such a case whether the public or the individual is being asked to sacrifice ownership rights? What are the distinguishing elements?

One possible answer might be that the public is affected if the majority of the citizens are affected. However, this standard is too arbitrary. Nor can one be satisfied with this doctrine's requirement of looking exclusively to equality before the law. When all owners of real property are concerned, is it really fair to say that the public is concerned? Taken to the extreme, such an approach would mean that no regulation is a taking because everyone is equal before the law. The problem with that argument is illustrated by the express recognition, in the Basic Law itself (and not by an administrative decision based on a law) of the taking of property by law. Furthermore, the modern tendency is to regulate specific problems by laws couched in general terms.

These factors show that although the doctrine of individual sacrifice may have some independent value in distinguishing between social obligation and taking, it cannot be accepted as the sole criterion. It must be used in conjunction with the doctrine of intensity. The basic constitutional protection afforded property means that the degree of impact upon an owner's rights must be chosen as the cardinal distinguishing criterion. This is the only way we can be assured that the owner will be duly compensated for a measure which heavily intrudes into his ownership rights. The general framework of the Basic Law, with its "compensation for taking" clause, presupposes that the individual must limit the exercise of his rights out of respect for societal needs, but only to the extent of group regulation in the public interest exclusive of a general redistribution of property in the society⁴⁹. The opinion of the Constitutional Court stands unequivocally for this view⁵⁰.

The complementary features of the doctrines of individual sacrifice and intensity suggest that their usefulness can be maximized if they are combined⁵¹. Since they address themselves to different dimensions, it seems feasible to establish a combined formula. However, the considerations outlined above also suggest that the element of individual sacrifice provides a secondary, corrective tool. Especially where the impact of government regulation is heavy and applies to a substantial number of owners. The doctrine of intensity must be decisive.

The opinions of the Bundesgerichtshof demonstrate the workability of a combined formula. Originally, the court had insisted upon the individual sacrifice test, but now uses the two-dimensional approach⁵².

In a general analysis of adjudicated cases in German courts, it should be noted that the doctrine of situational commitment has been substantially accepted by all courts regardless of their approach⁵³. Thus, this doctrine must be credited with providing a means of determining taking questions in harmony with both the doctrines of intensity and individual sacrifice. Situational commitment has been utilized in cases where the idea of social obligation is central to the subject matter, but where the overriding doctrine of intensity and individual sacrifice cannot effectively solve the issues. This is not to say that the notion of situational commitment provides easy answers in borderline cases, but it has been successful as a technique for solving several troublesome cases in a socially desirable, principle oriented manner.

The constitutional provision, the social obligation inherent in ownership, has, in the course of adjudication, become a widely accepted, practical concept. This is not due merely to the development of the two broad doctrines, intensity and individual sacrifice, or to the doctrine of situational commitment. To a considerable extent, the stability of the concept is due to particular opinions which have related to specific subject matters. As shall be discussed later, the courts in the past three decades have developed more specific criteria applicable to certain areas (for example, laws protecting the landscape), and thus constructed a judicial scheme for interpreting the clause which guarantees a high degree of predictability.

Would it be more desirable or more honest, to forget the two broad doctrines, knowing that the ultimate determination takes place within the context of more specific subject matters? One could argue that all broad doctrines should be abandoned because of their restricted "transmission power"⁵⁴. But the general constitutional concept of social obligation is so broad that it has been helpful to have these doctrines to provide a first, abstract clarification of the constitutional text. This leads to a clarity of analysis which is necessary as the concept is applied to separate subject matters.

The opinions of the Constitutional Court support this view. This court is charged with the authoritative interpretation of the Constitution⁵⁵; it deserves credit for developing and elaborating the method of distinguishing between social obligation and taking⁵⁶. The fact that its decisions must be respected by all governmental organs⁵⁷ was helpful, as it has thus been possible to authoritatively settle important questions in various fields. In this manner, most of the fundamental questions concerning social limitations on property have been settled, leaving open only singular issues. The court has not favored individual sacrifice or intensity, but has worked with the elements of both. It has clearly stated⁵⁸, that the owner must not be burdened by governmental regulation to an intolerable degree. In principle, this is a restatement of the theory of intensity as applied by the Bundesverwaltungsgericht. But the Constitutional Court has successfully elaborated further standards for the substance and limits of the constitutional concept of property. It has defined property by reference to its private, economic function, and by the owner's power to make decisions about his property unburdened by external controls⁵⁹. The private economic function has been split into the power to dispose of the property and the power to effectively use it⁶⁰.

In a landmark decision concerning takings law, the Court has laid out the social function to be served by property:

"Article 14, Section, Clause 1 of the Basic Law guarantees property both as a legal concept and as a concrete right held by the individual owner. To hold property is an elementary constitutional right which must be seen in close context with the protection of personal liberty. Within the general system of constitutional rights its function is to secure its holder a sphere of liberty in the economic field and thereby enable him to lead a self-governing life. The protection of property as a legal concept serves to secure this basic right. This constitutional right of the individual is conditioned upon legal concept of property⁶¹."

In a later part of the same opinion, the Court held that it would not uphold measures:

"which remove from the private legal order areas belonging to the elementary substance of constitutionally protected economic activities, consequently eliminating or essentially reducing the constitutionally protected realm of liberty⁶²."

In another opinion, the Court has stated that the social obligation must never impinge upon "the essential substance of the property protected⁶³". Every legislative initiative not in harmony with the fundamentals of the constitutional system of private property will be held unlawful⁶⁴. In several decisions the Court has noted that the sphere of property rights which, under Article 14, can never be infringed by the social obligation, is largely determined by the historical concept of property⁶⁵. Accordingly, a redistribution of property for general reasons, not dictated by a subject oriented necessity of public good, would be void, notwithstanding a government undertaking to compensate⁶⁶. The high priority given to property protection is also demonstrated by the Court's insistence that the social obligation must be legislatively determined, not determined by an administrative body in the absence of a legislative mandate⁶⁷. On the whole, the court has successfully stated the degree to which regulation cannot exceed social obligation, particularly through its perception of property rights as part of the full system of individual rights. The constitutional scheme of the social obligation clause is now comparable in precision and predictability to other constitutional clauses.

As shown, the Court has not relied exclusively upon the doctrine of intensity⁶⁸. Each measure affecting property rights must also be compatible with other constitutional norms⁶⁹. Since the court interprets equal protection as prohibiting governmental arbitrariness⁷⁰, it has examined whether a measure is internally consistent and then consistent with the subject matter itself⁷¹. The purpose of this test is to examine the systematic harmony of the measure with the general subject matter. Thus the court will, at the outset, state the rationale for the particular property limitation as expressed in the legislative history and text, decide whether the rationale must be deemed arbitrary, and finally find whether the measure limiting property rights is compatible with the broader aims of the limiting law. Here, the proportionality test will be applied. The court will necessarily ask whether the limitation was needed to accomplish the stated aims, whether it was the least onerous technique available to the legislature, and whether the public benefits are great enough to justify the costs to private owners⁷².

Such a test is similar, but not identical to, the doctrine of individual sacrifice. Both schemes will find a measure illegal if it imposes upon an individual, or upon a group of individuals, a burden not necessitated by the broader purpose of the law. If the regulation passes this first test (that is, it conforms to the broader legislative scheme), the Constitutional Court will still protect the individual if his specific rights are severely limited. At this point, the doctrine of individual sacrifice would necessarily require compensation. The Constitutional Court tends to reach the same result, in addition to the other criteria, it has stated that a taking results when the assumption of a social obligation would be intolerable to the affected owner⁷³. This is almost always the case where the burden of the measure falls exclusively upon one person or upon a small group. Thus, the results reached by the two courts will seldom differ, particularly because the Constitutional Court has essentially approved the doctrine of situational commitment as well⁷⁴.

In summary, one may conclude that, under Article 14, Section 2 of the Basic Law, the concept of property is not fixed but is subject to definition by the legislature⁷⁵, and that the Bundesverfassungsgericht has characterized certain aspects of property which cannot be changed by the legislature. The spectrum remaining available to the legislature constitutes the scope of social obligation. Legislative definitions of property rights are generally of a political nature and not subject to judicial scrutiny. For the owner, this means that the right to an adequate economic use of property is secured, but not every conceivable opportunity to use the property is guaranteed⁷⁶. It follows that, unless a violation of the standard of proportionality can be found, the government is not bound by budgetary constraints in determining the parameters of social obligation.

This means that, within the legitimate sphere of social obligation, the owner cannot rely upon existing legal rights in the face of later, limiting government actions. Expectations are protected only to the extent that measures, by means of the described techniques, are characterized as takings. Without a duty to compensate, the Government can alter legal positions, so long as the alteration is for the public good and no taking is assumed. This does not imply that a legislature is not free to compensate for a lawful extension of the sphere of social obligation⁷⁷.

Within these boundaries, the constitutional framework grants a degree of flexibility corresponding to the high political rank of property. The various lawful degrees of social obligation enable the social needs, as felt by successive generations⁷⁸, to be expressed within the concept of property law⁷⁹.

The positive features of this flexible system will become apparent when applied to newly perceived societal problems (such as environmental protection). The need for reform in a social area will lead to a change in existing relations only if the Constitution is sufficiently flexible. For economic reasons, the legislature will be disinclined to enact a reform if it entails only a marginal change in property regulations, but requires compensation. Article 14 of the Basic Law avoids this socially undesirable legislative dilemma.

PART III
SPECIFIC APPLICATIONS

CHAPTER 5 THE SOCIAL OBLIGATION OF LAND OWNERSHIP WITH RESPECT TO BUILDING LAWS

The most important kind of social obligation is that which arises from the rules which govern the construction of buildings. The necessity of limiting the unfettered construction of buildings can easily be understood, as in Germany more than 60 million people live in an area of less than 100,000 square miles. Under these conditions, any meaningful approach to city planning requires governmental regulation of building construction to reflect the public interest. The Constitutional Court has said, on this point:

"We cannot agree with plaintiff's argument that the market for rural land must be as free as the transfer of all other forms of 'capital'. The fact that the given soil is vital for society and cannot be enlarged does not allow entrusting its use to the incalculable market of free forces and the complete discretion of the individual; a just legal and social order leaves no choice but to assert the public interest in the land more strongly than in other fields of property. Neither from an economical nor a social perspective can land be equated with other values; the law cannot treat it like a mobile kind of merchandise. Article 14, Section 1, Clause 2 and Article 3 of the Basic Law, for these reasons, do not require the legislature to subject all forms of property to identical legal treatment⁸⁰".

The relationship between city planning and the conservation and improvement of the environment is so obvious that it needs no emphasis⁸¹, the existence of larger green spaces, for example, is a major environmental task which can be carried out only in the framework of systematic city planning.

The main rules governing the construction of buildings are found in the Federal Building Act (Bundesbaugesetz) of June 23, 1960⁸². This federal law is binding in all states. Paragraph 84, Section 18 of the Federal Building Act establishes federal jurisdiction for the regulation of land ownership. According to a 1954 memorandum of the Constitutional Court, the following specific powers fall under this jurisdiction; the rules for city planning, the reorganization of lots to be used for building purposes, the transfer of land, the building of streets and sewerage systems for development purposes, and the general use of land⁸³. The permissible kind and extent of building uses, the form of buildings, the minimal size of building lots and the installations allowed in building areas are not regulated in the Federal Building Act but in the Building Use Order (Bau-nutzungsverordnung) as amended and published on November 26, 1968⁸⁴. Federal jurisdiction also includes regulation of the main types of land-use in the states (Article 75, Section 4, Basic law). The states, therefore, retain only limited powers in the area of building laws. The state enacted building laws ("Landesbauordnung") may only regulate the detailed structures of a building generally covered by the Federal Building Act⁸⁵.

For building law purposes, federal law divides land into three categories: 1) those areas for which a zoning ordinance is enacted, § 30⁸⁶; 2) areas not governed by a zoning ordinance, but with existing coherent use for building purposes,

§ 34 ("interior area", "Innenbereich"); 3) areas not governed by a zoning ordinance, and with no existing coherent use for building purposes, § 35 ("exterior area", "Aussenbereich"). Different rules govern building permits for each type of area. Under all standards no taking is assumed where a building permit is denied because a planned building is inconsistent with these rules. Thus, the building regulations determine the substance and limits of property rights, based upon the social obligation inherent in ownership⁸⁷.

Under the Federal Building Law, the zoning ordinance is the main instrument for city planning⁸⁸. The local authorities must enact such ordinances as soon and as far as necessary (§ 2)⁸⁹. Such an obligation must be assumed, if a meaningful concept of city planning is impossible without an ordinance^{89a}. The enforcement of this obligation is secured by supervising state authorities, and not individual citizens. Generally, prior to the issuance of an ordinance, a land-use plan ("Flachennutzungsplan") is enacted; with the purpose of laying out the intended use of land, in accordance with the foreseen needs of the community. Whereas a zoning ordinance governs only one sector of the town, the land-use plan covers the whole town. The latter ensures that the town develops a comprehensive city plan beyond the limits of a zoning ordinance, taking into account the requirements of the broader region. The zoning ordinances, according to § 8, must be consistent with the planning structure of the land-use plan. Indeed, a zoning ordinance will be declared void if it conflicted with the land-use plan. The requirement of establishing a land-use plan may be waived only in extraordinary circumstances⁹⁰.

The formal procedure for enacting a zoning ordinance is governed by § 2. Subsection 4 requires the town, before enacting the ordinance, to consult all governmental agencies which have some interest in the concerned area ("representants of the public interest", "Träger der öffentlichen Belange"), such as the water regulating authorities, environmental, agricultural or business regulating agencies. In individual cases, up to twenty agencies must be consulted. Neighboring towns must also be included in this procedure (§ 2, Section 4). The town's citizens have a right to participate in the formulation of an ordinance, a preliminary ordinance must be publicly released, and it must include the written statement that each citizen may file suggestions and critical remarks concerning the plan (§ 2, Section 6). The ordinance document must include a statement outlining its planning function (§ 9, Section 6). Finally, every ordinance must be approved by a supervisory state agency. Thereafter, because of its legal nature as a rule ("Rechtsnorm"), it must, under § 12, be made publicly available again before it enters into force. This time consuming, intricate procedure is appropriate because a zoning ordinance has a long range, irreversible impact on the development of a town.

The Federal Building Act also contains substantive rules governing the legality of the zoning ordinance, which limit the town's discretion in enacting a zoning ordinance. The role of the region and the state in formulating the land-use plan has already been mentioned. Paragraph 1, Section 4 governs the substantive aspect of zoning ordinances:

Land-use plans and zoning enactments must be guided by the social and cultural needs and by the requirements of safety and health. The public and the private interests must, mutually and in themselves, be balanced in a just

manner. The housing needs and the aim to allow the acquisition of private homes by many citizens shall thereby be promoted.

In addition, § 1, Section 5 states:

Land-use plans and zoning ordinances must take into account the needs of the religious groups acknowledged by public law for their services and spiritual concerns, the needs of the business sector, the needs of the farmers, policies to promote young people, traffic and defense considerations; and they also have to serve the interests of preserving nature and landscape and the adequate formation of the town and landscape scenery. Agricultural areas shall be used for different purposes only to the extent that this is necessary.

The fact that such a variety of public interests has to be considered does not imply, however, that no room remains to accommodate private interests. Rather, the substance of the ordinance must reflect a just balance between the concerned interests⁹¹. It is obvious that the efficiency of these regulations will depend upon the justiciability of zoning ordinances. However, the courts may not substitute their judgment for that of the towns. The court may only ask whether the town has exercised its discretion in accordance with the described substantive rules of the Federal Building Act⁹². Three cases illustrate the operation of this scheme. If a town contracts with a private developer to enact a zoning ordinance reflecting the interests of the developer, without simultaneously considering the interests of citizens living in the neighboring area, the courts will invalidate the ordinance because it is not based on a just balance of public and private interests⁹³. If one wishes to build a house on his lot close to a scenic lake and an ordinance prohibits this, it will be upheld. The public interest in access to nature and the lake justify this result⁹⁴. Equally, a zoning ordinance which prohibits the construction of buildings in a recreation area close to a ship canal is valid under Article 1 of the Federal Building Law, due to the necessity of providing light signals for ships.

In the following pages, we shall examine the scope of the social obligation inherent in land ownership and its relationship to the taking issue, in the context of zoning ordinances. One conceptually important but rare case deserves initial comment, a taking is assumed where a zoning ordinance, for no apparently reasonable motive, excludes certain parcels⁹⁵. Such a case can seldom be established. In the words of the Bundesgerichtshof, the court will accept this argument only if the parcel "cries out to be used for building purposes"⁹⁶. The fact of this unusual exception does not detract from the broad range of alternatives for city planning available to the discretion of the local communities.

Apart from this case, the Federal Building Act itself sets out, in the detailed provisions of §§ 40—44, the circumstances under which an ordinance must be assumed to effect a taking of property⁹⁷. Naturally, these rules are not so exhaustive as to remove constitutional rights⁹⁸. But the enacted provisions tend to expand rather than limit constitutional rights (see in particular § 44). This explicitly legislative scheme for distinguishing between social obligation and taking is helpful to the legal process, since decisions in such a highly important field should not be left entirely to the courts. It will be recalled that the German Constitution itself grants the power to develop property rules to the legislature, and not to the courts.

Paragraph 40 states that the owner may claim compensation where he loses his right to build a house on his parcel because the ordinance provides for areas of public or special private business uses. In practice, it is rare for an owner to lose his building rights to a private business in which the public has a particularly high interest⁹⁹. As to public purposes causing such a loss, § 40 enumerates the following cases, parcels for supplying the public with water, spaces for the purification and channeling of liquid and solid sewerage, spaces for green areas, and spaces needed for the extraction and accumulation of stones and mineral resources. If the ordinance provides for these uses of private land, the owner has to be compensated. A qualification is made for public parking lots, garages or other installations. Under the rationale of the concept of "balancing benefits", the owner is compensated in such cases only if the planned use does not serve his interest, and if the owner is under no legal obligation to provide such a use (§ 40, Section 1, Clause 2). Most of the state building laws provide that certain types of houses may only be built if garages are simultaneously added¹⁰⁰. The obligation to shelter the means of traffic is part of the social obligation and, therefore, not compensable¹⁰¹. Such a case is meant when § 40, Section 1, Clause 2 refers to a legal obligation. Another example of this legal obligation is where the ordinance requires a large parking lot close to a shopping center. Under the theory that the interest of the shopping center's owner is thereby served, he is not entitled to compensation¹⁰².

For all cases, a right to compensation arises only where the plan, judged from an economic viewpoint, carries with it a disadvantage; this disadvantage being assumed if the owner is hindered in his own plans to use the parcel or if the market value is impaired¹⁰³. The mode of compensation is regulated by § 40, Section 2. The state must buy the land, if, after enactment of the ordinance, the owner can no longer be expected to keep it or use it in the previous or another lawful fashion. The duty to compensation also arises if the ordinance prohibits making improvements in a certain area (§ 40, Section 3; § 40, Section 2, Clause 2). The rationale behind these compensation provisions is to prevent the government from refusing to take the land, depriving the owner of its economic use without Compensation.

Paragraph 41 regulates the cases in which the ordinance prohibits any building on the land. There may be many reasons for such a prohibition, for example, the protection of civilians in emergencies, security regulations for areas close to a railway track, the quality of the soil being unsuitable for building purposes, or the preservation of the scenery¹⁰⁴. The provision also applies where there are health and safety dangers from nearby areas, such as nuclear power plants. Under § 41, Section 1, Clause 1, there is a presumption of compensation where buildings are prohibited, except where the land itself, independent of any legal considerations, makes it impossible to build a house.

The balance of § 41 is of particular interest for the purposes of this study. Paragraph 41, Section 1, Clause 2 states that no claim for compensation arises where the quality of the land or the peculiar nature of the site in relation to its local surroundings require a prohibition for building purposes. With these words, the legislature has adopted, into the written law, the substance of the doctrine of situational commitment developed by the courts¹⁰⁵. The Building Act establishes the limits of governmental, non compensable regulation in § 41, Section 3. The government must offer to purchase the land at market value if, under

the restrictions of the ordinance, the owner cannot reasonably be expected to keep the land or use it economically in the present or another lawful fashion. This formula indicates that, at least in this area, the legislature prefers the doctrine of intensity to that of individual sacrifice¹⁰⁶. Paragraph 42 gives the owner a right to compensation if the ordinance imposes public servitudes on his land, especially for public electricity installations¹⁰⁷. No compensation will be awarded for an installation which is essential for a house on the land (§ 42, Section 1, Sentence 2)¹⁰⁸. Under such conditions, the sacrifice cannot be levied upon the community, since the owner himself could not operate a house without electricity.

Paragraph 43 governs the case of an ordinance which orders the planting of trees or bushes, or the preservation of trees, bushes or lakes in a certain area. Because the Federal Building Act is limited in scope to city planning, and not directly concerned with environmental questions¹⁰⁹, such provisions must relate to city planning. The desire for scenic unity between a new building area and its surrounding environment will most often underly such an ordinance. A right of compensation exists, under these conditions, if the complying owner must make efforts beyond the reasonably regular care of his land (§ 43, Section 1, Clause 1). This may also be seen as an adoption of the courts' doctrine of "situational commitment", i. e., an action required of a private citizen is considered a social obligation as long as it does not go beyond that which a reasonable owner would do in the absence of the legal obligation. Consequently, an owner cannot avoid the application of § 43 by arguing that, in the absence of the ordinance, he would not take "regular care" of his land, but let it lie fallow. From a broader viewpoint, the whole scheme of § 43 turns out to be a classical case for the social obligation inherent in ownership.

The legislature also had to consider the legal consequences of an ordinance which changes or prohibits a prior lawful use in a manner not covered by the rules already discussed. For instance, what is the effect of an ordinance which only partially limits a former use, by allowing only three, instead of the previous six, stories? In particular, uses unrelated to building purposes had to be addressed¹¹⁰. Here, a variety of cases could arise, such as an ordinance permitting only forest usage in a previously agricultural area. Since it is impossible to state every possible case, general wording has been used by the legislature.

Paragraph 44 covers all cases not included in the previous rules, where prior lawful uses are altered or prohibited. The bill introduced by the executive containing this clause reflected the doctrine of individual sacrifice to distinguish between social obligation and taking, but the legislature preferred a provision based on the theory of intensity¹¹¹. Accordingly, a right to compensation is recognized only if the effect of the ordinance is "a considerable reduction of market value" (§ 44, Section 1, Sentence 1). In this context, it should be noted that a zoning ordinance can have simultaneously both negative and positive effects for an owner. Under the general rule of § 93, the positive effects must be taken into account when compensation is awarded; and this rule is particularly important in the framework of § 44¹¹². Read in context, § 44, Section 1 gives the following compensation: "1) if the previously lawful use of an existing building is prohibited or changed, 2) if a previously lawful building use of land not yet implemented is prohibited or changed, and the conditions described in § 30 are present, or 3) if a previous use unrelated to building purposes is prohibited or changed, resulting in a considerable reduction in market value." Previously law-

ful use is determined in accordance with laws of general application; usually, the provisions of the Federal Building Act (to be discussed later) will be relevant. Again, for particular cases the entire situation of the lot must be considered¹¹³.

Under § 44, the fact of actual exercise of a previously lawful use is not generally determinative. This is consistent with the general results of the cases adjudicated in property law¹¹⁴. It is based on the fact that Article 14 includes the protection of economical opportunities arising out of property rights, moreover, it is justified by a notion that regulation based on the implemented use of the land would be considered arbitrary¹¹⁵.

At this point, we shall touch upon an issue which has recently received increased attention from the German public. If the law compensates an owner for the loss of a right, should he not be obliged to also compensate the public for benefits which have accrued to him directly and only from the enactment of a zoning ordinance? Prima facie, a legal scheme based on such an approach could not be considered unjust. If the enactment of an ordinance raises the market value 100 % from one day to the next, then the "elimination of the planning profit" could limit those benefits arising not from individual efforts, but from the public concept of city planning¹¹⁶.

Returning to the case where a previously lawful use is prohibited or restricted, as discussed above, such a compensation is generally required by § 44. But the social obligation inherent in property also requires an exception here; according to § 44, Section 1, Sentence 1, Clause 2, no compensation is awarded, "if the previously lawful use is changed because it is inconsistent with the requirements of healthy and safe living and working conditions, for the persons living or working on the land or close to the land." This rule may not be applied if the lawful use in question had been already exercised before the issuance of the regulation, in such a case, the basic scheme of Article 14 will almost invariably confer a right to compensation¹¹⁷. Moreover, the scope of this rule excludes a case where the previously lawful use, even when not yet exercised, is fully prohibited, as it only regulates the case in which this use is modified. A right of compensation even exists if the ordinance prohibits, and not only modifies, a previously lawful use for reasons of public security, i. e., in the area of the police power. The courts have not made an attempt to ensure a restrictive interpretation of this rule.¹¹⁸ This is not fully consistent with the general analysis of Article 14, GG, under which an exercise of the power must be seen as a case of the social obligation inherent in property.¹¹⁹ The legislature apparently has expanded the compensation rights here beyond the constitutional minimum in order to avoid difficulties in handling the vague concept of causality used in German law.¹²⁰ In other cases in which § 44 establishes a social obligation, the motives of the town are central, in practice, this means that the courts will examine whether the reasoning given to the public was really decisive or whether it was used in order to circumvent the obligation to compensate.

Although the described exceptions somewhat reduce the scope of § 44, Section 1, Sentence 2, it is still of practical importance. The rule always become effective when many people live in a small area; forming the basis for a non-compensable social obligation, as it contributes to the welfare of citizens by facilitating healthy conditions in crowded areas. The freedom of the landowner is thus limited in downtown areas by the requirements of safety and health, an example which

aply illustrates the significance of Article 14 from a modern viewpoint. However, an examination of adjudicated cases reveals that this concept and the corresponding freedom of the legislature is not without limits. The strict wording of the rule grants a right to compensation only where a previous zoning ordinance allowed the use which was modified. The rule is silent as to the case in which the previously lawful use did not follow from a zoning ordinance. As shall be discussed later, a right to use land for building purposes will exist also, under certain conditions, in the absence of a zoning ordinance, both in populated and in less populated areas. Since the Federal Building Act provides for no compensation when the previously lawful use was based on the general laws rather than a zoning ordinance, it must be asked whether the constitutional scheme allows such a result. According to well established doctrine, Article 14 in general protects all forms of use of property. When a lawful use is prohibited and not only modified, a taking (and not a case of social obligation) must be assumed. Therefore, it follows that the constitutional scheme requires a right to compensation if a previously lawful use is cut off, regardless of whether that use arose from a zoning ordinance or not. The courts have indeed accepted this argument, subject to the doctrine of situational commitment.¹²¹

We turn now to the so called "anticipation effect." The Federal Building Act addresses itself to the situation where a town has decided to enact a zoning ordinance, but has not yet made all required detailed decisions and has not gone through the required procedures. The "intermediary stage" is of highly practical importance since only rarely will a zoning ordinance come into effect immediately. The planning purpose of the ordinance could be most seriously reduced, if the owners could lawfully circumvent its substance by quickly building new houses before the effective date. From the public viewpoint, this would be intolerable. For these reasons, § 14 of the Federal Building Act gives the towns the power to enact a "stop building ordinance" (Veränderungssperre). By such an ordinance, the town may decide to prohibit the building of houses in areas for which a zoning ordinance is being prepared. The "stop building ordinance" is usually valid for two years, but can be extended for a third year, and, in particular cases, for a fourth year. After this period, the town may pass an entirely new "stop building ordinance". The town also has an optional right to instead suspend the issuance of building permits if the planning preparations would be hindered by granting them.

It is obvious that all these intermediary measures may considerably impair the owners' rights to use the land. But the starting point of the constitutional implications of such measures must be that the owners are under a social obligation to tolerate them for a period which is reasonable in the light of all the requirements to be met in the procedure to issue the ordinance. Both the doctrine of special sacrifice and the theory of intensity will provide the legal basis for such social obligation. The Federal Building Act has limited the maximum waiting period to four years¹²². If the intermediary stage becomes longer, the owner must be compensated.

All the cases so far discussed only address the restriction of the owners' rights by means of a zoning ordinance. But the question of the lawful range of the social obligation also arises for general rules of law restricting or prohibiting the right to erect a building. Paragraph 34 governs the right to build a house in areas not governed by a zoning ordinance, but where an existing coherent use for building purposes exists ("interior area", "Innenbereich"). In small towns, it is not unusual

to find the absence of a zoning ordinance. According to § 34, a house, may be built in an interior area, "if this is not inconsistent with the present town structure and the existing streets and sewer facilities". In a concrete case, one will first examine whether a coherent use for building purposes is present. Given the general scheme of the Federal Building Act, this finding will be of major importance, since the standards governing building permits for areas without existing coherent use for building purposes are different, and will allow a grant of the permit only in exceptional cases.

Therefore, the definition of "an existing coherent use for building purposes" will often determine whether a building permit will be granted or denied. The courts were charged with the difficult task of developing workable standards. It is apparent from the subject matter that no broad formula exists which clearly covers all conceivable cases, as the variety of possible cases is too great. Again, as with the "situational commitment" doctrine, the whole complex of the local circumstances will be decisive. The courts have succeeded, however, in setting up broad interpretative guidelines which will often lead to a clear result. First, the courts will ask whether the area in question makes up "a part of a town". If this is affirmatively answered, the courts will examine whether an "existing coherent use for building purposes" can be ascertained. "A part of the town" is established if the existing buildings "with respect to their kind, number and local context in their entirety constitute a unity from the viewpoint of city planning, that is, if an impartial observer, familiar with city planning, will receive the impression of an existing pattern of city planning."¹²³ In this context it is not relevant how the local relationship of the area in question must be judged in relation to the center of the whole town. In particular, it is not necessary that the area make up a center of the town. Nor is it required that the area form a unit from the standpoint of living and working conditions. Only the external appearance of the town, as judged from a city planning perspective, is relevant.

Once such a "part of a town" is established, an "internal area" in the meaning of § 34 will be found if, again from the viewpoint of city planning, this part does not have such large gaps to prohibit the assumption of a given "coherent use". Again, no practical formula has been found which easily covers all cases. Some lower courts have ruled that a distance of more than 150 feet between two houses along a street will in no case allow an application of § 34; but the general opinion seems to be that even in such circumstances, one must look to all possible factors before making a final decision¹²⁴. Once one assumes a "coherent existing use for building purposes in the given area", the owner has a right to a building permit if the project is "not inconsistent with the present town structure, the existing streets and the sewer facilities". The legislature here had no other choice than to use a broad concept, leaving open its concise interpretation to the courts. What "inconsistent" means is largely a matter of deciding the general standard against which the "consistency" must be measured. Certainly, the present city structure is of primary importance, i. e., the project must not appear as an alien element within the given structure. But the previous type of use of the buildings, the existing streets, and the general traffic situation must be considered as well¹²⁵.

To interpret the term "inconsistent" the courts had to ask to what extent a building project must harmonize with the given structure in order to qualify as

"not inconsistent". One alternative was to grant a permit only if the project is fully integrated into the given structure. The other option was to allow the project as long as its building would not directly conflict with the previous structure. The Bundesverwaltungsgericht has based its decision largely on the protection of property and freedom, as ensured by Article 14, and therefore has adopted the latter standard in favor of a broader use of the land¹²⁶. Accordingly, a project may be qualified "inconsistent" only if its implementation from the viewpoint of city planning, would considerably deteriorate the present structure of the land-use. All aspects of the area surrounding the project, which could be impaired by it, must be considered. The negative effects of a project can be so intensive that they reach beyond the part of the town where it is located. For example, dust pollution affecting other areas could give rise to a judgment of "inconsistent".

From the viewpoint of environmental conservation, the extent to which land may be used for building purposes where no such use was made before is of central importance¹²⁷. The preservation of large green spaces outside the cities is essential not only for reasons of ecological stability, but also for recreation. The relationship of a modern environmental strategy with the substance of the building laws becomes particularly apparent here. The regulation adopted in § 35 largely accommodates environmental needs. Paragraph 35 governs the legality of building projects in areas "with no coherent previous use for building purposes" ("external area"). This definition is chosen to include all areas for which no zoning ordinance exists and which cannot be considered part of the internal area described in § 34.

Paragraph 35 provides that green areas must, in principle, not be used for building purposes¹²⁸. The resulting limitations of the property rights are not considered as takings, but as a social obligation for which no compensation is awarded.

However, § 35 has not stipulated total prohibition for building purposes in green areas. It has recognized that certain socially valuable types of projects should not be located in the "internal areas" because of their particular nature and therefore belong into "external areas". For these reasons, it has distinguished the so called "privileged projects" from all other buildings. Whereas permits for "privileged" projects are in principle granted in "external areas", this is true for other buildings only in extraordinary cases.

The Federal Building Act has not left the task of defining "privileged projects" to the courts alone. It has enumerated three "privileged" categories, (§ 35, Section 1, Clauses 1—3), and in Clause four, has generally stated that a building permit must be granted "if the project can only be located in the external area due to its special site needs, the project's adverse impact on its neighborhood, or its particular purpose".

The first three categories allowing permits for the "external area" are related to specific agricultural or forestry projects (Clause 1, 2), projects required for public services, and projects which, due to their nature, cannot be built in other areas (Clause 3). An agricultural or forestry project will be allowed in the external area if a) it is part of an agricultural or forestry enterprise¹²⁹, both from an objective and a subjective viewpoint¹³⁰, b) it serves this enterprise in fact,

and c) the space of the building project is only a small part of the space used by the entire enterprise¹³¹. If one of these three conditions is not present, the project will not be considered "privileged" and a building permit will be granted only under the highly restrictive conditions set forth in § 35.

In practice, the most difficult task for the agencies and the courts in this context was to distinguish between living quarters used for privileged enterprise on the one hand and disguised private weekend houses on the other hand. Such living quarters are "privileged" when, as judged from their location and their permanent functional use, they are designed to serve an agricultural or forestry enterprise. But the basic purpose of the regulation enacted in § 35 would be defeated if weekend houses were also considered as "privileged projects". In a given case, the agency must examine all aspects of the projects and then decide whether the leisure interest or the profit making aspect is dominant¹³². According to § 35, Section 1, Clause 1, such projects are privileged if built as houses by laborers working in the privileged enterprise. If the owner of the enterprise himself builds such houses, the project will fall under § 35, Section 1, Clause 1.

Among the projects related to the public services (§ 35, Section 1, Clause 3), one will find such projects as poles for electrical cables, television towers, water reservoirs or nuclear power plants. However, such installations are privileged only if their nature does not allow them to be located in the internal area. In practice, projects often found in external areas are those which can be built in no other location (§ 35, Section 1, Clause 3). These include quarries, brickworks, mines and undertakings in harbor areas.

As indicated above, the categories enumerated in Clauses 1–3 are not exhaustive; according to § 35, Section 1, Clause 4, all projects are privileged which cannot be built in internal areas because of their particular characteristics. This scheme was chosen because it is not a legislative task to enumerate all those projects which shall not be built in internal areas, given the basic intention of § 35. Therefore, the legislature has enumerated certain particularly relevant projects and thereafter established a general clause to describe "privileged projects". Thus, the administrative authorities are given a workable sufficiently clear standard.

Apart from the broad variety of projects conceivably belonging in the external areas, the possibility of future new developments has forced the legislature to adopt a general clause. In practice, such different projects as outdoor cinemas, observatories, tubercular sanatoriums, explosive dumps, power plants, observation towers or public ski cottages will fall under the general clause. But the clear wording of the statute does not allow one to disregard the fact that "privileged objections" are exceptions; the rationale behind § 35 prohibits as "privileged" all projects which are in some sense extraordinary. For these reasons, the courts have refused to include recreation grounds, churches or bee houses¹³³.

Under § 35, the final decision on the application for a building permit requires more than the "privileged" nature of the project; it is also mandatory that the "public interest" is not opposed to the project. The concept of the "public interest" is intended in this context to bring into operation all aspects relevant for the public with regard to projects in the external area¹³⁴. The legislature has used in its definition of the term the same technique which we have found with the "privileged" projects. It has noted in § 35, Section 3, certain specific

public interests, but has given no exhaustive definition in order to accommodate future developments. These specific interests are given "if the project requires economically unproportionately high efforts to build streets or other traffic installations, public service or sewerage installation for the public safety, health, or other public aspects, if the public water system is endangered, if the scenery is adversely affected, if the natural characteristics of the landscape are impaired, or if the development of an isolated neighborhood may result from a grant of the permit. All measures to improve the given agricultural structures must be given particular consideration". The legislature has, by adopting this formula, achieved a sufficiently clear description of the "public interest"; to interpret the term, the general objectives of the Building Act, as expressed in § 1, Section 4, may also be used¹³⁵. The legislature has chosen not to make explicit mention of the relevance of such town plans which have been made fairly concrete. It was considered self-evident that such concrete plans must be taken into account when the project in question would hinder them¹³⁶.

Among the "public interests" aspects particularly referred to by § 35, Section 4, the preservation of the natural characteristics of the landscape and of the scenery, and the prevention of isolated neighborhoods are of high environmental importance. Behind the law lies the notion that the present use of the land, and its topographical and biological features can determine the character of an area to such an extent that the public good does not allow a use of the land for building purposes. Thus, the public interest in areas particularly well fitted for recreational purposes is operational here. In general, the courts have preferred a broad interpretation of this rationale.

The courts' broad interpretive approach to the section is apparent from one case where the issue was whether a project is inconsistent with the landscape if it isn't visible at a certain distance. The court decided that a lack of optical interference doesn't necessarily mean a permit should be granted. Instead, other factors should be examined, such as whether the project conforms generally to the landscape and its use, whether the aesthetic protection of the landscape should be considered, and, in particular, whether public recreational needs are impaired¹³⁷. This interpretation led to the result discussed above, that weekend homes may only rarely be built in "external areas."¹³⁸

The clause is also directed to the question of whether the potential development of an isolated neighborhood conflicts with the public interest. An "isolated neighborhood" will be assumed when the given project cannot be integrated into the surrounding landscape, from the viewpoint of orderly town planning. A building permit cannot only be denied if such an isolated neighborhood in fact is created. A permit will also be denied if there is a danger that the project will initiate a future corresponding development. The existence of such a danger must be evaluated according to all given circumstances; the given building structure, the potential use for building purposes at the given site, and the administrative "precedential value" for future applications. A particular problem arises in this context when several existing buildings already form an isolated neighborhood, and another grant is requested. The grant will be denied only if the character of the project would substantially deteriorate the present structure.

This discussion of the various forms which the public interest may take is not exhaustive. In addition, the courts have expressly recognized environmental

concerns as elements of public interest. For example, despite the fact that they are not explicitly included in § 35, permits have been denied by the courts for a wall around a house on a green space, and noise created by an outdoor cinema on the theory that such structures would be contrary to the public interest^{138a}.

Under § 35, conflict with the public interest alone does not automatically lead to a denial of the permit. In the final decision, the owner's interest must be taken into account and the public interest must be weighed against it. This scheme applies to privileged and to non-privileged projects. The difference in the two categories is the respective weight of the private and the public interest as enacted in the statute. Paragraph 35 establishes the following mechanisms; in a typical privileged case, the private interests are accorded stronger weight than the public interest. However, in a usual non-privileged project, the public interest must prevail. On the whole, one can therefore speak of a "rule and exception" scheme. As a rule, permits are granted for privileged and denied for non-privileged projects. An exception from the rule is admissible only in the event of very unusual circumstances which would make the application of the normal scheme unjustified¹³⁹. In summary, it may be said that the legislative criteria established by § 35 generally lead to clear, unequivocal results¹⁴⁰.

One peculiar problem arising from § 35 should be noted, that is, when factual circumstances relevant to the granting of a building permit change. One example is where a building established as a privileged project would later, because of factual changes, no longer qualify as such. This might occur, for instance, if a farmer retires and sells his originally privileged farm to a third person intending to use the farm as a weekend house. From the viewpoint of the farmer's vested right, it would seem difficult here to prohibit the sale of the farm¹⁴¹. But from a strict viewpoint of city planning, the sale should be prevented, particularly in view of the potential abuses to the system which could arise. Nonetheless, the constitutionally protected property rights of the farmer probably outweigh the public concern of town planning.

A second example is where, at the time of construction, a building was legal under § 35, but later, due to changed circumstances, was not. In this type of case, there was little doubt that the owner's vested right must prevail¹⁴². It has been held that the owner may even adapt the building to changing needs, e. g., by adding a garage. The limits for such changes are reached when the function of the building is broadened, and, consequently, the given town structure deteriorates under the standards of § 35.

Are the outlined, imposed restrictions compatible with constitutional ownership rights¹⁴³? Ultimately, the regulations adopted by § 35 can be squared with Article 14 of the Basic Law. That is, they will be considered a social obligation and not a taking. To a degree, the reasoning behind this result is related to the old German tradition of restricting the free use of land for building purposes¹⁴⁴. Since the Basic Law did not intend to introduce a new concept of property, the social obligation can still be assumed today¹⁴⁵. The courts additionally point out that present constitutional standards would lead to the same result. The Bundesgerichtshof will assume no taking as long as all citizens are equally affected¹⁴⁶, and the Bundesgerichtshof's doctrine of situational commitment would compel the same conclusion¹⁴⁷. Paragraph 34 itself lists the constitutionally controlling factors, and, since a permit is denied only if city planning considerations require it, situational commitment covers the case and helps to explain why no taking is assumed.

As to zoning ordinances under §§ 40-44, compensation is granted only where a permit is excluded by the substance of the ordinance. An exception arises if local circumstances make it inappropriate to build on the land, or if use of the land for building is inappropriate from the viewpoint of city planning-both exceptions which also fall under the doctrine of situational commitment.

Although this system is burdensome to owners, it is advantageous to environmental concerns. There can be little doubt that only through the scheme adopted by § 35 has the German public been able to retain the large green areas which are so vital to ecological stability and recreational needs.

CHAPTER 6 THE SOCIAL OBLIGATION OF PROPERTY IN WATER LAW

We shall now discuss how the social obligation affects ownership in water, asking, for example, to what extent a riparian may use a creek running through his land. It is obvious, that the public interest will have a considerable impact on the legal position of the owners¹⁴⁸. If the owner uses the water so as to reduce its quality, the public will suffer. The limited extent of water resources and the growing need for clean water explains the modern tendency to stress the social obligation of the riparian¹⁴⁹. Accordingly, the position of the owner has been highly regulated by the legislature. The whole area of water law cannot be discussed here in detail because the legal situation varies from state to state.¹⁵⁰ Therefore, the discussion will be limited to the basic features of the owner's position.

In contrast to traditional practice, water law is now treated as governed by public, not private, law. This means that the owner is not only limited by the corresponding private rights of other riparians, but also by rules protecting the public interest. This change illustrates the modern tendency to limit the riparian's rights on grounds of the public interest in pure and usable water. Nevertheless the 1960 Water Resource Act (herein: WRA) has not abandoned the concept of ownership in water¹⁵¹. Technically, the public interest is secured by treating water as a so called "public object" (öffentliche Sache). This brings to bear upon water law all the limitations on ownership which have been developed in administrative law for all other "public objects". In particular, the rule of "social acceptability" ("Gemeinverträglichkeit") comes into play. This rule states that the owner may use the object only to the extent that his use does not conflict with its legally determined public function. As to flowing surface water, § 24 of the WRA states that the owner may, without special permit, only use the water "for his own needs."¹⁵⁴

Since the Act does not define "own needs", a controversy has arisen as to whether purely personal uses are implied or whether use for his farm or factory may be included. Most courts adhere to the latter version¹⁵⁵. However, the "own needs" must be exercised in a manner consistent with the objectives of the WRA. Paragraph 24, Section 2, states the owner may use the water "as long as third persons are not impaired, as long as the quality of the water is not adversely affected, as long as the amount of the carried water is not substantially reduced and as long as no other negative effects on the water system accompany the use". The latter general wording ensures that the full range of public interests is protected.

These regulations place strict limits on ownership rights. But in contrast to third parties, the owner still has considerable advantages. Absent a special permit, third parties may use surface waters only in the framework of "social acceptability" as defined by regulations of the various states¹⁵⁷. These regulations do not fully cover "the own needs" as defined for the owner in § 24, WRA¹⁵⁸. For this reason, the far reaching limitation of ownership rights in § 24 do not mean a total restriction, which is important for the constitutional evaluation.

If the owner wishes to extend his use beyond the scope of § 24 WRA¹⁵⁹, he must apply for a special permit¹⁶⁰, and is then subject to almost the same regu-

lations as third persons¹⁶¹. He only enjoys the advantage that, in most states, his application must be given preference over those of third persons, if both applications equally affect the public interest¹⁶².

Apart from the limitations arising from third parties' rights, this general permit system places an additional burden on the owner. Once a permit has been granted, to a third party, the owner has an obligation to tolerate the implementation of that permit (§ 8, Section 4). The owner's basic rights are narrow, since he has no right to a particular quantity of water, he cannot object to a third party use which reduces the flow. (A different scheme is adopted for solid substances which, under Section 3, the owner can extract.) The legislature has, however, also considered the owner's interests. If it is anticipated that an application will have adverse effects on the water passing over the land, a permit may only be granted, according to § 8, Section 3, if these adverse effects can be prevented or balanced by the third party. If preventive measures are not available, the permit will be granted if the public good requires it. The remaining negative effects on the owner must be compensated under § 8, Section 3, Sentence 2. By this regulation, the protective function of Article 14 becomes operative. A social obligation cannot be assumed if something is taken which, according to the general regulation, was intended for allocation to the owner.

Paragraph 8, Section 1, Clause 2 states that a permit for the third person does not by itself imply, a right "to use objects belonging to other persons, or to use land or installations which are in the possession of other persons". In this way, each state is allowed to decide whether or not the owner must tolerate third party use¹⁶³. However most states have decided to extend the owner's social obligation. Moreover, this obligation is not limited to the actual use of the water, but also comprises tolerance by the owner of the construction and maintenance of installations on the bottom of the water, as long as these are required in order to implement the third party's permit¹⁶⁴. The grantee must, however, obtain the owner's consent to use the land, since the permit applies only to the water system. The government can require this consent, but then it would be characterized as a taking.

It is clear, even from this sketch survey, that an owner's water rights, as compared to his land rights, are severely restricted. It may be asked whether such far reaching restrictions are really a form of social obligation. In answering this question, the fact must not be overlooked that considerable legal obligations were placed upon the owner even prior to the enactment of the Constitution and the WRA¹⁶⁵. Furthermore, a taking can only be assumed, if the owner's position was adversely affected by the WRA regulations. Article 14 was not intended to protect property, including water, more extensively than was the case under former regulations¹⁶⁷. Accordingly the taking clause only comes into play in that narrow sphere where the owner's position has been weakened¹⁶⁸. For practical reasons, the most onerous rule is that the owner may use the water only for his own needs. It is true that the owner may assign this right to a third party, but if he does so, his rights thereafter are the same as those of the rest of the public. In other words, the owner may use the water himself, but cannot use it for the benefit of others, or grant permits for its use. Such rights are reserved to the government. From a constitutional standpoint, a similar scheme, if applied to real property, would be void as in con-

flict with Article 19, Section 2 of the constitution (protecting the basic substance of the property clause). But almost all commentators agree that in water law specific criteria must prevail because of the great public interest involved. For these reasons, the Bundesgerichtshof has concluded that these regulations may be considered as part of the social obligation inherent in ownership.

Regarding the state's power to grant permits for water use in the owner's area, § 6, WRA allows the granting of the permit only if required for the public good. This does not automatically mean that no taking can be assumed; since the owner's obligation does not necessarily infringe upon the basic essence of his property rights, it cannot be generally stated that this obligation constitutes a taking. If the owner suffers damages related to his ownership rights in the land, § 8, Section 3, Sentence 3 grants compensation.

These far reaching social restrictions of ownership rights in water are only explicable due to the specific background of water law: i. e. the traditional restrictions of water law and the close nexus of the public good. The latter aspect is of general interest for the law of takings, as it illustrates that the social obligation inherent in property can extend to circumstances under which the owners' action can lead to serious or irreparable harm to the public good.

In closing, the two water law cases that were mentioned earlier, shall be discussed in greater detail. In both cases, the Bundesgerichtshof had to deal with the question, whether a taking must be assumed where the owner of land is prohibited from making a certain use because his land has been declared part of a "water protection area". According to § 19, Section 1, WRA, a "water protection area" can be designated for the public good to protect waters needed for the public supply from adverse affects, to increase the amount of ground water and to prevent an undesirable flow of precipitation water¹⁷². The law itself does not speak to the issue of whether and when a "water protection order" constitutes a taking¹⁷³. In order to satisfy the constitutional limits posed by Article 14, Section 3, of the Basic Law, it simply states that in the case of taking, an adequate amount of compensation must be paid. Paragraph 20 states further in Section 2, Clause 2, that in the case of a taking, the amount of compensation must be determined with regard to the previous use of the land which has been precluded by the water protection order.

In both cases, water protection areas had been designated to secure the public supply of clean water. In the first case, as a consequence, the plaintiff (owner of land within the area) was denied a permit for extracting gravel from his farm land. In the second case, the order implied that the plaintiff, (again on farm land) could, in the future, construct buildings only under severe restrictions. The plaintiff claimed that he had intended to start a timber business on his land at some future time. The Court reached different results in the two cases, while relying on its doctrine of "situational commitment". In the first case, a taking was assumed, in the second, a social obligation was found.

The controlling factor in the first case was that the nature of the land made it possible to immediately extract gravel, as shown by local practice. Therefore, any reasonable, economically minded owner would have seriously considered extracting gravel from his land. For these reasons, the "doctrine of situational commitment" favored the owner. The opinion is noteworthy on a broader con-

stitutional level since it implies a limited judicial innovation in takings law; in drawing the line between a taking and a social obligation, the Court did not refer to the actual, previous use of the land, but to the present objective factors which would condition the future use of the land¹⁷⁵. This is a sensible approach because often it is only due to chance that a certain use has been previously made. Thus, the former practice of relying upon previous use as the controlling factor was not satisfactory. The Court also stressed that what had been taken from the plaintiff was not something created by public efforts¹⁷⁶, as the use of gravel was strictly related to the quality of the land itself. Finally, the opinion is remarkable because it discusses whether the denial of the permit was a legitimate exercise of the police power. The defendant had argued that the intended use would have endangered the public supply of clean water and therefore was subject to the police power¹⁷⁷. The Court rejected this argument finding that, under aspects of the constitutional protection of property, the plaintiff could not be treated as someone endangering public order and security¹⁷⁸. Legally, the permit had been denied due to the sensitivity of the water system and not due to plaintiff's plan to extract gravel. As long as the area was used and treated in a usual, customary fashion, the extraction of gravel did not constitute a danger to the public order.

In the second case, the Court used the same legal standards, but rejected the plaintiff's claim of a taking. His position was based upon a reduction in the land's value due to the water protection order, and the current infeasibility of a future timber business, due to restrictions in the order. The Court assumed a social obligation because the plaintiff's former use of the land was not restricted and because no other economic possibilities directly inherent in the land and its surroundings were prohibited. Therefore, the Court argued that the plaintiff had not made a considerable sacrifice. The Court distinguished the two cases by observing that, in the first case, the land had, without any further preparation, directly and immediately lent itself to the intended use; in the second case the possible future planning of a timber business would not, under objective standards, be considered an immediate, economic and directly relevant use of the land. The Court further stressed that the plaintiff in the second case had not even established that the nature and accessibility of the land made a timber business possible.

The two cases illustrate, even beyond the scope of the water law, the crucial importance of the doctrine of "situational commitment" for the distinction between taking and social obligation. This doctrine complements the theories of intensity and individual sacrifice and often provides for a fair result in cases where the two other theories do not lead to a clear conclusion. The two cases also illustrate that the doctrine of "situational commitment" does not automatically produce decisions with absolute precision. Of course, few legal doctrines even do. Nonetheless, the doctrine of "situational commitment" is a feasible instrument for resolving cases which cannot be solved by reference to the two other doctrines.

CHAPTER 7 THE SOCIAL OBLIGATION AND THE PRESERVATION OF THE LANDSCAPE AND NATURE

The law governing the protection of the landscape and nature ("Naturschutz und Landschaftspflege")¹⁷⁹ is particularly interesting in the German constitutional system. The dynamics of constitutional property law are probably highlighted more in this subject matter than in any other field.

In contrast to the two areas discussed above, only a few traditional forms of social obligation were carried over to the field from the time prior to 1949. In fact, one of the more spectacular cases in which courts set aside legislation originating before the enactment of the Basic Law related to the protection of the landscape and nature. The 1935 Federal Nature Protection Act had provided that parts of the landscape of particular interest to the public could be declared natural monuments (§ 13), nature protection areas (§ 40), or landscape protection areas (§ 15). When authority was exercised under this Act, private ownership rights were often severely circumscribed. "Natural monuments" could, absent a permit, no longer be removed, destroyed or changed (§ 16, Section 1). In "nature protection areas", alterations to the functioning and outlook of the area were not allowed without a permit (§ 16, Section 2). Finally, in "landscape protection areas", all actions which harmed the scenery, had negative effects on the natural stability of the area, or generally impaired the use of the landscape for recreational purposes were prohibited. Paragraph 24 of the Act had provided that no limitation of ownership rights caused by this Act would be considered a taking¹⁸⁰. After 1949, the courts did not assume that the Constitution was intended to carry over the former status of the law, but measured the provisions against Article 14 of the Basic Law¹⁸¹. By this standard, certain cases under the 1935 Act could be considered a taking. For this reason, § 24 was rendered invalid after 1949¹⁸². The scheme of the Basic Law could therefore operate without traditional restrictions. The following discussion reveals the substance and limitation of the social obligation as envisioned by the Constitutional Assembly and developed by the courts. The practical operation of specific criteria to distinguish social obligation and taking, as established under the Basic Law, can be demonstrated in this context. On the one hand, regulations protecting nature and landscape may entail far reaching limitations of ownership rights and therefore call for compensation. On the other hand, this area coincides with interests to be protected and promoted by the very concept of social obligation. Traditional private law schemes cannot adequately protect nature, because regional public planning, which partially limits the owner's disposition powers, without implying a formal taking of the land, is required.

The first case to be discussed here is the widely quoted "dome of beech trees" case¹⁸³, which reflects the divergent interests of the owner and the public. The plaintiff owned a large farming area where a beautiful group of eight beech trees and two oaks (popularly called the "dome of beeches") had grown for a long time. The trees had been designated a "natural protection area" in 1925, and under § 16 of the Federal Natural Protection Act, the owner was prohibited from felling the trees. The plaintiff claimed that this regulation amounted to a taking. The Bundesgerichtshof applied its doctrine of "situational commitment", stating that, under the circumstances, the relevant question was not primarily whether the plaintiff had to bear an individual sacrifice for the com-

munity. In the court's view, because the trees could not be compared with other land, the general approach of contrasting the aggrieved person's situation with that of third parties, was inappropriate¹⁸⁴. The Court argued that the natural location of a piece of land within the general landscape might impose a special responsibility upon the owner not to use his property in a certain manner. Such circumstances will be assumed "if a reasonable and economically oriented person" would not make such a use. Under these conditions, the legislature has the power to make the moral obligation a legal one. Since the legislature required the plaintiff, in the absence of any regulation, to act as a "reasonable and economically oriented person", the order could not be considered a taking, but a form of social obligation. The Court next described the limitations of the social obligation in the area of landscape protection. First, a taking will be assumed, if the regulation heavily interferes with the major economical use of a reasonable owner. This exception did not govern this case since the plaintiff never contended that the originally intended use of the trees was timber. Neither was the second exception operative, as the prior economic use of the land was not limited by the regulation. What was precluded however was an additional, further reaching use which conflicted with the public interest and therefore was not protected by the Constitution¹⁸⁵.

The principles developed in this decision, in particular the application of the doctrine of "situational commitment", laid the path for the further development of the distinction between social obligation and taking in landscape and nature protection law. In 1956, the Bundesverwaltungsgericht had already found that, in general, measures to protect nature could not be seen as takings since the preservation of the scenery serves public recreational purposes¹⁸⁶. But the theory (and limitation) of this rationale was not stated as clearly in this decision as in the "dome of beech trees" case.

The potential force of this rationale for the protection of landscape and nature was evident from the beginning. The German Council for the Protection of Nature ("Rat für Landespflege") expressed it unequivocally in a 1967 resolution: "Article 14, Section 2 of the Basic Law states that property entails an obligation and that its use shall also serve the public. This means that where the owner or another person, in using land, causes adverse effects, dangers or inconveniences, and thus acts against the public interest, the injuries must be corrected by the owner and not by the public¹⁸⁷." Such statements had little practical effect because, for a long time, the legislature was reluctant to enact new provisions to protect the landscape and nature.

This situation changed in the early 1970's, when heightened public sensitivity to the environment led to several new statutes at the state level. The federal government has jurisdiction to prescribe the guidelines to be followed by the states (Article 75, Section 3, Basic Law), but has, so far, not exercised this power¹⁸⁸.

Its hesitation has led several states to enact comprehensive regulations to protect the landscape and nature. A first step in this direction was Baden-Württemberg's Agricultural and Landscape Protection Act ("Landwirtschafts-und Landeskultugesetz) of March 14, 1972. This Act provides in § 26 that any person in possession of agricultural land must maintain and cultivate it. The possessor's obligation to mow grassland at least once a year is intended to prevent the spreading of harmful seeds into neighboring areas. An exception is made only if an owner

cannot cultivate the land because of personal circumstances and if he has unsuccessfully attempted to find someone else willing to cultivate the land at no cost.

Several states have enacted legislation concerning the social obligation inherent in ownership. As of June 1975, the states Hessen¹⁹⁰, Schleswig-Holstein¹⁹¹, Rhineland-Palatinate¹⁹², Bavaria¹⁹³ and North-Rhine-Westphalia¹⁹⁴ had enacted statutes to preserve nature, expressing the public interest and creating several forms of corresponding social obligations.

These statutes largely rely on the notion of "intervention" into scenery and environmental stability¹⁹⁵. Whereas the statutes of Rhineland-Palatinate and North-Rhine-Westphalia contain a general clause describing the meaning of "intervention", the legislatures in Schleswig-Holstein and Hessen have enacted a nonexhaustive catalogue of nine specific instances of "intervention". The Schleswig-Holstein Act gives the following examples¹⁹⁶:

1. The extraction and production of mineral resources or other parts of the soil^{196a}
2. the digging, piling and filling up, and the dredging of land,
3. the construction or a major change in the buildings, streets and paths in the external area (§ 19, Section 2 of the Federal Building Act),
4. the construction or a major change of dumps, storage or exhibition silos or camping areas in the external area,
5. the storage or dumping of wastes,
6. any consolidation of water systems,
7. the construction or change of poles and support systems for open air electric cables,
8. the draining of moors, swamps and marshes, and
9. the construction of enclosures or fences in the external area."

If an "intervention" occurs, the statutes set out several requirements. To the degree possible an "intervention" must avoid negative effects on nature and landscape¹⁹⁷. Negative effects which cannot be avoided must be removed or corrected by the interventor¹⁹⁸ (§ 8, Section 2, Sentence 3 of the Schleswig-Holstein statute provides that an intervention is prohibited if the negative effects cannot be avoided or corrected and the public interest in conservation outweighs the potential interventor's interests.) Where a license is required, compliance may be secured by the government by requesting proof of the prescribed measures or by asking for security from the applicant.

These regulations reflect to a great extent, German public opinion about the preservation of landscape. The statutory objectives and the variety of cases covered by the broadly phrased statutes will help protect the environment. But since these statutes contain potentially far reaching limitations on ownership, the legislature had to cope with the takings problem. In all instances, a general clause provides for adequate compensation in the case of a taking²⁰¹. The conditions constituting a taking are not fully specified in the statutes and will have to be determined by the courts in accordance with general standards. Bavaria has chosen a particular approach. Article 32 of its statute states that all measures under the act are an expression of the social obligation inherent in ownership, as long as the prior lawful use of property is not considerably impaired or limited.

Since the enacted statutes went into force immediately, the legislatures also needed to address the general question of compensation for the restriction of prior use. For example, the Rhineland-Palatinate parliament provided: "If a prior lawful use is prohibited by any measure based on this act, in a manner seriously limiting the general use to which the land can be put, the owner must receive adequate compensation". The wording of other statutes does not expressly limit compensation to cases where a prior use is restricted. North-Rhine-Westphalia has chosen this formula in § 3, Sentence 1: "If the lawful use of land or the exercise of a right is prohibited, or intolerably limited or hindered, the owner will receive adequate compensation in money". Although recourse to the courts will undoubtedly be necessary to clarify the scope of these general clauses, the statutes exemplify the public's interest in preserving landscape and nature; consequently, the individual is expected to exercise his ownership rights accordingly.

The North-Rhine-Westphalia statute contains a number of provisions which impose a social obligation on the owner. Paragraph 35 provides that the owner must tolerate public recreational walking on paths, headland, slopes, fallow land and other areas not used agriculturally. In order to avoid constitutional problems, § 37 stipulates that these public rights may be exercised only to the extent that they impose no intolerable burden on the owner, while § 35, Section 2 expressly provides that the public has no access to any private living area or land used for privately or publicly held businesses. Another provision taking into account the owner's interest is found in § 35, Section 3: if the owner suffers considerable damages due to the public access right, he may recover his damages from a state agency, thus avoiding a search for the private person responsible.

Another type of social obligation is enacted in § 28, which requires a private owner to plant greenery in order to prevent ecological problems created by nature itself or by man (the latter category excluding problems arising from traffic installations). If this is required by a so called landscape plan²⁰⁴, § 28, Section 1, Sentence 2, stipulates that this obligation will be considered a social obligation as long as it creates "no intolerable burden". The owner must cultivate shrubs or trees only if this requires a small effort. In § 24, the Act provides that in nature and landscape protection areas, as designated by the landscape plan, all actions are precluded which change the land, have adverse effects on the ecological stability, impair the scenery or carry negative consequences for protected land. Finally, § 24 of the North-Rhine-Westphalia Act secures public access to banks and shores. Within about 150 feet of certain larger water systems, no construction will be permitted. Exceptions are made in § 2 for public transportation systems, for prior constructed or permitted installations, and for projects required for the maintenance and care of the water and for the public water supply. Section 3 makes further exceptions for cases of individual hardship and for installations required for the public good.

Some state legislation is designed to prevent ecological damage from mining. Two examples are the March 15, 1972 Act to Protect the Landscape from Damages Coming From the Extraction of Coal and Minerals of Lower Saxony²⁰⁵ and North-Rhine-Westphalia Extraction Act of November 11, 1972²⁰⁶. Paragraph 2 of the law of the Lower Saxony describes this aim:

- "1. The ecological stability of the landscape must not be harmed by any intervention into the ground, the fauna and flora, the regional climate, the water system or other ecologically relevant areas. Harm will be assumed if the land can no longer be used for agricultural purposes, if its recreational value or any other natural factor relevant to human conditions is impaired.
2. The scenery must not be permanently destroyed.
3. Parts of the landscape which are of any particular value must be preserved.
4. Areas used for extraction purposes must be recultivated so that they can be used again in accordance with master plans, regional and state planning."

The obligation to reclaim the land rests upon the mining operator or upon the land-owner (§ 2). All major projects must receive a permit, (§ 14), and the state is bound to require, before implementation, an amount of security covering the estimated costs of reclamation. The owner may be ordered to mine in areas formerly or presently mined, but only if this will improve the later use of the land or scenery, and if the order is tolerable from the owner's viewpoint (Section 2). Because such an order may be a taking, it is provided in § 5 that the owner will receive adequate compensation if he suffers an economics loss.

The objectives of these mining laws are also reflected in the mining acts of most of the other states. In particular, these acts oblige the mining licensee²⁰⁷ to remove landscape damages arising from his enterprise. Most states have enacted regulations of the kind found in § 148 of the Hessen Mining Act of November 10, 1969: "The mining licensee is obliged to repair all damages suffered by the land and its improvements through his business, regardless of whether the business was operated below surface or not, whether the licensee acted negligently or whether the damages were foreseeable. If the license is transferred to a third person, the former and present licensees are both liable for the damages arising after the transfer, unless the original licensee can demonstrate that his operations did not cause the damage."

PART IV
CONCLUSIONS

CHAPTER 8 PROPERTY AND THE ENVIRONMENT: THE SOCIAL OBLIGATION

This discussion has attempted to demonstrate that the legal concept of property can only be unchangeable in part. The unchangeable core of the concept which consists mainly of the power of disposition and the power to exclude others, will not determine peripheral questions related to ownership rights. The inherent flexibility of the concept of property becomes even more obvious by looking at historical²⁰⁹ and comparative²¹⁰ studies. Despite the strong protection granted to property by the Basic Law, there is no permanent concept of property (as illustrated by the clause stating that the substance and limits of property will be determined by the legislature). The Constitutional Court²¹¹ and almost all commentators²¹² have agreed, however, that there is an essential core of property rights under Article 79, Section 3 of the Basic Law which is not subject to legislative change²¹³.

The policy reason behind this scheme is evident. Constitutional law must remain flexible where major factors are constantly changing. Because the concept of property affects a broad range of other matters, the legislature must be free to determine the specific legal powers related to the other matters. Politically, such an approach is necessary; for if the concept of property were rigidly fixed, every legislative alteration limiting ownership rights would have to be construed as a compensable taking. The Constitutional Court rightly emphasized that the constitutional protection of property does not imply that compensation must accompany each legislative reform. As long as the basic essence of property rights is not curtailed, the legislature may engage in reform without the spectre of fiscal impossibility.

The Court has stated: "if measures of reform become necessary, the protection of property and the given property distribution shall not pose an insuperable burden for the legislature. The legislature is not left with the choice of either preserving existing private rights or compensating under the conditions of Article 14, Section 3; it may change certain individual rights without violating the constitutional protection of property²¹⁵."

Policy considerations suggesting a change of ownership rights may originate for several reasons. When general political concerns (the preservation of a sound structure of the agricultural sector) can be implemented only by limiting ownership rights (the permit requirement for a sale of agricultural land), property rights may have to be circumscribed. When a socially disruptive use of property occurs with greater frequency (the disposal or the storage of waste in ecologically sensitive areas), the legislature may be inclined to invoke the social obligation inherent in property. Technological developments may cause socially negative consequences (machine exhaust emissions) necessitating limits on ownership rights for the public good. Further, the legislature may invoke the social obligation to protect the private property of third persons where procedural aspects (burden of proof or litigation costs) prevent vindication of those rights (dust sediments close to several cement factories).

Such legislative objectives, which may often be overlapping, are of relevance to environmental law. Before returning to this aspect, reference must be made to

the limitations of the State's power of invoking the social obligation. We refer to the constitutional rationale of social obligation within the property clause and the system of constitutional rights in general. The Constitutional Court has, again and again, stressed the importance of a method of interpretation based on the systematic context of a rule²¹⁶. Such an interpretation of the social obligation establishes that the social obligation must not be so elevated as to obliterate private property as a central social tool. Public discussion of environmental policy has, in some few instances, revealed an intent to use the social obligation as the first step in a general socialization of property. Such an approach is, of course, inconsistent with the meaning of social obligation as established in the Basic Law. A politically motivated socialization of all private sectors finds no legitimacy in Article 14²¹⁸. The social obligation is limited to cases, within an individually oriented system, where specific uses of property conflict with the public interest. The social obligation may be invoked in such instances, based on considerations related to the specific subject matter and not to notions of the general redistribution of wealth. The Constitutional Court has underlined this limitation upon the social obligation by demanding that it must be required "by considerations tied to the very subject matter" ("von der Sache selbst")²²⁰. It is obvious that environmental law tends to require a limitation of property rights for reasons "tied to the very subject matter". The full complex of environmental law belongs to those areas in which "the social dimension of property functions²²³" is intensely felt, and therefore calls for some form of social obligation. One must not forget that the environmental problems of today arise largely from yesterday's use of property rights.

Nearly all the policy considerations mentioned, which cause the State to regulate property rights, are of immediate relevance to environmental protection. Technological developments, the same disruptive uses of property by an increasing number of persons, and environmental issues all are factors requiring a redefinition of the social obligation of ownership. The price of an effective environmental strategy must be paid, in the legal sphere, by a reoriented response to certain exercises of ownership rights²²⁴. Laws enacted in the Federal Republic over the past few years (i. e., the landscape and nature protection laws, the 1972 Waste Disposal Act, or the 1974 Federal Act Protecting the Environment from Adverse Affects of Industry Installations (Bundesimmissionsschutzgesetz), show that the social obligation is often an acceptable method of solving serious and urgent environmental problems. Protection of the environment is related to individually oriented values, equally relevant for all citizens, and can often be achieved only by limiting individual rights. On this constitutional ground, will be placed the increased use of the state's power to involve the social obligation of ownership in the future.

NOTES

- 1 See F. Baur, *207 Lehrbuch des Sachenrechts*, (8th ed., 1975).
- 2 For a perspective of legal philosophy see Larenz, "Die rechtsphilosophische Problematik des Eigentums", in: Th. Heckel (ed.), *Eigentum und Eigentumsverteilung*, pp. 21 *et seq.* (1962).
- 3 See in general Badura, "Eigentum im Verfassungsrecht der Gegenwart", *Verhandlungen des 49. Juristentags*, vol. II, Part T, p. 18.
- 4 Cf. Chapter VIII.
- 5 The Constitutional Court (BVerfGE 20, 351) has emphasized that a governmental order to destroy property which poses a danger for public order and security cannot be seen as a case of taking; the same result is reached in BVerwGE 7, 257 and BGH 43, 296 (all these cases dealt with the killing of house animals suspected of having hydrophobia). The Bundesverwaltungsgericht has most clearly stated the rationale behind these cases: whereas a taking serves the interests of an independent third party (the public), no clash of interests exists between the owner's and the public's interest in such a case. However, it cannot be overlooked that property conditions leading to an application of police regulations do not in all cases necessarily lead to a denial of a taking; see BGH 60, 126; BGH NJW 1974, 267; Ruland, "Eigentumsschutz und Störerhaftung", VerwA 1975, p. 255; Maunz-Durig-Herzog, *Grundgesetz*, Article 14, note 62; Richter, 104 *Die Rechtsprechung des Bundesverfassungsgerichts zum Eigentumsbegriff des Article 14 GG*, Diss. jur., Hamburg (1971), Henning, "Der sog. latente Störer in baurechtlicher und planender Sicht", DVBl 1968, 740. The distinction between the various cases will essentially have to be made on the standards of the doctrine of situational commitment, see *supra* p. 21.
- 6 See for example the speech given by Bundespräsident Scheel on June 17, 1975 before the U. S. Congress:
" . . . Freedom and social justice go together. Social peace is the prerequisite for a nation's inner strength. Without that inner strength it has no strength internationally. Our constitution upholds the concept of ownership as the basis of a free economic order. But at the same time it postulates the social obligation inherent in ownership. That is what our constitution, the Basic Law of the Federal Republic of Germany, prescribes. And this has been the approach of all Governments of the Federal Republic of Germany . . . "
Bull. of The Bundesregierung, p. 766, 1975.
- 6a These basic principles consist of the protection of human dignity, the inalienable human rights, the binding effect of all individual rights upon all governmental organs, and the structure of the Federal Republic as a democratic and social federal state; see Maunz-Durig-Herzog, *Grundgesetz*, Article 79, note 3.
- 7 See the opinions of the Constitutional Court in Leibholz-Rinck, 83 *Grundgesetz für die Bundesrepublik Deutschland*, (4th ed., 1971).
- 8 As to the relationship between the protection of property and the "social clause" see W. Geiger, "Die Eigentumsgarantie des Article 14 GG und ihre Bedeutung für den sozialen Rechtsstaat", in: *Eigentum und Eigentümer in unserer Gesellschaftsordnung*, publications of the Walter-Raymond-Foundation, vol. I, p. 185, 1960.
- 9 See the opinions of the Constitutional Court in Leibholz-Rinck, 216 *Grundgesetz für die Bundesrepublik Deutschland*, (4th ed., 1971).
- 10 See the minutes of the Committee on Principal Decisions of October 5, 1948, 6th session, pp. 60 *et seq.* 8th session, pp. 63 *et seq.*; 26th session of October 30, 1948, pp. 20 *et seq.*; further the protocols of the Main Committee of December 4, 1948, 18th session, pp. 216 *et seq.* (first reading); of January 19, 1949, 44th session, pp. 578 *et seq.* (second reading); of February 8, 1949 42nd session, pp. 618 *et seq.* (third reading) and of May 5, 1949, 57th session, pp. 747 *et seq.*
- 11 The basic importance of property as a condition for personal liberty has been stressed by the Constitutional Court; see for example BVerfGE 24, 389; 31 239. cf. also Kröner, "zur Bedeutung der Eigentumsgarantie", in *Menschenwürde und freiheitliche Rechtsordnung*, *Festschrift für Willi Geiger*, p. 147, 1974; Richter, 25, *Die*

Rechtsprechung des Bundesverfassungsgerichts zum Eigentumsbegriff des Article 14 des Grundgesetzes, Diss. jur., Hamburg, (1970); Badura, "Eigentum im Verfassungsrecht der Gegenwart", *Verhandlungen des 49. Deutschen Juristentags*, vol. II, Part T, p. 18.

- 12 See in particular the explanations given by the Representative Schmid in the 8th session of Committee on Principal Decisions, *Stenographische Protokolle*, pp. 63 *et seq.*
- 13 Article 153, Section 1 of the Weimar Constitution reads: "Property is protected by the Constitution. Its substance and its limits are determined by the laws."
- 14 Cf. the *Stenographische Protokolle* of the Committee on the Principle Decisions, November 11, 1948, 26th edition, pp. 20 *et seq.*
- 15 *ibid.*, pp. 23 *et seq.*
- 16 *Stenographische Bericht* on the 9th plenary session, May 5, 1949, and 10th session, May 8, 1949.
- 17 During the time of the Third Reich, ownership was often construed as a form of trust on behalf of the total community, see, e. g. E. R. Huber, 96 *ZfgesStW* (1936) p. 464; with this justification, the state interfered with private ownership rights, and did not compensate. The basic principle of the duty to compensate for a taking was, however, not formally abandoned. See also Forsthoff, 333 *Lehrbuch des Verwaltungsrechts*, Allgemeiner Teil, note 2 (1973).
- 18 For discussions of the historical development of property rights in Germany see T. Bihler, "Zur Geschichte des Eigentumsbegriffs", *SJZ* 1974, pp. 289, 305; Diester, 25 *Entschädigung nach altem und neuem Recht*, 1953; Leisner, 16 *Sozialbildung des Eigentums* 1972; Rittstieg, 1 *Eigentum als Verfassungsproblem* K. Rudolph, *Die Bindung des Eigentums*, (1960) Stein, "Funktionswandel des Eigentums", in 515 *Festschrift für G. Müller*, (1970); Wesenberg, *Neuere deutsche Privatrechtsgeschichte*, 2. ed., 1971, p. 51; Mann, "Zur Geschichte des Enteignungsrechts", in: *Festschrift Deutscher Juristentag*, vol. II, (1960) p. 291.
- 19 See note 4.
- 20 According to the opinions of the Constitutional Court, the legislative history is usually without decisive importance in interpreting a law (BVerfGE 6, 341). An exception will be made if the legislative history supports a conclusion reached by other modes of interpretation, or if the rationale of a law remains completely obscure without knowledge of the legislative history. See also BVerfGE 1, 27.
- 21 To serve the rule of law, Article 14, Section 3 further requires that a taking may only be based upon a law or an authority granting law, and, additionally, that the law itself must regulate the nature and the extent of the compensation. This compensation has to be determined, according to Article 14, Section 3, by way of a just balance between the interests of the public and the concerned owners. The concept of the "public good" (*Wohl der Allgemeinheit*) is hardly capable of abstract definition. But the Constitutional Court has decided that it will, in a given case, exercise its own judgement as to the existence of the conditions required for the "public good", granting a wide range of legislative discretion (BVerfGE 24, 404). The danger of a misuse of the "public good" is thereby minimized.
- 22 For the strong influence of judicial opinions upon the concept of property, see also Badura, "Eigentum im Verfassungsrecht der Gegenwart", *Verhandlungen des 49. Deutschen Juristentags*, vol. II, Part T, p. 20.
- 23 Such a legal situation is possible in the Federal Republic because the judiciary is divided, according to Article 95 of the Basic Law, into five separate, independent, subject related branches. Normally, there is no problem of diverse judicial opinions, since only one branch, hierarchically ordered, will have jurisdiction. For purely historical reasons, this is not true in the field of property law. On the one hand, the Administrative Courts have jurisdiction to decide whether a taking must be assumed, on the other hand, the civil courts must decide upon the amount of compensation required. But because the amount of compensation is dependent upon the existence of a right to compensation, both the civil and the administrative courts exercise their independent judgement upon the distinction between social obligation and taking. Since the *Bundesgerichtshof* (the highest civil court) has stressed, from the outset,

the doctrine of individual sacrifice, and the Bundesverwaltungsgericht (the highest administrative court) has emphasized the concept of intensity of regulation, the opinions of the courts, (although now for almost all practical reasons meet on the middle ground) have traditionally presented no uniform picture. The Bundesverfassungsgericht, although having power to authoritatively decide the matter, has so far declined to rule on the subject (BVerfGE 25, 121). Given the strong trend of the two branches to continue to apply these differing criteria, it is quite probable that the attitude of the Constitutional Court will not change. Also, the judicial body representing all five judicial branches (Gemeinsamer Senat) has not given a judgement on this matter so far.

- 24 See Kreft, "Grenzfragen des Enteignungsrechts in der Rechtsprechung des Bundesgerichtshofs und des Bundesverwaltungsgerichts", *Ehrengabe Heusinger 167* (1968); note 51, *infra*.
- 25 BGH 6, 270: The central passage of the opinion reads: "A taking is characterized not by a general, equally applicable determination and limitation of ownership rights in accordance with the nature of the concerned right, but by a lawful, forced governmental intervention into the property right, in the form of a full taking or a particular burden putting an unequal special burden on the individual or the group as compared to third persons, thereby forcing a special sacrifice not demanded from third persons; and the characteristic mark of this burden is that it does not generally and in a uniform manner regulate the substance and the limitations of the subject matter, but singles out specific individuals of groups among all owners, asking a particular sacrifice under violation of equal protection marks a taking. For the very purpose of finding an appropriate balance, a taking demands a corresponding compensation, whereas a property regulation equally applicable to all owners does not demand a compensation. This is the correct basic idea of the opinions of the Reichsgericht viewing a taking as a "single intervention", and it will therefore be applied in the future as well. Numerous attacks notwithstanding, this legal doctrine does not depend upon a formal standard. On the contrary, it provides for the exclusively correct substance oriented standard for a taking by having recourse to its character as a forceful, not equally applicable, special sacrifice for the public."
- 26 BGH 15, 268; 23, 30; 48, 193; 60, 126; for a summary of the most relevant opinions of the BGH in the area of property law, see Kröner, *Die Eigentumsgarantie in der Rechtsprechung des BGH*, 2nd ed., 1969.
- 27 See BVerfGE 7, 377; 22, 180.
- 28 See BVerfGE 2, 185; 21, 193; 22, 119.
- 29 BGH 23, 32; 48, 193; 60, 126; see also Maunz-Dürig-Herzog, *Grundgesetz*, Article 14, note 63; for the high practical importance of the doctrine of situational commitment see also BGH 57, 127.
- 30 BGH 60, 126.
- 31 see e. g. BGH 23, 30.
- 32 BGH 60, 145; 48, 193.
- 33 In its decision BGH 23, 30 the Court states that the owner does not have any property rights in this area of social obligation; but, at least in the time before the limitation of the property rights, the owner had a legally protected position.
- 34 BGH 60, 126.
- 35 BVerfGE 12, 51.
- 36 BGH 23, 30; the Court also takes recourse to the "rational" and "understanding" owner, BGH 60, 126.
- 37 See e. g. BGH 48, 193 with further citations.
- 38 BGH 60, 126.
- 39 See *supra* p. 33.
- 40 The decision BGH 60, 145 is identical in the basic argumentation; both opinions were handed down on the same day.
- 41 See also BGH DVBl. 1974, p. 232.
- 42 For a critical discussion of the doctrine of individual sacrifice see BVerfGE 5, 143; Forstthoff, 340 *Lehrbuch des Verwaltungsrechts*, vol. 1, General Part, (1973); Leisner, 136 *Sozialbindung des Eigentums*, (1972); Bender, "Sozialbindung des Eigentums

- und Enteignung", NJW 1965, p. 1297. In several recent decisions the legislature has chosen formulations in the area of takings law which reflect the substance of the theory of intensity, see Kimminich, 94 *Umweltrecht*, (2nd ed., 1973).
- 43 Among the numerous articles and monographs written on this matter see Martens and Häberle, "Grundrechte im Leistungsstaat", VVdStRL 1971, (vol. 30), 7 *et. seq.*; Willke, *Stand und Kritik der neueren Grundrechtstheorie*, 1975, with further citations,
- 44 BVerwGE 5, 143; 11, 68; 24, 60; 32, 173.
- 45 BVerwGE 11,68.
- 46 See on this point Dolzer, 88 *Die staatsrechtliche und Staatsrecht-Position des Bundesverfassungsgerichts*, (1972).
- 47 The principle of proportionality has constitutional rank, see BVerfGE 19, 348.
- 48 BVerwGE 22, 26.
- 49 Cf. Leisner, 155 *Sozialbindung des Eigentums*, (1972).
- 50 BVerfGE 24, 357.
- 51 See Schack, DVBl. 1963, p. 751; *Bonner Kommentar*, Zweitbearbeitung Kimminich, 1964, Article 14, cipher 60.
- 52 Cf. BGH 60, 126.
- 53 In BVerfGE 25, 119 the Court states: "Each lot equally contributes to serve this task (to avoid a flood). The magnitude of the danger and the importance of preventive measures for the public make it largely impossible to rely upon the free will of the concerned owners in the fighting of the danger. Therefore, it is adequate to limit the property rights for these lots. If the legislature restricts the uses of property in order to secure an appropriate and effective fighting of the danger, it only declares what results from the obligation owed to the public by virtue of the position of the parcel."
- 54 Leisner, 192 *Sozialbindung des Eigentums*, (1972) argues in this direction.
- 55 See Article 53 Basic Law; the opinions of the Constitutional Court have the rank of normal laws according to § 31 of the statute of the Constitutional Court and therefore bind all governmental organs.
- 56 For a summary see Leibholz-Rink, 297 *Grundgesetze für die Bundesrepublik Deutschland*, (4th ed., 1971).
- 57 Only the holding of the opinion, not the reasoning supporting it, are binding for the future, cf. . Mauz-Siglich-Schmidt-Bleibtreu-Klein, *Bundesverfassungsgerichtsgesetz*, § 31, p. 77 (1972).
- 58 BVerfGE 21, 150.
- 59 BVerfGE 24, 390.
- 60 BVerfGE 21,329.
- 61 BVerfGE 24, 389; the Court was inspired by certain commentators arguing that the proper test is to ask whether the governmental intervention has made it impossible to use the object for the originally intended purpose ("Zweckentfremdungstheorie"; if this is so, according to this view one can no longer speak of a social obligation; see e. g. Forsthoff, 344 *Lehrbuch des Verwaltungsrechts*, (10th ed., 1973) with further citations. Reinhardt has coined the term, the "private usefulness" of property; see 8, Reinhardt-Scheuner, *Verfassungsschutz des Eigentums*, (1954). It seems obvious that such a doctrine may offer a starting point for a practical decision, but will, especially in controversial areas, be insufficient to provide enough criteria for the actual decision of a case; see Leisner, *Sozialbindung des Eigentums*, 1972, p. 174 with further citations. Occasionally, commentators have tried to develop complementary or new distinguishing criteria. Jellinek (*Verwaltungsrecht*, 3rd ed., reprint 1948, p. 413) has established a "theory of worthiness of protection", Stödter ("Über den Enteignungsbegriff, DÖV, 1953, 97) a "theory of intolerability", Schelcher ("Gesetzliche Eigentumsbeschränkung und Enteignung", AOR vol. 81, p. 321) a "theory of reduction of substance". Sellmann ("Sozialbindung des Eigentums und Enteignung", NJW 1965, 1689) has openly argued that one should decide capabilities of the government. Inasmuch as these theories have a substance different from the criteria used by the courts, they have not been able to muster wide support.
- 62 BVerfGE 24, 389.
- 63 BVerfGE 14, 263; 18, 121; 21, 73; 34, 137.

64 Cf. BVerfGE 14, 263; 35, 360.

65 BVerfGE 14, 263; 360.

66 BVerfGE 24, 367.

67 To secure effective judicial protection of property the Constitutional Court has (on the specific German background of the conditions required by the various possible remedies), found that a taking by the administration, based on a law, must be the rule. A taking directly effectuated by the legislature is admissible only under extraordinary circumstances; BVerfGE 24, 362.

68 Cf. BVerfGE 25, 112.

69 Cf. BVerfGE 34, 119, with further citations.

70 See the cases adjudicated before the Constitutional Court, Leibholz-Rinck, *Grundgesetz für die Bundesrepublik Deutschland*, 4th ed., pp. 83 *et. seq.* 1971.

71 BVerfGE 21, 150.

72 This judicial procedure was particularly well demonstrated in the so called vineyard case, BVerfGE 21, 150. In this opinion the Court had to determine the constitutionality of the Wine Business Law of August 19, 1961. This law made it mandatory to procure a governmental permit before cultivating new vines. Permission was not granted if the respective vineyard was "unsuitable". A procedure was laid out under which experts were to test the suitability of the soil according to objective standards, in particular, the quality of products formerly grown there. When a permit was denied, the law differentiated between old and new vinedressers. (Compensation was granted only to those who had grown vines prior to the denial of the permit). The Constitutional Court upheld the validity of this law. It first identified the aim of the law by viewing, in context, the various rules involved. This aim was to preserve the market for the German wine. A preceding liberalization of the intra-European wine trade had, for various reasons, resulted in an average price for German wine which was higher than that of Italian and French products. Therefore, the new wine law attempted to provide for a justification of the higher price by securing higher quality. In a second step, the Court established that, within the general legal order, this aim was legitimate since it was designed to protect the consumer and the wine industry. In the next part, the Court examined whether the chosen means was adequate for the pursued aim. Since the location and the soil of a vineyard are key to the quality of the product, the Court had no doubt in giving a positive answer. In the fourth part, the Court examined whether the legislature had chosen the burden least onerous to the concerned owners, and the various means did rather complement each other. In a final step, the Court pointed out that the winegrowers had received a large number of subsidies over the past years. For this reason, the chosen regulation appeared tolerable as well. In most cases, the single vinedresser suffered no substantial harm from the regulation, and the Court stressed that, in exceptional cases, the law had to be construed so as to avoid individual hardship.

Another example for this test method is found in BVerfGE 21, 73. In this case the Court had to decide whether a taking occurs when the sale of land used for agricultural and forest purposes is regulated by requiring the vendor to obtain a governmental permit certifying that the sale did not result in an "unsound redistribution of the soil". Since this rule had a legitimate aim (preservation and improvement of the agricultural sector), the permit requirement posed no intolerable burden, and, no less onerous means to reach the given aim being available, the Court upheld this Act as well.

73 BVerfGE 21, 50.

74 BVerfGE 25, 119.

75 BVerfGE 14, 263; 20, 351; 24 367; 31, 229.

76 See the reasoning in BVerfGE 31, 229: "But this basic decision to allocate the economic resources flowing from the protected author's rights to the author does not imply that each conceivable kind of use is constitutionally protected. The constitutional protection of property secures a basic body of rules which must be given, so that one may speak of the right as "private property". But as to the details, it is the province of the legislature to establish, in accordance with Article 14, Section 1,

Clause 2, substantive standards for the extent of authors' rights which guarantee a form of use adequate to the nature and social relevance of the right."

77 Cf. BVerfGE 31, 285.

78 BVerfGE 20,351.

79 See, in general, BVerfGE 31, 273.

80 BVerfGE 21,82.

81 Cf. in general Schmidt-Assmann, *Grundfragen des Städtebaurechts*, 1972.

82 BGBl. I. p. 873.

83 BVerfGE 3, 407.

84 BGBl. I, p. 1237.

85 The state regulations also introduce provisions which are relevant to environmental protection. Most of the states have, for example, enacted the rule that no construction may have an optical disruptive effect, see e. g. § 3 LBO Baden Württemberg, as published on July 20, 1972 (GBl. 351).

86 All further quotations of paragraphs refer to the Federal Building Act, unless indicated otherwise.

87 As to the constitutional relationship between property rights and zoning plans, see Bielenberg, "Verfassungsrechtliche Eigentumsgarantie und Sozialbindung im Städtebau", DVBl 1971, p. 441; Böckenförde, Eigentum, "Sozialbindung des Eigentums, Enteignung", in *Gerechtigkeit in der Industriegesellschaft*, 1972, p. 215; Götz, *Bauleitplanung und Eigentum*, 1969, pp. 39 *et. seq.*; Hoppe, "Bauleitplanung und Eigentums-garantie", DVBl. 1964, pp. 165 *et. seq.*; Rübner, "Bodenordnung und Eigentums-garantie", JuS 1973, p. 593; Sandler, "Zum Wandel der Auffassung vom Eigentum", DÖV 1974, p. 73; Westermann, *Die Befugnis zum Bauen nach der Rechtsprechung und nach dem Bundesbaugesetz als Frage der Inhaltsbestimmung des Grundeigentums im Rahmen von Article 14 GG*.

88 Germany has a long tradition of zoning ordinances, see Ernst, "Zur Geschichte des städtischen Bau- und Bodenrechts", BBauBl. 1953, p. 206.

89 This duty must be viewed in context of Article 28, Section 2 of the Basic Law, which provides that the local communities have a right to determine by themselves all matters of local interest, within the framework of the general laws.

89a See also Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, as published 1975, note 11 to § 2. In general, Ernst-Zinkahn-Bielenberg is the most influential work written on the BBauG, and therefore most citations in this chapter refer to it. For a more extensive study, the following books should also be consult ed: Brügelmann-Pohl (Kohlhammer-Kommentar), *Bundesbaugesetz*, 1967; Heitzer-Oestreicher, *Bundesbaugesetz*, 4th ed., 1969; Meyer-Stich-Tittel, *Bundesbaurecht*, 1966; Schröder, *Bundesbaugesetz*, 3rd ed., 1973; Schütz-Frohberg, *Bundesbaugesetz*, 3rd ed., 1970.

90 Cf. § 2, Section 2, and § 8, Section 2 BBauG.

91 In constitutional terms, a "just balance" of the interests concerned requires a harmonization of the property clause of Article 14 and the "social interest" clause of Article 20 of the Basic Law; see also Werner, "Verfassung, Rechtsgefühl und Städtebau", in *Entwicklungsgesetze der Stadt*, 1963, pp. 27 *et. seq.*; also Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 50 to § 1 BBauG.

92 Here the difference between legality and the expediency of a rule is in play. The self-governing right of the local communities is operative in this context; the supervisory state authorities may control the legality of the town's action but not its expediency.

92a Cf. Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 59 to § 1

93 BVerfGE DÖV 1975, p. 92; cf. also Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 64 to § 1

94 For a broader discussion, see Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 56 to § 1.

95 BGH NJW 1964, 202; Westermann, "Die Befugnis zum Bauen nach der Rechtsprechung und nach dem Bundesbaugesetz als Frage der Inhaltsbestimmung des Grundeigentums im Rahmen von Article 14 GG", *Festschrift für Nipperdey*, 1965, vol. 1, p. 765.

96 BGH NJW 1964,202.

- 97 See Birnbaum, *Die Entschädigung für Planungsschäden nach dem BBauG und Article 14 GG*, Diss. jur., Kiel 1972.
- 98 Cf. Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, Rdn. 73, § 40, with further citations.
- 99 *Id.*, note 14, to § 40.
- 100 See for example the state regulation of Baden-Württemberg, LBO as published on July 7, 1972 (GBI.351).
- 101 BVerwGE 2, 122.
- 102 See also BGH NJW 1956, 1798 and Ernst-Zinkahn-Bielenberg, note 22 to § 40.
- 103 BGH MDR 1958, 220; cf. also BGH 57, 278.
- 104 Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 43 to § 9,
- 105 For the legislative history see Ernst-Zinkahn-Bielenberg note 4 to § 41.
- 106 *Id.*, before § 40, note 12.
- 107 Technically, this is achieved by giving the owner the power to force the state to implementing the provided rights and then to collect the corresponding damages.
- 108 Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 18, § 42.
- 109 *Id.*, note 83 to § 9.
- 110 *Id.*, note 219, before § 40.
- 111 *Id.*, note 3 to § 44.
- 112 *Id.*, note 58 to § 44.
- 113 *Id.*, note 35 to § 44.
- 114 See BGH 30, 338; 37, 269.
- 115 For a critical evaluation of this policy, see Rüfner, "Bodenordnung und Eigentums-garantie", JuS 1973, p. 593; also Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 98 before § 40.
- 116 The 1971 Urban Development Act (Städtebauförderungsgesetz) makes limited use of this concept. As to the present plans to give a broader application to this approach, including a constitutional analysis, see Engelken, "Zum Planungswertausgleich", DÖV 1974, 361, 403; DVBl. 1974, 750; DÖV 1975, 296; Rüfner, "Bodenordnung und Eigentums-garantie", JuS 1973, 593.
- 117 Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 40 to § 44.
- 118 *Id.*, note 60 to § 44.
- 119 But see also supra note 4.
- 120 Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 42 to § 44.
- 121 *Id.*, note 221 before § 40, note 25 to § 44.
- 122 Prior to the enactment of the Federal Building Act, the Bundesgerichtshof objected to a standard which would only depend on the duration of the prohibition period, BGH 15, 368; 30, 338. The Court wanted to give particular weight to the question of whether the prohibition was to serve a strictly local or a broader regional planning process. In BGH 30, 338 the Court assumed that even under difficult conditions, any carefully conducted planning process could be finished within three years; after such a time, a taking would have to be assumed. After the legislature had established a maximum four year non-compensable waiting period, the Court went along with this approach (BGH NJW 75, 1783). The Court's changed position was not easy to explain, since its former view was directly based on constitutional grounds which have a higher rank than statutory regulations. When a town suspends response to an application for a building permit without a formally declared waiting period, the Bundesgerichtshof today still adheres to its original three years maximum waiting period. (BGH 58, 124; BGH NJW 1975, 1783). The reason given is that the long maximum period prescribed by the Federal Building Act is due to the intensity of the intricate planning process preceding a zoning ordinance. In the Court's view, these particular considerations do not apply in case of a "factual waiting period" (see also BGH NJW 1972, 1713).
- 123 Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 16 to § 34.
- 124 *Id.*, note 17 to § 19.
- 125 The Bundesverwaltungsgericht has therefore denied a permit for a clothes producing factory in a residential neighborhood BBauBl. 1969, 449.
- 126 DÖV 1969, 751, but see also DÖV 1968, 329; apart from the individual-right notion, the opinion could also have been based on the fact that the lack of a zoning ordinance

- indicates the town's view that there is no immediate danger of a development inconsistent with the requirements of city planning.
- 127 Cf. Stich, *Bauen im Aussenbereich und Eigentumsgarantie*, Betriebsberater 1965, 107.
- 128 See Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 7 to § 35.
- 129 An enterprise is characterized by the fact that it does not serve as a spare time leisure object, but as a means of subsistence. But it is not required that the enterprise is the main income source for the farmer, BVerfGE 26, 21. In this context it is immaterial whether the farmer or a third person owns the enterprise.
- 130 "Farming and forestry" are defined in § 146. The terms include tillage, grassland and pasture cultivation, gardening, fruit growing and wine growing for profit.
- 131 The area needed for the enterprise must therefore, economically and spacewise, dominate the area needed for the building project. The legislature has introduced this requirement in order to prevent small enterprises with only little working area, as according to the general objectives of the Act, such projects shall not be located in the external area.
- 132 Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 34 to § 35.
- 133 For a detailed discussion see Ernst-Zinkahn-Bielenberg, note 57 to § 35.
- 134 BVerwGE DVBl. 1972, 688.
- 135 BVerwGE DVBl. 1962, 223.
- 136 For a detailed discussion see Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 71 to § 35.
- 137 BVerwGE BauR 1972, 286; Stich, "Der heutige Stand des Rechts der Landschaft und seines Vollzugs", in: *Festschrift für Werner Weber*, 1974, 687.
- 138 BVerwGE 4, 124.
- 138a Cf. Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 113 *et. seq.* to § 35.
- 139 BVerwGE 28, 148.
- 140 In the balancing process, only criteria directly relevant to city planning may be considered; fiscal aspects and personal circumstances of the applicant are not material; see Ernst-Zinkahn-Bielenberg, *Bundesbaugesetz*, note 122 to § 35, with further citations.
- 141 Cf. OVG Lüneburg, DVBl. 1965, 211.
- 142 BVerwGE 28, 161; 27, 341.
- 143 See BGH 15, 268; Bischoff, "Rechtliche Aspekte der Bodenordnung", VerwA 1968, 33; Hamann, "Öffentlich-rechtliche Bau- und Planungsmassnahmen und die Eigentumsgarantie des Article 14", DVBl. 1957, 513; Konow, *Eigentumsschutz gegen Eingriff der öffentlichen Hand*, 1968, 133.
- 144 For the history of the German laws governing the construction of buildings see Kaiser, *Verfassungsrechtliche Eigentumsgewähr, Enteignung und Sozialbindung in der BDR*, in *Staat und Privateigentum, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 34 (1960), p. 26.
- 145 BGH 15, 275; BVerwGE 7, 297.
- 146 BGH 30, 342.
- 147 BVerwGE 15, 1.
- 148 Cf. Brück, "Die neuere Rechtsprechung zum Wasserrecht", NJW 1972, 737.
- 149 "The water system belongs to the fundamental necessities of our people. Water is the basic precondition for human, animal and plant life, for the health of human beings and animals, for the fertility of our soil, and for each form of economic production and activity. Water resources cannot be enlarged by man directed measures. But it is indispensable and irreplaceable as a raw material and as a production factor. Therefore, it is necessary to regulate its use in accordance with public needs. Our water systems must be cultivated and used in a manner precluding foreseeable economical harm." (Official Memorandum on the WRA, BT-Drs. II/2072).
- 150 The federal government has, by enacting the WRA, made use of its jurisdiction under Article 75, Clause 4 of the Basic Law. But this jurisdiction is limited by the principal guidelines ("Rahmenkompetenz"), and therefore the states had to supplement the federal law. Although the states have mostly relied on a common model draft, sometimes considerable differences have remained. Moreover, the legal situation in the Federal Republic is complicated by the fact that rights existing before the enactment of the WRA (July 27, 1957; BGBl. I, 1110), have only to some extent been cancelled

- by this Act (§ 15). For the sake of clarity regarding the basic question, the following remarks do not address themselves to the old rights.
- 151 Cf. Salzwedel, "Wasserrecht", in: *Besonderes Verwaltungsrecht* 517 (ed. 3, 1972).
- 152 Cf. Scheuner, "Die Gemeinverträglichkeit im Rahmen des Gemeingebrauchs und der Nutzung öffentlicher Sachen", *Festschrift Gieseke*, pp. 73 *et. seq.* 1958.
- 153 All further citations of paragraphs refer to the WRA, unless indicated otherwise.
- 154 Those states which did not grant special rights to the owner before 1957 had the choice of continuing this practice; but only the Saar Territory has chosen to do so (§ 27 Water Law, Saar Territory). This did not violate the property clause since no previous right was taken from the owners. As to legal questions related to ground water, see Gieseke, *Eigentum und Grundwasser* (1959).
- 155 Cf. Gieseke-Wiedemann, *WHG* (ed. 2, 1971), note 4, § 24.
- 156 According to most commentators, water rights of the owner originate in the ownership of land, and not in a grant of the state. In the judicial system of the Federal Republic this is relevant for the jurisdiction of the various court hierarchies, Gieseke-Wiedemann, *WHG*, note 1b to § 24 with further citations.
- 157 For a compilation of the regulations, see Gieseke-Wiedemann, *WHG*, note 5 to § 23.
- 158 North-Rhine Westphalia has decided, for example, to allow each town to decide whether the public use of water for private gardening is subject to a permit procedure (§ 31 Water Law, North-Rhine Westphalia).
- 159 The owner has the additional right to extract solid substances from the water, as long as this has no adverse effect on the water system (§ 3, Section 1, Clause 3, WRA).
- 160 The owner therefore has no better rights than a third party and is subject to the general rule which grants no one the right to a permit. The competent agency decides at its discretion whether the public interest allows the grant of a permit.
- 161 The WRA distinguishes two forms of rights in § 7 and § 8: the permit ("Erlaubnis") and the license ("Bewilligung"). The license is the stronger right, protective not only as against the state, but also as against private rights. Even more importantly, a license may not be revoked. Because of the strength of these rights, a license may be granted only in very exceptional circumstances, § 8, Section 2. See for the details of this system Renaud, *Die Bewilligung und Erlaubnis nach dem WHG unter Berücksichtigung des Landeswassergesetzes von Nordrhein-Westfalen*, Diss. jur. p. 12, 1965.
- 162 For a survey see Gieseke-Wiedemann, *WHG*, note 6 to § 6.
- 163 See Gieseke-Wiedemann, note 4 to § 8.
- 164 *Id.*, note 4b to § 4; but see also Friesecke NJW 1963, 2300 with further citations.
- 165 For the historical development of water law in Germany, see Alper, *Enteignung und Eigentumsbindung im Wasserrecht*, Diss. jur. 1965, p. 12.
- 166 See the rules governing the constructions of buildings, *supra* p. 29. *
- 167 But this analysis may not be taken to indicate that traditional forms of social obligation will always serve as standards where property rights were limited after the enactment of the Basic Law. All such limitations will be measured against Article 14 of the Basic Law, and not against earlier rules. The correctness of this notion can easily be demonstrated, if ownership rights could be limited only by reference to former similar limitations the gradual change could sometimes result in virtually eliminating all property rights. The Basic Law does not lend itself to such a development.
- 168 BGH 19, 209.
- 169 BGH 49, 68; but see also Salzwedel, *Recht der Wasserwirtschaft*, Heft 12, pp. *et. seq.* Anderer, "Die Sozialbindung des Eigentums im Wasserrecht", BayVbl. 1964, 83.
- 170 The reasoning of Gieseke-Wiedemann, *WHG*, Introduction VIII is ambiguous on this point.
- 171 BGH 60, 126; 60, 145; BGH DVBl. 1974, 232; but see also the discussion of the case by Salzwedel, Zeitler and Czychowski, in *Zeitschrift für Wasserrecht*, 1973, p. 131, 166, 168.
- 172 For a different type of regulation see § 12 of the Law Concerning the Limitation of Real Property Rights Due to the Requirements of National Defense, of December 7, 1956 (BGBl. I, 503). According to this law, each economic disadvantage which stems from a designation of an area as "military protection area" (militärisches Schutzge-

- biet") must be compensated. (The Bundesgerichtshof has decided that a designation in itself does not constitute damage, as only concrete consequences are compensable, BGH 57, 278). The policy considerations behind the two different schemes are not difficult to perceive. Whereas a designation of a water protection area is immediately related to the concerned land, no area is, in itself, related to military purposes.
- 173 See in general Kukat, *Die Ausweisung von Wasserschutzgebieten*, Diss. jur., Hamburg 1964; Kreft, "Eigentumsinhalt und Enteignung bei der Festsetzung von Wasserschutzgebieten", *Das Recht der Wasserwirtschaft*, 1971, 35.
- 174 The opinions cited by the Court supported its position, but did not compel the result reached. In the case decided in BGH 48, 193 (see also BGH 54, 293), the Court had also relied on the present objectively possible use, and not on former use. This case dealt with the reconstruction of a backyard house destroyed in the war. But here the Court had decided that, given the objective circumstances, a reasonable and economically oriented owner would not decide to reconstruct the house. The former, partially still existing use could not support the plaintiff's case then, due to recent developments. But this result did not directly compel the result in a case in which a formerly and presently possible use had not yet been implemented.
- 175 It cannot be overlooked that the emphasis on "present objective circumstances" instead of the prior use will present difficult tasks for the Court when it is forced to develop detailed criteria to determine "an objectively possible use, fitted to the circumstances." Also, this approach implies the possibility of far reaching judicial "legislation" with respect to property law.
- 176 The Court referred to its decision in BGH 23, 30. There it had found no taking in the fact that agricultural land was designated "green land", whereby a future use for building purpose was precluded; at the time of the decision, a building permit would not have been granted.
- 177 See supra p. 42.
- 178 The Court has now ruled out exclusive reliance on categories of police law for constitutional decisions on ownership rights. Under German police law, a person will be considered a "disturber" ("Störer"), if his actions immediately threaten public security and order.
- 179 As to the terminology, see Stich, "Notwendigkeit und Inhalt eines modernen Naturschutz- und Landschaftspflegerechts", DVBl. 1972, 201.
- 180 The Act remains in force as state law, unless superceded by later state regulations; BVerfGE 8, 106.
- 181 See BVerwGE 3, 355; further citation in Stich, "Naturschutz und Privateigentum", DVBl. 1962, p. 397, note 4.
- 182 Under the ruling of the Constitutional Court (BVerfGE 4, 339) that court has no monopoly on setting aside legislation dating from a time prior to the enactment of the Basic Law; each judge has, in such a case, independent power to decide the constitutionality of the law.
- 183 BGH DVBl. 1957,861.
- 184 See supra p. 20.
- 185 See Kimminich, *Recht des Umweltschutzes* 95 (ed. 2, 1973).
- 186 BVerwGE 3, 335; 4, 57.
- 187 Burhenne, *Umweltrecht - Raum und Natur*, vol. II, as of 1975, 0702 - 11.
- 188 Cf. Stich, "Der heutige Stand des Rechts der Landschaft und seines Vollzuges", *Festschrift für Werner Weber*, 1974, pp. 681 *et. seq.*
- 189 Ges. Bl. p. 74.
- 190 Hessisches Landschaftspflegegesetz of April 4, 1973, GVBl. I, p. 216.
- 191 Gesetz für Naturschutz und Landschaftspflege of April 16, 1973, GVBl. p. 122.
- 192 Landespflegegesetz of July 14, 1973, GVBl. p. 147.
- 193 Bayrisches Naturschutzgesetz of July 27, 1973, GVBl. p. 147.
- 194 Gesetz zur Sicherung des Naturhaushalts und zur Entwicklung der Landschaft of February 18, 1975, GV. p. 190.
- 195 § 37 of the Sleswig-Holstein Act, § 4, section 1 of the Rhineland-Palatinate Act, § 2 of the Act of North-Rhine-Westphalia and § 4 of the Hessen Act.
- 196 See also the mining acts of Lower Saxony and North-Rhine-Westphalia, supra p. 49.

- 197 § 8, Section 1, Sentence 1 of the Act of Sleswig-Holstein; Section 1 of the Rhineland-Palatinate Act; § 4, Section 2 of the Hessen Act; § 2, Section 1 of the Act of North-Rhine-Westphalia.
- 198 § 8, Section 1 of the Sleswig-Holstein Act, § 4, Section 1 of the Rhineland-Palatinate Act, § 2, Section 2 of the Act of North-Rhine-Westphalia, § 4, Section 2 of the Hessen Act.
- 199 § 4, Section 7 of the Rhineland-Palatinate Act, § 2, Section 3 of the Act of North-Rhine-Westphalia, § 8, Section 3 of the Schleswig-Holstein Act, § 10 of the Hessen Act.
- 200 See, for example, § 4, Section 7 of the Rhineland-Palatinate Act.
- 201 See, for example, § 9 of the Hessen Act.
- 202 But see Article 141, Section 3, Sentence 1 of the Bavarian Constitution: "Everybody has a right to the enjoyment of natural beauties, recreation in free nature, access to the forests and mountain meadows, navigation of waters, and the acquiring of wild fruits as locally practiced." For an interpretation of this clause, see Mang-Maunz-Mayer-Obermayer, *Staats- und Verwaltungsrecht in Bayern* 81 (ed. 2, 1964); see also Mayer, "Privateigentum und Naturgenuss", DVBl. 1964, 302.
- 203 A draft for a Federal Forest Act (see BT-Drs. VII/89) provides that, in principle, the public has a right of access to forests; this does not apply, however, to horse-riding, driving, camping and the parking of trailers. See also the regulation of § 13 of the Forest Act of Lower Saxony, of July 12, 1973 (GVBl. 223), and Article 13 of the Forest Act of Bavaria, of October 26, 1974 (GVBl. 551). - Also, the draft places considerable restrictions on the owner's freedom to use forest land for new purposes; similarly, § 10, Section 1, of the Act of Lower Saxony and Article 9, of the Bavarian statute state that a change in the use of forest land will only be permitted if the general necessities for the use of the land, the protective elements of forest use, and the recreational function of the forest have no stronger weight than the owner's interest, or if adverse effects due to the change of the use are avoided.
- 204 According to § 10, all counties have to set up "landscape plans" to secure the development, the protection and the cultivation of the landscape.
- 205 GVBl. p. 137.
- 206 GVBl. p. 372.
- 207 The mining license is granted not by the surface owner, but by the state. Since, according to the basic principle of § 905 of the Civil Code, ownership of land extends below the surface, the question arises whether the state's granting of the license may not, under certain circumstances, amount to a taking of surface owner's rights. This question shall not be pursued here since the answers depend on specific details of the mining law. The most recent cases to be consulted are BGH 57, 375; 53, 226; 50, 180; as to the controversy among commentators see Weitnauer, "Grundeigentum und Bergbau", JZ 1973, 73 and Schulte "Rechtsdogmatische und rechtspolitische Bemerkungen zum Verhältnis Bergbau-Grundeigentum", *Zeitschrift für Bergrecht*, 1972, 166.
- 208 GVBl. I, p. 233.
- 209 Supra note 18.
- 210 See in particular *Staat und Privateigentum, Beiträge zum ausländischen öffentlichen Frechtund Völkerrecht*, vol 34 (1960).
- 211 BVerfGE 14, 263; 20, 351; 24, 367; 31, 273; 35, 360.
- 212 See for example, Badura, "Eigentum im Verfassungsrecht der Gegenwart", *Verhandlungen des 49. Deutschen Juristentags*, Bd. II, Teil T, S. 8; Böckenförde, "Eigentum, Sozialbindung des Eigentums, Enteignung", in: *Gerechtigkeit in der Industriegesellschaft*, 1972, p. 216; Forstthöf, *Lehrbuch des Verwaltungsrechts*, vol. I, Allgemeiner Teil 340 (ed. 10, 1973); Kröner, "Zur Bedeutung der Eigentumsgarantie", in: *Festschrift für W. Geiger*, 1974, p. 149; Pernthaler, "Der Wandel des Eigentumsbegriffs im technischen Zeitalter"; in *100 Jahre Verfassungsgerichtsbarkeit*, 1963, p. 193; Scheuner, in: *Reinhard-Scheuner, Verfassungsschutz des Eigentums* 77 (1954); Sandler, "Zum Wandel der Auffassung vom Eigentum", DÖV 1974, 77; Stein, "Zur Wandlung des Eigentumsbegriffs", *Festschrift für G. Müller*, 1970, p. 505; Wertenbruch, "Eigentum aus verfassungsrechtlicher Sicht", in: *Eigentum und Bodenrecht, Materialien und Stellungnahmen*, 1972, p. 49. Leisner, *Sozialbindung des Eigentums* 46 (1972) argues for an unchangeable concept of property, but seems to imply only that the basic core can never change.

- 213 Cf. Chlosta, *Der Wesensgehalt der Eigentumsgewährleistung* (1975); Reuss, "Der Wesenskern des Eigentums im Sinne des Article 14 GG", DVBl. 1964. 384.
- 214 See the reasoning of the Bundesgerichtshof, BGH DVBl. 1965, 398: "Moreover, the right to hold property may not be limited in its basic features by governmental regulation further than is required strictly by the rationale behind the governmental measure. But it must be noted that the measures required are related to the "historical situation"(BGH 6, 270, 279). This "historical situation" will not only be characterized by the "times of emergency and crisis" as mentioned in BGH 6, 279 for illustrative purposes, but also by the stage of scientific development and the corresponding knowledge, means and methods."
- 215 BVerfGE 31,285.
- 216 BVerfGE 1,32; 7, 205; 19, 220; 24, 184.
- 217 See also Kimminich, *Das Recht des Umweltschutzes* 71 (ed. 2, 1973).
- 218 The preconditions and consequences are regulated in Article 15 of the Basic Law.
- 219 Cf. Forsthoff, *Lehrbuch des Verwaltungsrechts*, vol. I, Allgemeiner Teil, ed. 10, 1973, p. 343; Leisner, *Sozialbindung des Eigentums* 155 (1972).
- 220 BVerfGE 8, 71; 14, 263; 25, 112; in the latter opinion the Court has stated: "The legislature is bound to guard the basic meaning of the property clause, but also not to conflict with other constitutional provisions. For this reason, each regulation of property must find its justification in the subject matter regulated and must itself be adapted to the requirements of the subject matter. No limitation of property rights may exceed the boundaries established by the rationale of the legislation".
- 221 See BGH 54, 293; in this case the Court decided that the duty to connect one's disposal facilities with the public sewage system cannot be considered a taking, even though this may in effect eliminate an owner's right to discharge his sewage into a lake. The case is approvingly noted in Kriele, "Verfassungspolitische und rechtspolitische Erwägungen", in: *Gerechtigkeit in der Industriegesellschaft*, Hrsg. Duden et al., 1972, p. 143.
- 222 Werner Weber, "Umweltschutz im Verfassungs- und Verwaltungsrecht", DVBl. 1971, 807, has warned however, not to overemphasize the social obligation in this area.
- 223 Von Mangoldt-Klein, *Das Bonner Grundgesetz*, vol. I, Article 14, note V 2b; Richter, *Die Rechtsprechung des Bundesverfassungsgerichts zum Eigentumsbegriff des Artikel 14 Grundgesetz* 98, Diss. jur., Hamburg 1971.
- 224 See also Rupp, "Die Verfassungsrechtliche Seite des Umweltschutzes", JZ 1971, 401; *Umweltgutachten* 1974, ed. by the Rat für Sachverständige für Umweltfragen, p. 173, note 638. The increasing social obligation correlates with the demand for wider participation rights of the owner, see Steiger, "Rechtliches Instrumentarium", in: *Gerechtigkeit in der Industriegesellschaft*, ed. by K. Duden et al., 1972, p. 159; Bielenberg, "Einige planungsrechtliche Grundsatzprobleme der Novelle zum BBauG", DÖV 1975, 289.
- 225 BGBl. I, p. 873.
- 226 BGBl. I, p. 271; according to § 5 of the law, all installations have to be constructed and operated in a manner:
1. avoiding adverse environmental effects and other dangers, considerable disadvantages and inconveniences for the public and the neighbourhood,
 2. preventing adverse environmental effects, particularly by reducing all negative consequences in accordance with the latest results of technological research,
 3. adequately recycling all wastes of production, or, if this is technologically impossible or economically unreasonable, discharging all wastes in an adequate manner."
- See Sellner, "Die Genehmigung nach dem Bundesimmissionsschutzgesetz", NJW 1975, 801; Schwerdtfeger, "Das Bundesimmissionsschutzgesetz", NJW 1974, 77; as to the social restriction of property rights by that act in general see Ule, *Bundes-Immissionschutzgesetz*, 1974, note to § 21, p. 6; see also § 3 of the Environmental Protection Act (Immissionsschutzgesetz) of North-Rhine-Westphalia, of March 3, 1975 (GV. 1975, 232): "Everybody has to act in a manner avoiding adverse environmental effects, inasmuch as the concrete circumstances make this possible and tolerable."
- 227 See also Kimminich, *Das Recht des Umweltschutzes* 17 (ed. 2, 1973).

ABBREVIATIONS

AÖR	Archiv des öffentlichen Rechts
BayVbl.	Bayerisches Verwaltungsblatt
BBauG	Bundesbaugesetz
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BT.-Drs.	Bundestags-Drucksache
Bull.	Bulletin
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidung des Bundesverfassungsgerichts
BVerwG	Bundesverwaltungsgericht
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts
Diss.	Dissertation
DÖV	Die öffentliche Verwaltung
DVBl.	Deutsches Verwaltungsblatt
GBI.	Gesetzesblatt
Ges. Bl.	Gesetzesblatt
GV.	Gesetze und Verordnungen
GVBl.	Gesetzes- und Verordnungsblatt
JuS	Juristische Schulung
JZ	Juristenzeitung
NJW	Neue Juristische Wochenschrift
OLG	Oberlandesgericht
OVG	Oberverwaltungsgericht
SJZ	Schweizerische Juristen-Zeitung
VerwA	Verwaltungsarchiv
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
WHG	Wasserhaushaltsgesetz
WRV	Weimarer Rechtsverfassung

The International Union for Conservation of Nature and Natural Resources (IUCN) is an independent international body, formed in 1948, which has its headquarters in Morges, Switzerland. It is a Union of sovereign states, government agencies and non-governmental organizations concerned with the initiation and promotion of scientifically-based action that will ensure perpetuation of the living world - man's natural environment - and the natural resources on which all living things depend, not only for their intrinsic cultural or scientific values, but also for the long-term economic and social welfare of mankind.

This objective can be achieved through active conservation programmes for the wise use of natural resources in areas where the flora and fauna are of particular importance and where the landscape is especially beautiful or striking, or of historical, cultural or scientific significance. IUCN believes that its aims can be achieved most effectively by international effort in co-operation with other international agencies, such as Unesco, UNEP and FAO.

The World Wildlife Fund (WWF) is an international charitable organization dedicated to saving the world's wildlife and wild places, carrying out the wide variety of programmes and actions that this entails. WWF was established in 1961 under Swiss law, with headquarters also in Morges.

Since 1961, IUCN has enjoyed a symbiotic relationship with its sister organization, the World Wildlife Fund, with which it works closely throughout the world on projects of mutual interest. IUCN and WWF now jointly operate the various projects originated by, or submitted to them.

The projects cover a very wide range, from education, ecological studies and surveys, to the establishment and management of areas as national parks and reserves and emergency programmes for the safeguarding of animal and plant species threatened with extinction as well as support for certain key international conservation bodies.

WWF fund-raising and publicity activities are mainly carried out by National Appeals in a number of countries, and its international governing body is made up of prominent personalities in many fields.