

# ENVIRONMENTAL DUTIES IN THE GERMAN LAND REGISTER

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## §1. ANY PROBLEM? ENVIRONMENTAL DUTIES IN THE GERMAN LAND REGISTER

In Germany, environmental duties in relation to land are often safeguarded by way of ‘restricted personal easements’<sup>1</sup> (§1090 German Civil Code, BGB), sometimes by ‘real burdens’<sup>2</sup> (in German: ‘*Reallast*’, §1105 BGB). These two forms of land burdens secure environmentally friendly behaviour by way of entries in the German land register. They are unquestioned standard practise. The instrument of restricted personal easements is employed where ‘negative’ behavioural duties (forbearance) prevail, real burdens are applied in case of ‘positive’ duties (payments).<sup>3</sup> In the wide field of promoting environmental

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<sup>1</sup> The terminology of land burdens in the interest of the environment which ‘run with the land’ is contingent, and the translation is difficult. In England, the term used most often is ‘conservation covenant’; in Scotland ‘conservation burden’, in the US ‘conservation easement’, in France ‘*obligation réelle environnementale*’. In the first part of this paper, I will use the narrow technical terms referring to the two instruments used in German law (‘restricted personal easement’ under §1090 BGB and ‘real burden’ under §1105 BGB). In part IV., I will shift to the more generic term ‘environmental land burden’. Please note that academic literature translates the German ‘*Persönlich beschränkte Dienstbarkeit*’ (official English translation by the German Justice Department: ‘restricted personal easement’) as ‘limited personal servitude’. S. V. ERP and B. AKKERMANS (eds.), *Property Law – Commentary, Materials and Text*, Hart, Oxford, 2012, *inter alia* p. 264. On the problem of terminology for conservation burdens/easements/covenants: C. T. REID, ‘Conservation burdens and covenants’ (2014) 165 *Scottish Planning and Environmental Law* 59; also B. HOLLIGAN, ‘Narratives of capital versus narratives of community: conservation covenants and the private regulation of land use’ (2018) *Journal of Environmental Law* 55–81 (p. 57).

<sup>2</sup> It should be taken into account that legal *termini* adapt to the national legal environment in which they operate. ‘Real burdens’ have a different meaning under Scots law than ‘real burdens’ (literal translation to German: ‘*Reallast*’) under §1105 BGB. Compare Andrew Steven’s contribution in this volume, and C. Godt *infra*; also E. NEUBAUER, *Easements and Servitudes- Eine rechtsvergleichende Untersuchung zu Grunddienstbarkeiten im englischen und schottischen Recht*, Duncker und Humblot, Berlin 2012.

<sup>3</sup> Even terms such as ‘positive’ and ‘negative’ duties are contingent. In German law, a ‘negative duty’ under the property title of the ‘restricted personal easement’ is the duty of the owner

conversion, ‘restricted personal easements’ are used to secure credits for windmills and photovoltaic plants on agricultural land<sup>4</sup>, and to safeguard specific behaviour. This article is exclusively interested in the latter use. It focusses on the implementation of climate change funding schemes, which foster energy efficient housing, and on nature conservation measures (§§14 *et seq.* Federal Nature Conservation Act, BNatSchG; §§1a and 35 Federal Construction Code, BBauG; and the respective acts of the German states [‘Länder’]). In these two areas of environmental law, the ‘restricted personal easement’ under §1090 BGB is the prevailing form of land burden. The benefitting party is the state (usually the ‘Länder’, sometimes the Federal state, sometimes local communities). There is neither evidence of any judicial dispute, nor a public debate about the legal (in)validity or appropriateness of this instrument.

Against this backdrop, the sceptical debate in some neighbouring countries about Germany’s practise raises questions. Siel Demeyere writes<sup>5</sup>:

‘In the [German] deed we have analysed, the contracting parties [...] tried to mask the partly positive nature by referring to the obligations in general as *Baubeschränkung* (building restriction). The parties do, however, not seem really easy about the proprietary nature of their construction, because a perpetual clause [...] is inserted in the contract as well in order to bind specific transferees.’

She advises to shift to subjective-personal real charges under §§1105 sec. 1, 1111 BGB.<sup>6</sup> In practice, the restricted personal easement is sometimes combined with the real burden in one single deed.<sup>7</sup> It would still remain questionable if

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to forbear. In Dutch law, the perspective is inverse: it is the right to do something for the entitled person. The Dutch concept is described as a ‘qualitative duty’ which is not a property right, but a personal right ‘with some property law effects’. B. AKKERMANS/W. SWADLING, ‘Types of Property Rights’, in: S.V. ERP/B. AKKERMANS (2012, *supra* fn. 1), p. 294. The reciprocity of the (negative) duty not to prohibit and the (positive) right to use (sic: ‘a positive servitude’) is discussed by J. WILHELM, *Sachenrecht*, 6<sup>th</sup> ed. De Gruyter, Berlin 2019, p. 1156, para. 1956.

<sup>4</sup> MOHR in Münchener Kommentar zum BGB (Munich Commentary to the German Civil Code) (2017), vol. 7 §§854–1296, 7 edn, Beck, München, 2017, ‘Introduction to §§1018 *et seq.*’, para. 8. For wind mills, §1090 BGB secures against §94 BGB (non-essential parts of land) and makes sure that the bank holds rights to the valuable plant, and not the less valuable land; MOHR, *ibid*, §1090, paras. 8, 9, 11.

<sup>5</sup> S. DEMEYERE, ‘Affirmative Land Burdens in German, Dutch and Belgian Law: Possibilities, Restrictions and Workarounds’ (2017) 6 *European Property Law Journal* 196–235, p. 219 f.

<sup>6</sup> DEMEYERE (2017, *supra* fn. 5), p. 234. (similar V. SAGAERT and S. DEMEYERE, ‘Le droit des biens et le droit de l’environnement: vers une réconciliation?’ (2019) *Journal tribunaux* 313 at p. 320). They refer to an article of Grziwotz to insinuate that the Reallast is preferred in Germany. But closer reading of Grziwotz reveals that he *combines* the restricted personal easement *and* the real burden in one single deed, cp. H. GRZIWOTZ, ‘Die Sicherung von naturschutzrechtlichen Auszeichnungsmaßnahmen’, *Kommunaljurist* 2008 (8), 288–294.

<sup>7</sup> H. GRZIWOTZ (2008, *supra* fn. 6); for Bavaria: Superior Regional Court Munich (OLG München), decision of 13.2.2019, Agrar- und Umweltrecht 2019, 218–221; for Northrhine-

the real burden under §§1105 sec. 1, 1111 BGB was the appropriate instrument. §1105 BGB secures positive duties such as money payments, natural produce and services<sup>8</sup>, ‘performances drawn out of the plot’ (in German: ‘*aus dem Grundstück*’). These duties must have an identifiable economic value.<sup>9</sup> The rationale is that the *Reallast* (§1105 BGB) is a security right for economic exploitation.<sup>10</sup> It allows forced sale (§§1107, 1147 BGB). In addition, the duty has to be of a purely private, not public nature.<sup>11</sup> While it is arguable whether behavioural duties may or may not be secured this way<sup>12</sup>, the characteristic of most environmental duties is their non-economic value. The duty to cooperate with a certain engineering office has no economic value, since the engineer is paid by the local authority. Equally, the duty to inform the local authority about data on energy consumption has no economic value. For these reasons, the *Reallast* is not the obvious and suitable instrument for securing environmental duties.<sup>13</sup>

Why, then, should the ‘restricted personal easement’ be the incorrect choice? What is the problem? The irritation grows, if one acknowledges the lively debate about conservation easements in other European countries<sup>14</sup>, apart from

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Westfalia the single use of §1090 BGB is common, the combination possible: HARALD KOCH, interview 19.7.2019: He is the notary mandated to register the environmental duties on behalf of the authority of the local community ‘Steinhagen’ for the climate change settlement ‘Hilterweg’ in the same community.

<sup>8</sup> T. MORVILIUS, in: W. Böhringer et al. (ed), *Meikel-GBO Grundbuchordnung*, 11 ed. Heymann, Köln 2015, Einl. B, para. 451.

<sup>9</sup> HERRLER, in *Palandt – Bürgerliches Gesetzbuch (Commentary)*, 78. ed. Beck, München 2019, §1105, para. 4; F. BAUR/R. STÜRNER, *Sachenrecht*, 18. edn Beck, München 2009, §35.6.

<sup>10</sup> BGH NJW-RR 2005, 1054 ‘Verwertungsrecht’; for a comparative analysis see B. AKKERMANS/W. SWADLING, ‘Types of Property Rights’, in: S.V. ERP/B. AKKERMANS (2012, *supra* fn. 1), p. 270.

<sup>11</sup> T. MORVILIUS (2015, *supra* fn. 8), Einl. B, para. 451.

<sup>12</sup> The mere possibility of forced sale exerts a preventive effect on the debtor to act positively in order to avert the forced sale. The example of a burden to clear the water way (channels) is discussed by BAUR/STÜRNER (2009, *supra* fn. 9), §35, n. 6.

<sup>13</sup> This is the reason why the *Reallast* is ‘unpopular’ for securing environmental obligations, as Sagaert/Demeyere rightfully sense (SAGAERT/DEMEYERE, 2019, *supra* fn. 6, p. 320).

<sup>14</sup> In Scotland, the respective regulation was enacted in 2000/2003: C.T. REID, ‘Conservation covenants’, (2013) 77(3) *Conveyancer and Property Lawyer*, 176–185; C. MACKIE and M.M. COMBE, ‘Charges on Land for Environmental Liabilities: A Matter Of Priority for Scotland’, (2019) 31 *Journal of Environmental Law* 83–108; see also A. STEVEN in this volume. In France, new regulation was introduced in 2016: Art. 72 Law No. 2016–1087 of 8 August 2016 (Loi pour la reconquête de la biodiversité, de la nature et des paysages). It establishes a compensation scheme in kind, see B. MALLET-BRICOUT in this volume. In England, a reform proposal layed on ice for years. The (English) Law recommended respective new regulation, see: Law Commission, Conservation Covenants (Law Com Nr. 349) 2014 <s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc349\_conservation-covenants.pdf>; on this proposal: B. Holligan (2018, *supra* fn. 1); see also the Report commissioned by DEFRA, *A review of recent biodiversity offsetting practice in Germany*, Februar 2014, Defra project code: WC 1051. On the UK in general: C. T. REID and W. NSOH, *The Privatisation of Biodiversity: New Approaches to Nature Conservation Law*, E. Elgar, Cheltenham 2016, with conclusions for offsets (pp. 174–177), and for conservation

precedents in the US<sup>15</sup>, Canada<sup>16</sup> and Australia.<sup>17</sup> This article will first describe the current use of restricted personal easements (§1090 BGB) in the fields of climate change regulation and nature conservation and explain the technical interpretation of §1090 BGB (II.). It will then discuss the five property principles, which arguably stand in the way of long-term securisation of behavioural duties (III.). Under (IV.), the practise of how the German state utilises private law institutions of real burdens will be analysed functionally, before the conclusion (V.) raises the question of European harmonisation of the securisation of environmental duties.

## §2. CURRENT PRACTISE UNDER §1090 BGB IN TWO AREAS OF ENVIRONMENTAL LAW

### 1. CLIMATE CHANGE REGULATION

Apart from the cap-and-trade mechanism in emission abatement (which is not covered by this article), an important instrument of climate change regulation is financial aid.<sup>18</sup> While both instruments are voluntary measures and capitalise on financial incentives, only the former is a pure market instrument, while the

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covenants (pp. 201–202), N. HOPKINS, in this volume, notes that the legislation is now on its way.

<sup>15</sup> Z. BRAY, 'Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements' (2010) 34 *Harv Envl Law Rev* 119, pp.126–130; A. RISSMAN and N. SAYRE, 'Conservation Outcomes and Social Relations: A Comparative Study of Private Ranchland Conservation Easements', 25 *Soc. Nat. Ressources* 2011, 523; on forest preservation easements: L. WAYBURN, 'Conservation Easements as Tools to Achieve Regulatory Environmental Goals' (2011) 74 *Contemporary Probl* 175. J. OWLEY, 'Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements' (2011) 30 *Stanford Env. LJ* 121; A. VINSON, 'Re-allocating the conservation landscape: conservation easements and regulation working in concert (2006–07) 18 *Fordham Environmental Law Review* 273.

<sup>16</sup> G. GIDROL-MISTRAL, 'L'environnement à l'épreuve du droit des biens' (2017) 62 *McGill LJ* 687; J. TRUELLE, *La servitude de conservation et la protection durable des milieux naturels au Québec: constats et recommandations*, mémoire de M.Env., Université de Sherbrooks, 2014; J.-F. GIRARD, 'La vraie nature de la servitude de conservation: analyse d'un outil juridique méconnu', in: Service de la formation continue du Barreau de Québec (ed.), *Développements récents en droit de l'environnement*, vol. 352, Yvon Blais, Cowansville (Qc), 2012; also G. GIDROL-MISTRAL in this volume.

<sup>17</sup> J. FITZSIMONS and B. CARRS, 'Conservation Covenants on Private Land: Issues with Measuring and Achieving Biodiversity Outcomes in Australia' (2014) 54 *Environmental Management* 606.

<sup>18</sup> E.g. '100 Klimaschutzsiedlungen in NRW' (NRW=Northrhine Westfalia), fostering the planning of eco-housing development, precedents are the '1000 Dächer Programm' (1990–1992) and the '1000 Dächer Programm' (1999–2003), fostering photovoltaic energy production on roof tops. These programmes are based on Ministerial decisions (published in official journals), stipulating the respective requirements. The Programme '100 Klimaschutzsiedlungen' for instance was based on a precedent of the current 'Richtlinie über die Gewährung von Zuwendungen aus dem 'Programm für Rationelle Energieverwendung, Regenerative Energien und Energiesparen' (progres.nrw) – Programmbereich Markt-

latter pursues a ‘carrot and stick’ policy. The state incentivises the choice of environmentally friendly materials in house construction, energy production and landscaping (greens, gardens, hedges, trees). The duties set out go beyond the requirements stipulated by public zoning law. A representative example is the Northrhine-Westfalian (NRW) eco-housing development programme. Local communities are eligible for funding, if they zone and sell public land according to the programme requirements. They receive funding if they condition the sale of a plot by submitting it to ecological duties as described in the programme. The legal technique is a deed<sup>19</sup> to which both the contract of sale and the registered easement refer. The deed explicitly makes reference to the aid requirements of the respective public aid programme. The subsidy programme<sup>20</sup> as well as the local community’s decision<sup>21</sup> are governed by public law, thus both decisions are publically accessible. The deed obliges the purchaser to seven duties. The core obligation is a so-called 3-litre-passive house.<sup>22</sup> The metric of measurement is prescribed.

It is telling that the assigned contractor, who operates the programme, refers on his/her webpage to the public plans – the obligatory land registration is not mentioned.<sup>23</sup> This self-description mirrors the conception of the registration as a mere supporting instrument to the subsidy programme. It binds the land to the conditions of the financial aid programme.

## 2. NATURE CONSERVATION

§15 sec. 4 Federal Nature Conservation Act (BNatSchG) requires that compensation measures and offsets are maintained and secured by law (in German: *‘unterhalten und rechtlich zu sichern’*). In larger construction planning, the decision about the compensation measure becomes part of the permit to build the house, emit emissions, build a freeway, railway, power line, pipeline etc. (so-called ‘concentration effect’). Consequently, the vertical competence to decide about the compensation measure depends on the competence to decide about the primary permit (resulting in split competences between the

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einführung (progres.nrw – Markteinführung 2019)’, Runderlass des Ministeriums für Wirtschaft, Innovation, Digitalisierung und Energie, Ministerialblatt NRW, 1.10.2018, p. 551.

<sup>19</sup> So called ‘*Verweisungsurkunde*’ (more colloquial ‘*Mutterurkunde*’).

<sup>20</sup> E.g. for climate protecting housing: [www.energieagentur.nrw/gebaeude/klimaschutzsiedlungen](http://www.energieagentur.nrw/gebaeude/klimaschutzsiedlungen).

<sup>21</sup> The decision and the deed are made available on request by the mayor’s office of the local community. Personal information given by the mayor’s office of the local community of Steinhagen (29.8.2016), on file with the author.

<sup>22</sup> The qualification of these duties as ‘positive’ or ‘negative’ in nature might be disputable. However, the nature of the duty is doctrinally close to irrelevant. One may argue that the positive duties are submitted to the primary duty ‘not to pollute’. Equally, one may argue that these are positive duties justified by the subsidy programme (*infra* II.3).

<sup>23</sup> <[www.energieagentur.nrw/gebaeude/klimaschutzsiedlungen/klimaschutzsiedlung\\_steinhagen](http://www.energieagentur.nrw/gebaeude/klimaschutzsiedlungen/klimaschutzsiedlung_steinhagen)>.

federal level and the 'Länder', §15 section 8 BNatSchG<sup>24</sup>). The investor bears the costs of registration.<sup>25</sup> Regarding the question of how the measure is to be 'secured by law', wide discretion is granted, both for the states to regulate<sup>26</sup> and for the responsible agencies.<sup>27</sup> E.g. the state of Hesse refers in its internal guidance to restricted personal easements, §1090 BGB ('soweit es sich um *Unterlassenspflichten handelt*'), real burdens, §1105 BGB ('für nicht lediglich einmalige Handlungspflichten'), and leases (*Pachtvertrag*: 'wenn eine vertragliche Vereinbarung ausreichend erscheint, um eine ausreichende Sicherung zu erreichen').<sup>28</sup> In practise, the competent authorities unevenly decide between restricted personal easements and real burdens<sup>29</sup>, or combine both forms.<sup>30</sup> The region of the Northern part of Hesse ('Regierungspräsidium Kassel') prefers the restricted personal easement<sup>31</sup>; so do Brandenburg and Mecklenburg-

<sup>24</sup> Section recently introduced by Art. 8 of the Law for the Acceleration of the Construction of Power Lines, Federal Official Journal (BGBl. I of 16.5.2019, 706).

<sup>25</sup> The costs are determined by §52 GNotKG (Nutzungs- und Leistungsrechte), and depend on the value for the benefitting person or land lot.

<sup>26</sup> As of 2019, all 16 Bundesländer issued – and the Federal State will soon issue (draft submitted on 13.9.2019) – ordinances regulating how compensation measures are secured legally, with diverging titles and content. Brandenburg, Sachsen-Anhalt und Sachsen issued 'Flächenpool-Verordnungen' (FPV-Brdg), Hesse and the Federal level call their ordinance 'Kompensations-Verordnung' (KV-Hs; BundesKV), Baden-Württemberg 'Kompensationsverzeichnis-Verordnung' (KVV-BaWü), or side by side 'Ökokonto-Verordnung' and Kompensations-VO (Mecklenburg-Vorpommern). All differ in important questions: (1) Are the state, public agencies, public companies and publically controlled companies exempt from the duty to secure legally? ('Yes, always' in Saxony-Anhalt and Saxony; 'can-option' in Hesse and Brandenburg). (2) Does 'legally binding' always requires a register entry? (wide discretion in Hesse; substitutable in Brandenburg only with 'certified contractor offer'). The draft BundesKV proposes an exemption for measures executed on public land and for measures executed on the land owned by the addressee of the permit. (3) Can addressees of the permit (=obligation to compensate and secure it legally) delegate the duty to a contractor with liberating effect? ('Yes' in Saxony-Anhalt, Saxony, Brandenburg, Mecklenburg-Vorpommern; 'can-option' in Hesse). (4) Is eco-banking ('Öko-Konto', 'Öko-Punkte') allowed, which allows a decoupling of the permitted impairment and the compensation measure in space and in time? ('Yes' in Baden-Württemberg and Bavaria; 'no' in Brandenburg).

<sup>27</sup> H. MÜHLBAUER, in: A. Lorz/C. Konrad/H. Mühlbauer/M.H. Müller-Walter/H. Stöckl, *Naturschutzrecht*, 3<sup>rd</sup>. ed. Beck, München 2013, §15 para. 28.

<sup>28</sup> Drs. 278/09, p. 183.

<sup>29</sup> Statistical evidence provided by Susanne Boldt, Interview of 17 June 2019. She is lawyer at the regional agency of Northern Hesse ('Regierungspräsidium Kassel').

<sup>30</sup> H. GRZIWOTZ (2008, *supra* fn. 6), at p. 293.

<sup>31</sup> Empirical evidence shows that the southern territory of the state Hesse prefers real burdens. The following standard formulation in the Northern territory of Hesse for restricted personal easements benefitting the state of Hesse is registered in the land registry: '*Beschränkt persönliche Dienstbarkeit zugunsten des Landes Hessen – Forstverwaltung – für Maßnahmen zum Zwecke des Naturschutzes und der Landschaftspflege nach Maßgabe des Genehmigungsbescheides des Regierungspräsidiums xxx vom (Date), (file number of the approval)*'. The model formulation is the following: '(1) Das Grundstück dient als Kompensationsfläche gemäß §15 Bundesnaturschutzgesetz. Der Eigentümer gestattet dem Berechtigten, auf seinem Grundstück optional ergänzend innerhalb des im als Anlage 1 beigefügten Lageplan mit A-B-C-D-E-F gekennzeichneten Ausübungsbereichs

Vorpommern. In 2013, a legislative proposal was made to harmonize the executive application of the compensation regime on the federal level<sup>32</sup>, but it failed the approval of the German Bundesrat (the second Federal parliamentary chamber). After a new federal competence was legislated for projects under the administration of the Federal agencies in May 2019 (*supra* fn. 24), the new exclusive Federal compensation ordinance is expected to soon replace the internal guidelines.<sup>33</sup>

At the time of writing this article (2019), a vivid debate on transparency and the enforcement deficit has commenced.<sup>34</sup> On a technical level, the relation between impairment and compensation is criticised; on a legal level, the permit-compensation link and the responsibilities of developers and contractors are scrutinized. For the permit-compensation link, a central point of political contention are (publically accessible) administrative cadastres and registers. These document the link established by an administrative decision between a plot of benefitting land (e.g. a license to build) and a plot of land bound by a compensation decision, based on §17 section 11 Federal Nature Conservation Code of Germany (BNatSchG).<sup>35</sup> Positive examples in this regard are the Hesse

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*naturschutzrechtliche Ausgleichs- und Ersatzmaßnahmen im Rahmen der gesetzlichen Eingriffsregelung in Form von: Eintragen Bsp: Extensivierung oder Pflanzung von Gehölzen... sowie Artenschutzmaßnahmen in Form von Eintragen auf Dauer vorzunehmen und zu unterhalten. Der Eigentümer hat das notwendige Betreten und Befahren des belasteten Grundstücks zum Anlegen und Unterhalten sowie zur Kontrolle der naturschutzrechtliche Ausgleichs- und Ersatzmaßnahme und der Artenschutzmaßnahmen zu dulden. (2) Der Eigentümer wird innerhalb des im als Anlage 1 beigefügten Lageplan mit A-B-C-D-E-F gekennzeichneten Ausübungsbereichs alle Handlungen unterlassen, die zu einer Zerstörung, Schädigung oder nachhaltigen Veränderung der Kompensationsmaßnahmen auf diesem Grundstück führen können.'*

<sup>32</sup> Off. J. of the German Bundesrat (Bundesrats-Drucksache) 332/13 of 25.4.2013.

<sup>33</sup> Draft on compensation measures for projects in the regulatory competence of Federal agencies tabled by the Federal Ministry of the Environment on 13.9.2019, <<https://www.bmu.de/gesetz/831/>> (essentially large infrastructure projects like power lines, water ways, highways, railways, ports, and military projects).

<sup>34</sup> J. RABENSCHLAG, N. SCHOOF, J. SCHUMACHER and A. REIF, 'Evaluation der Umsetzung baurechtlicher Ausgleichsmaßnahmen', 51 *Naturschutz und Landschaftsplanung*, 2019, 434–442; S. ECKER and U. PRÖBSTL-HAIDER, 'Erfolgskontrolle von Ausgleichsflächen im Rahmen der Bauleitplanung in Bayern', 48(5) *Naturschutz und Landschaftsplanung*, 2016, 161–167, B. JEUTHER, E. SCHUBERT, R. HETTRICH, A. RUFF and E. GUSSMANN, 'Evaluation der Ökokonto-Verordnung Baden-Württemberg'. 22. 11. 2018, download: <[www.lubw.baden-wuerttemberg.de/documents/10184/389779/Evaluation\\_OekokontoVO\\_Endbericht.pdf/](http://www.lubw.baden-wuerttemberg.de/documents/10184/389779/Evaluation_OekokontoVO_Endbericht.pdf/)> (last retrieved 24.9.2019). These evaluations document striking quantitative and qualitative deficits. On average, 30% of all measures are not detectable. In cases of large infrastructure projects (e.g. highspeed track) 75% of the imposed measure are undetectable.

<sup>35</sup> §17 sec. 11 BNatSchG provides for a legal base for further regulation on the regional state level. This competence which is utilized by most of the 16 states, e.g. Lower Saxony's Executive Order about a Register on Compensation Measures ((NKompVzVO) of 1 February 2013 (Off. J. Lower Saxony 2013, p. 42). Yet, while these registries are installed, no public information duties are imposed on the agencies. Therefore, the notion of an 'active right to environmental information' is not yet fully achieved, as conceived by S. WHITTAKER/J. MENDEL/C.T.

NATUREG map and database<sup>36</sup>, and the state of Mecklenburg-Vorpommern.<sup>37</sup> Other states prioritise a proactive policy by employing ‘certified agents’, who secure that compensation measures are implemented. These are service contractors of the addressee of the permit.<sup>38</sup> Yet, the rationale is again public policy. Most of these contractors are privatised public land administrations.<sup>39</sup> A contract with a ‘certified’ organisation relieves the developer from the burden to ‘organise’ compensation. Those compensatory arrangements are being secured only in some of the ‘Länder’.<sup>40</sup>

Today, most entries to the land registry for property titles (*Grundbuch*) refer to the permit number, but do not (yet) refer to the administrative registry. Access to the permit is granted under states’ freedom of information acts. While state courts of auditors, such as the one of Hesse<sup>41</sup>, demanded a legally binding form of ‘compensation land’ by way of registered land burdens, legislative proposals were rebutted by, *inter alia*, cost arguments<sup>42</sup> and by the argument that public

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REID, Back to Square One: Revisiting how we analyse the right of access to environmental information, *JEL* 2019, 1–21, at 4.

<sup>36</sup> The Hesse ‘NATUREG’ was installed by §4 Hessisches Ausführungsgesetz zum BNatSchG (Hessian Implementing Act for the Federal Nature Protection Law), Hessian GVBl. I 2010, p. 629 of 28.12.2010. It has a public surface level accessible to everyone ([umwelt.hessen.de/umwelt-natur/naturschutz/hessisches-naturschutzinformationssystem](http://umwelt.hessen.de/umwelt-natur/naturschutz/hessisches-naturschutzinformationssystem)) and an internal level (with data restricted to agency use). Public access (‘Einsichtsrecht für Jedermann’) to the Nature Information System of the state of Hessen (NATUREG) is granted since 27.4.2017; see press release Hesse Ministry of the Environment, Climate Change, Agriculture and Consumer Protection, 24.4.2017 ‘Naturschutz online, Von Kompensationsflächen und Ökokonten – im Internet transparent im NATUREG einsehbar’, *Natur und Landschaft* 2017. <[kompensationsflaechen-mv.de/wiki/index.php/Hauptseite](http://kompensationsflaechen-mv.de/wiki/index.php/Hauptseite)>.

<sup>37</sup> With regard to ‘certified agents’, two different systems are in place (which overlap with regard to eco-points): Brandenburg, Saxony and Saxony-Anhalt installed ‘certified agents’ as qualified conservation experts trusted to fulfil longterm contracts (e.g. §4 ‘Pooling-Regulation’ of Brandenburg [German: Flächenpool-Verordnung: FPV] provides for the registration of organisations, such as ‘Flächenagentur Brandenburg GmbH’). In turn, the agency will exempt the permit’s addressee from the duty to maintain the compensation measure (§5 Brandenburg FPV). The regulatory rationale is that a simple book-duty in the permit or the land register does not secure the maintenance of the natural environment, only active human engagement for nature does. An ‘Administrative note’ clarifies that the ‘liberalising effect’ is granted for contracts lasting for 25 years. In Bavaria, Baden-Württemberg, Schleswig-Holstein, ‘certified agents’ exist as well, however their primary function is different. The respective regulations do not allow for a liberating effect, but allow ‘certified agents’ to commercially ‘eco-bank’. Yet, ‘eco-points’ exist in almost all states (except Brandenburg).

<sup>39</sup> Privatised companies, which ‘pool’ land for the management of compensation measures. These companies may consist of public agencies (such as ‘Forstanstalten’), agencies controlled by the state (agriculture, estate administrations) and state governed nature conservation foundations.

<sup>40</sup> E.g. in Brandenburg, land burdens on public land will be registered for the benefit of the state of Brandenburg. In other states, e.g. Mecklenburg-Vorpommern, no registration is required since the certified agents are deemed to be annually controlled and public.

<sup>41</sup> Notification by the Court of Auditors of the State of Hesse to the Hessian Ministry of Environment of 14.12.2007.

<sup>42</sup> The costs, however, appear reasonable, and will be attributed to the one who impairs the environment in the first place (thus, not the state). Depending on the economic value of the



access to the administrative registries, like NATUREG, is already provided for.<sup>43</sup> The central point of discussion is the effect of the entries in the register. Legislative initiatives propose to convey ‘public faith’ to the administrative register (as stipulated by §892 BGB).<sup>44</sup> Yet, there is a good reason for caution since the current registries are managerial instruments. There are no safeguards and no strict procedures, which secure that all entries and non-entries are ‘correct’.<sup>45</sup> Their goal is information, not security. To the author’s understanding it would suffice to include either a reference to the docket number of the administrative data base in the entry of the (proprietary title) land register when registering the restricted personal easement or to extend the notarial duty from checking not only the property title register but also the public registries (more on distinguishing the function of this entry and the public faith principle of §892 BGB *infra* IV.4.).

### 3. TECHNICAL INTERPRETATION OF §1090 BGB

§1090 BGB is a child of the typical German reception process in the 19<sup>th</sup> century, and has evolved by adjudication since then.<sup>46</sup>

In contrast to its Roman precedent, the legislator of the German Civil Code did not design the restricted personal easements (§1090 BGB) in parallel to §1030 BGB (*usufruct*, in German: ‘*Nießbrauch*’), which stipulates a right to use and usufruct (*usus et frui*), limited by the lifetime of the beneficiary. Deliberately, §1090 section 2 BGB refers to the rules of ‘praedial servitudes’ (§1018 BGB, ‘*Grunddienstbarkeit*’).<sup>47</sup> Thus, the restricted personal easement is to

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approved project, the costs for the registration of a restricted personal easement range from 100 to 300 Euros.

<sup>43</sup> A representative of the State Environmental Ministry of Hessen is quoted to have said that the registry already enjoys ‘public faith’. Taking into consideration that this person is a natural scientist and not a trained lawyer, this quote shall not be taken as a reliable legal information.

<sup>44</sup> As *lege ferenda* and according to the currently governing (Green Party) Environmental Minister, once all compensation duties and offsets have been inserted to the data bank.

<sup>45</sup> This is the precondition for the German understanding of ‘public faith’ stipulated in §892 BGB which allows the assumption that the register is correct, both with regard to entries and non-entries, which in turn allows for ‘burden free good faith acquisition’. The concept of ‘relative faith’ of land registries (common to ‘causal’ systems of land acquisition) does not exist in Germany. For a comparatist analysis see M. Hinteregger/L. van Vliet, Transfer, in: S. van Erp/B. Akkermans (2012, *supra* fn. 1), p. 869.

<sup>46</sup> There is no equivalent in the French Code Civil. I thank William Dross for this clarification (communication on 29.7.2019). The French servitude (§art. 686 French Code Civil) can only benefit a piece of land and never a natural or legal person. It creates a legal link between two pieces of land. However, according to a recent decision of the French High Court (*Cour de cassation*), a land owner can constitute a ‘real right’ (*droit réel*) on his/her land to benefit a natural or legal person. According to William Dross, it is currently unclear if such a real right can be perpetual (as easements are); clarification by the *Cour de cassation* is awaited.

<sup>47</sup> P. GÖZ, *Die beschränkt persönliche Dienstbarkeit*, Lang, Frankfurt/M., 1997, p. 87; today scholars qualify the restricted personal easement ‘between Nießbrauch und Grunddienstbarkeit’. Cf. J. WILHELM (2019, *supra* fn. 3), p. 1172, para. 1990.

be technically distinguished from the *Reallast* (§1105 BGB). The legislative intent was to extend the rights to use and *usufruct* towards duties of omissions.<sup>48</sup> §1090 section 2 BGB refers to the rules of the right to possession (§§1090 section 2, 1029, §861 BGB – modelled on the *Actio Publicana* in Roman law), thus allowing for a claim of injunction. In retrospect, a parallel stipulation appears as important: The law deliberately abstains from demanding a link to another plot of land (thus rejecting the praedial rule, *vicinitas*), also no economic benefit is required (*utilitas*).<sup>49</sup> Today's standard example is the right of way. The lifetime limitation (historically linked to *uti et frui*) became obsolete for the sake of legal persons, which have been equated with natural persons and have become an integral part of economic reality since 1870.<sup>50</sup> In 1953, the legislator codified this judge made law in the Civil Code (rule §1059a BGB, to which §1092 section 2 refers<sup>51</sup>). Since Germany has always rejected a separate notion of 'state property', the state is equated with any other legal person. Thus, the state (the federal state and the 'Länder') or a local community<sup>52</sup> are eligible to be a beneficiary of a restricted personal easement.<sup>53</sup> In principle, also non-governmental organisations qualify, if they guarantee sufficient stability.<sup>54</sup> There is neither debate, nor resistance against the perpetual duration for restricted personal easements benefitting the state.<sup>55</sup>

The entitlement to register an environmental obligation as a restricted personal easement is not only restricted to the owner, but encompasses all 'equivalent land rights' such as *emphyteusis* (in German: '*Erbbaurecht*').<sup>56</sup> A holder of an *usufructus* right should, in principle, be equally eligible to burden his/her right with a restricted personal easement as far as the obligation is within the scope of his/her entitlement. Being proprietary in nature, §415 BGB (prior consent of the other party when the *debtor* is to be exchanged) does not apply. Equally, an owner whose property is already burdened by a usufruct right is entitled to register a restricted personal easement – as far as the priority use right is not impaired.

<sup>48</sup> C. MÖLLER, *Servituten*, Wallstein, Göttingen, 2010, p. 394.

<sup>49</sup> Ibid.

<sup>50</sup> The freedom of corporate establishment was installed in Germany by law in 1870, G. BRÜGGEMEIER, 'Probleme einer Theorie des Wirtschaftsrechts', in: H.-D. ASSMANN/G. BRÜGGEMANN/D. HART and C. JOERGES (eds.), *Wirtschaftsrecht als Kritik des Privatrechts*, Athenäum, Königstein/Ts., 1980, 9–81, p. 44.

<sup>51</sup> C. HEINZE in *Staudinger BGB Commentary* (2017), §§1018–1112, §1059, para. 1.

<sup>52</sup> Attention: DEMEYERE (2017, *supra* fn. 5, p. 219) seems to think that only local authorities are eligible.

<sup>53</sup> C. REYMANN in *Staudinger BGB Commentary* (2017), §§1018–1112, §1090, para. 5.

<sup>54</sup> I owe this information to the Berlin based German notary, Joachim Garbe-Emden, Interview on 14 June 2019.

<sup>55</sup> This is a decisive difference compared to France which prompted the French legislative reform of 2016. N. REBOUL-MAUPIN and B. GRIMONPREZ, 'Les obligations réelles environnementales: chronique d'une naissance annoncées', *Recueil Dalloz* 2016, 2074.

<sup>56</sup> HERRLER (2019, *supra* fn. 9), §1105, para. 2.

In the course of the 20<sup>th</sup> century, the default rule that negative duties are to be secured under §1090 BGB was further softened. It was not positively stipulated in §1090 BGB anyway, only interpreted indirectly in delimitation to real burdens under §1105 BGB.<sup>57</sup> The delineation was understood as technical clarification, not as a normative restriction abiding by the *numerus clausus*.<sup>58</sup> With the ‘*Seilbahnfall*’<sup>59</sup> of 1959, the word ‘*benutzen*’ (in English: to utilize) in §1090 BGB was finally interpreted as meaning ‘*handeln*’ (in English: ‘to act’) as in other areas of law, namely as ‘positively and negatively acting’ [to act or omit, in German: ‘*Tun und Unterlassen*’<sup>60</sup>]. Consequently, the benefit may also consist of a positive behaviour.<sup>61</sup> This interpretation became doctrine<sup>62</sup> in form of a (secondary) statutory accessory duty which might emerge from the proprietary right.<sup>63</sup> Today, a reasoning based on rule and exception prevails.<sup>64</sup> While possible, the exceptions are submitted to justifications under the *numerus clausus*, privity, the rationale of §1090 BGB and competition law.<sup>65</sup> Thus, legal practise has moved away from a doctrinal thinking.<sup>66</sup>

### §3. CONFLICTING PRINCIPLES?

Considering the widespread unease with the German practise in the European neighbourhood, both in countries with a civil law tradition and in those with a common law tradition, the following section aims at discussing the five respective property doctrines which arguably stand in the way of using restricted personal easements.

<sup>57</sup> H. AMANN in *Staudinger BGB Commentary* (2012), Einleitung zu §§1105–1112, Rn. 1; C. REYMANN (2017, *supra* fn. 53), §1090, para. 11.

<sup>58</sup> MOHR (2017, *supra* fn. 4), §1090, para. 15.

<sup>59</sup> BGH, decision of 25. 2. 1959, V ZR 176/57, DNotZ 1959, 240. The case deals with a positive duty to maintain a bridge in order to protect a cable car, inferred from §§1091 section 2, §1022 BGB.

<sup>60</sup> So called ‘rule of equivalence’ as stipulated in criminal law (§13 sec. 1 Penal Code).

<sup>61</sup> A more recent decision evaluates the duty to only sell a specific type of beer (Weißbier) as compliant with property law’s doctrine, BayOLG, DNotZ 1998, 122.

<sup>62</sup> Seminal article by H. AMANN, ‘Leistungspflichten und Leistungsansprüche aus Dienstbarkeiten’, *Deutsche Notarzeitschrift* (DNotZ) 1989, 531–562.

<sup>63</sup> As formulated by the Federal Supreme Court (BGH) in a case published in DNotZ 1989, 565. For subsequent case law on purchase obligations: MOHR (2017, *supra* fn. 4), §1090, para. 15.

<sup>64</sup> Exceptions already existed in Roman law, H. HONSELL, *Römisches Recht*, 8. ed. Springer, Berlin 2015, p. 73.

<sup>65</sup> On NC-limits: H. AMANN (1989, *supra* fn. 62) at 561; on privity and function, MOHR (2017, *supra* fn. 4), §1090, para. 25; on EU Competition law, *ibid*, para. 31, J. BORMANN, *Wettbewerbsbeschränkungen durch Grundstücke*, Müller, Heidelberg, 2003; On economic rationales: REYMANN (2017, *supra* fn. 53), §1090, para 17 ‘qualified interest in amortisation’.

<sup>66</sup> Yet, it seems that this is how jurists interpret the law when looking at the BGB from outside, *cp.* DEMEYERE (2017, *supra* fn. 5), p. 234.

## 1. APPURTENANT RULE

The appurtenant rule is considered a characteristic of specified land burdens. Unlike other property rights, the right to use land and the right to take a specific resource from someone else's land are bound to the land which profits and cannot be severed from it. Alison Clarke explains: 'There are (at least) two possible answers. One of them is that the law will not give proprietary status to a right to make use of (and therefore diminish the value of) someone else's land, unless that right enhances the value/utility of the other piece of land. [...] The second possible answer is that the link between use of one piece of land and the enhancement of the value of another piece provides a reasonably precise but flexible measure for quantifying the measure of the burden on the burdened land.'<sup>67</sup>

It is worth noticing that under German law the appurtenant rule is not considered to be a mandatory property principle; it does not always apply. Where the appurtenant rule is part of the canon of property principles, it is closely connected with the praedial rule (which focusses on the burdened land). Therefore, both should be discussed in context.

## 2. PRAEDIAL RULE

The praedial rule requires that a real burden must affect and relate to the encumbered property itself, for the benefit of the benefitting property itself (*utilitas* rule). It is not enough that the burden merely affects the economic interests of the landowner in the sense that such a rule would constitute exclusively a trade restraint.

While Roman law distinguished praedial servitudes (with *vicinitas* as a rule) and personal servitudes (encompassing the right to take resources [*fructus*], the right of way [*usus*], the right to reside [*habitation*] and slavery [*operae servorum*])<sup>68</sup>, it seems that England *and* those countries strongly influenced by the Code Napoléon 1804, fully abolished 'purely' proprietary personal servitudes, so that only praedial burdens have survived.<sup>69</sup> Only the state, under the limits of public law, may impose restrictions on land. Thus, under private law, the utility requirement is understood as a base principle *sine qua non* in many countries.<sup>70</sup> This is not the case in Germany. It deliberately

<sup>67</sup> A. CLARKE and P. KOHLER, *Property Law*, Cambridge University Press, Cambridge 2005, p. 343.

<sup>68</sup> HONSELL (2015, *supra* fn. 64), pp. 74/75.

<sup>69</sup> On the historic context: W. DROSS, *Tiers et biens en France, Les tiers – Journées panaméennes*, Brussels, Bruylant, 2016, 377, at p. 381, no 8; SAGAERT/DEMEYERE (2019, *supra* fn. 6), p. 317.

<sup>70</sup> SAGAERT/DEMEYERE (2019, *supra* fn. 6), p. 317; DEMEYERE (2017, *supra* fn. 5), p. 204 ('*utilitas*'); exactly the justification for the appurtenant rule formulated by A. CLARKE and

abolished the praedial rule for the 'restricted personal easement' under §1090 BGB.<sup>71</sup>

Yet, refinements have evolved across Europe. Belgian courts have cut back on the utility requirement since the early 50s by ordering that any benefit might suffice as long as it only increases the use and exploitation of the dominant land.<sup>72</sup> The Law Commission of England called for exceptions to the rule in 2014<sup>73</sup>, and essentially thought of reducing the rule to a 'touch and concern requirement'.<sup>74</sup> In Scottish law, an acknowledged exception for the 'neighbouring land requirement' can be found in planning agreements made by 'local authorities, the National Trust, the Forestry Commission, the statutory conservation bodies, and Ministers'.<sup>75</sup> In French legislation, public authorities and registered nongovernmental organisations (NGOs) are accepted as benefitting entities for '*obligations réelles environnementales*'.<sup>76</sup>

In a widely recognized decision of the Inner House of the Court of Session (the supreme civil court in Scotland) in 2015, the Court loosened the requirements for what constitutes a 'benefit' for the neighbouring lands when it had to decide a dispute about the development of an office block at *Rubislaw Quarry* in Aberdeen.<sup>77</sup> A developer seeking to obtain access rights over a road leading to the development site had entered into an agreement with a number of neighbouring proprietors and tenants of nearby office blocks. The agreement included a clause restricting the net lettable office space within the new development. The pursuers in the court action were the successors of the original developer named in the agreement. They sought a planning permission to build a further office development on the land, and had argued that the clause was not a real burden, and therefore did not pass on to them. The Inner House contradicted. Whether the restriction is an enforceable real burden depended on whether the benefit conferred was merely one of commercial significance to those with an interest in the offices, or whether a material benefit was also conferred on the properties themselves. The court reasoned that in the given case, the neighbouring proprietors and tenants sought protection against falls in rental value as a result of 'increased competition' (sic traffic) within the

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P. KOHLER (2005, *supra* fn. 67); for Canada: G. GIDROL-MISTRAL (2017, *supra* fn. 16), at p. 723.

<sup>71</sup> Consequently, the utility requirement is not debated – even if one could argue in the case of climate friendly housing that the value of private houses is enhanced by the easement. But this is speculative and does not play a role in the public discourse.

<sup>72</sup> See references in S. DEMEYERE (2017, *supra* fn. 5), p. 204, fn. 30.

<sup>73</sup> English Law Commission 'Conservation Covenants' Law Com. No. 349, 2014.

<sup>74</sup> See NICHOLAS HOPKINS in this volume. 'Touch and concern' requires *some* benefit for the land; the duty shall not be 'purely personal'.

<sup>75</sup> C.T. REID (2014, *supra* fn. 1), p. 108.

<sup>76</sup> L. 132–3 Code de l'environnement (inserted by Loi n° 2016–1087 of 8. Aug. 2016): '*Les propriétaires de biens immobiliers peuvent conclure un contrat avec une collectivité publique, un établissement public ou une personne morale de droit privé agissant pour la protection de l'environnement.*'

<sup>77</sup> *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* [2014] CSIH 105.

neighbourhood. This benefit was independent of the identity of the proprietor or landlord and accrued to the property itself. Therefore, the restriction on the buildings' lettable office space – so as to protect the rental value of neighbouring subjects – is a benefit that satisfies the praedial rule. Yet, the requirement for what constitutes a benefit was softened, but a relationship to an appurtenant land is still needed.

Overall, both the praedial rule in itself and in conjunction with the appurtenant rule have lost their clear-cut format.

### 3. NO POSITIVE DUTIES

Positive duties in form of land burdens encounter the most profound resistance. They trigger the strongest reflex<sup>78</sup>, based in the resistance to feudalism.<sup>79</sup> In many countries, the prohibition is embedded in the *numerus clausus* principle. The resulting bifurcation in property law between non-acceptable positive duties and acceptable negative duties, however, is not ubiquitous. This categorical distinction does not exist in countries such as Germany, the US and Scotland (for different reasons, *infra* IV.1).

Many countries have witnessed a legal softening as far as a 'negative duty' is concerned. The Netherlands acknowledge the obligation of maintenance, article 5:71, §2 Dutch Civil Code [NBW].<sup>80</sup> In Germany, the doctrine of the '*gesetzliches Begleitschuldverhältnis*'<sup>81</sup> (a secondary relationship that is accessory to the primary property right), and the existence of public land burden registries since the 1950s<sup>82</sup>, both shifted the legal discourse towards an argumentation in rule and exception. In England, *Tulk v. Moxhay* (1848) became the leading case. This case was later severely restricted in England<sup>83</sup>; other Commonwealth states redefined the ruling by different interpretations.<sup>84</sup>

In the context of conservation, positive duties became fashionable in the US in form of 'easements'.<sup>85</sup> They are also widespread in Australia in form of 'trusts'

<sup>78</sup> Law Commission of England, *Making Land Work: Easements, Covenants and Profits à Prendre* (LAW COM 327, 2011), para.2.24; SAGAERT/DEMEYERE (2019, *supra* fn. 6), p. 314, 317; Canada: G. GIDROL-MISTRAL (2017, *supra* fn. 16), p. 720.

<sup>79</sup> DEMEYERE (2017, *supra* fn. 5), p. 197/199 with further references; W. DROSS, 'L'originalité de l'obligation réelle environnementale en droits des biens', *Rev. Énergie-Environnement-Infrastructure* 2017, 53–59, at p. 53.

<sup>80</sup> DEMEYERE (2017, *supra* fn. 5), p. 206; SAGAERT/DEMEYERE (2019, *supra* fn. 6), p. 319.

<sup>81</sup> *Supra* II.3.

<sup>82</sup> G. WENZEL, *Baulasten in der Praxis*, 2<sup>nd</sup> ed. Bundesanzeiger, Köln, 2012.

<sup>83</sup> For discussions of this case see CLARKE AND KOHLER (2005, *supra* fn. 67), pp. 250–253; B. AKKERMANS/W. SWADLING, *Types of Property*, in Van Erp/Akkermans (2012, *supra* fn. 1), pp. 331–332.

<sup>84</sup> E.g. Supreme Court of Canada in *Noble et al. v. Alley* [1951] SCR 64 (20 November 1950) at p. 69.

<sup>85</sup> For references on the US see *supra* fn. 15.

supported by the Ministry of Environment and incentivized by tax cuts.<sup>86</sup> Also in Canada, conservation burdens came about without a legislative change.<sup>87</sup> Scotland introduced a parliamentary act on 'conservation burdens' in 2003<sup>88</sup>, yet for technical reasons, not for principled reasons with regard to positive duties. In contrast, doctrinal reasons appear to have driven the legislative introduction of '*obligations réelles environnementales*' by positive law in France in 2016.<sup>89</sup>

Contemporary concerns against positive duties are twofold. One is the same which supports the praedial rule: the loss of economic value ('*la vide de la substance du droit de propriété*'<sup>90</sup>). The second concern is undue exploitation.<sup>91</sup>

#### 4. RULE AGAINST PERPETUITIES / RULE AGAINST UNREASONABLE RESTRAINTS ON ALIENATION

The rule against perpetuities exists in common *and* in civil law, yet with different jurisprudence. In the common law, it is purported to have originated in England in the 17<sup>th</sup> century and to have crystallized into a single rule in the 19<sup>th</sup> century.<sup>92</sup> Its essence is to prevent people from using deeds or wills to exert

<sup>86</sup> <[www.environment.gov.au/biodiversity/conservation/covenants](http://www.environment.gov.au/biodiversity/conservation/covenants)> (last visit 27.9.2019); J. FITZSIMONS and B. CARRS (2014, *supra* fn. 17).

<sup>87</sup> G. GIDROL-MISTRAL (2017, *supra* fn. 16), p. 713, p. 722, p. 726, p. 712 (she critically discusses the lack of a legislative base).

<sup>88</sup> C.T. REID (2013, *supra* fn. 14); C. T. REID (2014, *supra* fn. 1). However, only few entries made preserve mainly cultural heritage. As to natural heritage, Reid implies a lack of incentives. He points at tax-cuts as in the US, but cautions at the same time that in the US, taxes serve as substitutes for proper land use planning. (On incentives in general, C.T. REID and W. NSOH [2016, *supra* fn. 14], p. 201).

<sup>89</sup> Loi n° 2016-1087 of 8. Aug. 2016 'pour la reconquête de la biodiversité, de la nature et des paysages', Off. J. 9.8.2016, N. REBOUL-MAUPIN and B. GRIMONPREZ (2016, *supra* fn. 55), 2074; W. DROSS (2017, *supra* fn. 79), 53-59. Podcasts of a conference organised by P. Billet and M. Hautereau-Boutonnet at Lyon on 2. Febr. 2017, available under: <[webtv.univ-lyon3.fr/channels/protectiondelabiodiversite/media/MEDIA170220114911798?server=1](http://webtv.univ-lyon3.fr/channels/protectiondelabiodiversite/media/MEDIA170220114911798?server=1)>.

<sup>90</sup> SAGAERT/DEMEYERE (2019, *supra* fn. 6), p. 318.

<sup>91</sup> Recently in June 2019, the UK Competition and Market Authority started a novel investigation into an old problem called 'leasehold trap', [www.gov.uk/cma-cases/leasehold](http://www.gov.uk/cma-cases/leasehold). Leases often include positive obligations with unexpected consequences for tenants. Cases become public that houses were 'sold', but in fact a leasehold property contract was signed, so that tenants were surprised by annual fees to be payed to the freehold owner. In other cases, the progression in flat fees grew exponentially. In other cases, high refurbishing costs were charged. A competition problem has arisen, since most houses in England are constructed by a very small number of property developers. Already in 1994, the UK House of Lords (now the Supreme Court) discussed positive land burdens in tenants leaseholds as unjust in *Rhone v Stephens* [1994] UKHL 3 [page 6], asking Parliament to act. Earlier, other types of positive land burdens (chancel repair liability; liability to contribute to the repair of a church) were challenged unsuccessfully in *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37. I thank B. Holligan for these references.

<sup>92</sup> TH. MERRILL and H. SMITH, *Property*, 3<sup>rd</sup> ed. Oxford University Press, Oxford 2017, p. 567.

control over the ownership of property for a time long beyond the lives of people living at the time the legal instrument was written<sup>93</sup>, but exempting charity trusts.<sup>94</sup> The rule cuts off control of future interests (traditionally contingent remainders and executory interests) after 21 years following death. However, the English technical term ‘*mortmain*’ already indicates its much older origin. In France, the doctrine of *main morte* dates back to the middle ages. It describes the *post mortem* legal incapacity. The original objective was to differentiate between lifetime disposals and disposals upon death.<sup>95</sup> While, the rationale was different in feudal societies, today we still systematically differentiate between transfers between living persons, and transfers upon death. It is all about protecting the freedom of the individual, and the marketability of property.

Yet, in common and civil law jurisdictions, this rule was transformed differently into modern law. While still in place in France, most jurisdictions abolished the rule altogether and developed it into a straightforward doctrine against restraints on alienation (such as §139 German Civil Code [BGB]). In common law countries, perpetuity was secured for the legal estate of fee simple<sup>96</sup> and domesticated by the doctrine against *unreasonable* restraints on alienation, thus encompassing strict time limitations and exceptions to perpetuity such as the charity-to-charity-exception.<sup>97</sup>

As Colin Reid rightfully stresses<sup>98</sup>, the perpetual burden might not always be in the interest of environmental conservation. Therefore, all modern regulations implemented ways to change the law at a later stage. The French law limited the ‘*obligation réelle environnementale*’ by way of demanding the contract to be limited in time, *à la limite* 99 years. The Dutch legislator attributed the competence to modify the easement to the judiciary.<sup>99</sup>

In German practise, the restricted personal easements to the benefit of the state or a communal authority are limited in time in two ways. As a matter of principle, compensation easements are timely limited either until the ecological

<sup>93</sup> In short: no more than the ‘following generation plus 21 years’, or, as the classic formulation reads (American scholar John Chipman Gray, 1886): ‘No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest’, MERRILL/SMITH (2017, *ibid*), p. 567.

<sup>94</sup> Which are perpetual by nature, A. HUDSON, *Equity and Trusts*, 5<sup>th</sup> edn 2007, Routledge/Cavendish, London/New York, \$25.9, p. 1064; G. WATT, *Trusts and Equity*, 8<sup>th</sup> eds. Oxford University Press, Oxford 2018, p. 189.

<sup>95</sup> While the lower landlord could freely dispose of his personal wealth during his lifetime, and of his feudal wealth during his lifetime upon permission of his superior lord, he could not dispose of land by way of testament. His goods return to his lord: ‘*Le serf mort, saisit le vif son seigneur*’. Thus, no wills in favour of family members, no ‘testamentary freedom’.

<sup>96</sup> G. WATT (2018, *supra* fn. 94), p. 185.

<sup>97</sup> G. WATT (2018, *supra* fn. 94), p. 234 on the *cypres* rule.

<sup>98</sup> C. REID, ‘Employing Property Rights for Nature Conservation’, in: C. GODT (ed.), *Regulatory Property Rights, The Transforming Notion of Property in Transnational Business Regulation*, Leiden/Boston: Brill/Nijhoff 2017, 169 (at 187).

<sup>99</sup> Article 5:78 Dutch Civil Code ( [a] if circumstance have changed, [b] 20 years after the contract has been made if the continuation is contrary to public interest).



impairment ends, or by an explicit term of 25–30 years. The terms of the deed for climate change programmes refer to a legal act, which might be changed by subsequent regulators.

## 5. NUMERUS CLAUSUS

The violation of the numerus clausus (NC) principle was suggested by Demeyere.<sup>100</sup> The principle says that property rights are fixed types and immune to contractual change; its purpose is to allow for transparency and the protection of contractual freedoms.<sup>101</sup> While not strongly dogmatized under common law, the principle does exist in both civil and common law.<sup>102</sup> Demeyere criticises that the deed in German climate change easements refers to contractual obligations.

While the content of the NC differs across countries<sup>103</sup>, hybrids between contract and property are especially challenging for jurisdictions in the French tradition, since the NC demarcates the red line between the domain of the individual will of contract partners and restrictions imposed by third parties. How deep this antagonism is enshrined in the French legal tradition can be taken from the exercise to translate the common law trust into French law, 'la fiducie'.<sup>104</sup> Demeyere's criticism of the German practise seems to be fuelled by the same concerns.<sup>105</sup> The same problems are encountered by proposals for conservation easements which aim to translate the common law trust and estates, such as the doctrine of private stewardship for land (see the debates in the UK<sup>106</sup> and in Canada<sup>107</sup>).

Yet, the NC got cut back in France.<sup>108</sup> In Germany, the NC principle has also lost its status of absoluteness by way of various important exceptions, for different reasons.<sup>109</sup> The idea of a uniform concept of numerus clausus has vanished. The

<sup>100</sup> DEMEYERE (2017 *infra* fn. 5).

<sup>101</sup> S. V. ERP, General Issues, in: S. V. ERP and B. AKKERMANS (2012, *supra* fn. 1), p. 65 *et seq.*, esp. 75.

<sup>102</sup> CLARKE/KOHLER (2005, *supra* fn. 67), p. 150 *et seq.*

<sup>103</sup> B. AKKERMANS, The Principle of Numerus Clausus in European Property Law, Intersentia: Antwerp, 2008, p. 482.

<sup>104</sup> B. MALLET-BRICOUT, 'Le Fiduciare: veritable pivot ou simple rouage de l'opération de fiducie' (2013) 58 *McGill LJ* 905.

<sup>105</sup> S. DEMEYERE (2017, *supra* fn. 5), p. 220 (see *supra* introductory quote).

<sup>106</sup> B. HOLLIGAN (2018, *supra* fn. 1).

<sup>107</sup> G. GIDROL-MISTRAL (2017, *supra* fn. 16).

<sup>108</sup> Point of reference is the Court de Cassation in *Maison de Poésie* (2012): DROSS (2017, *supra* fn. 79), at p. 55 with further references; B. MALLET-BRICOUT, Le numerus clausus des droits reels: la fin d'un mythe, *Conférences Albert Mayrand (19ème conférence)*, Thémis, 2017 hal-01683344.

<sup>109</sup> Prime example in German private law are the non-possessory pledge 'Sicherungsübereignung' (acknowledged by the judiciary in 1922), and the 'relative effect' of the 'Vormerkung' (§883 German Civil Code). More recent examples are *in rem* effects of licenses, C. GODT and J.

guiding idea of transparency is still in place, but the concrete characteristics vary from jurisdiction to jurisdiction, which *together* form the European idea of *numerus clausus*.<sup>110</sup> All in all, the NC is not a clear-cut standard.

With regard to the two areas of environmental law analysed here (II.), transparency is safeguarded by the adjacent public instruments. The entry into the land registry only supports the administrative decision. It secures the duty in the long term and against the purchaser of the land (it ‘runs’ with the land and avoids burden free good-faith acquisition).<sup>111</sup>

#### §4. EXPLAINING THE GERMAN PRACTISE OF §1090 BGB

The preceding paragraph made clear that only an outsider might oppose the instrument of ‘restricted personal easements’ for environmental burdens in Germany. Some purported principles do exist in German Law. Other principles appear to be a common European standard by name, but have a different content among and between jurisdictions. Against this backdrop, the German legal environment requires further explanation.

##### 1. THE LIBERAL LEGACY

At the time when the German Civil Code was enacted in 1900, the French Civil Code had come to age and was already in place for 96 years. Feudalism was long gone.<sup>112</sup> Opposition to feudal bounds no longer played a role.<sup>113</sup> The ‘social question’ had shifted policy questions to urban tenant protection and securities

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SIMON, ‘*In Rem* Effects of Non-exclusive Sub-licenses in Insolvency’, in C. GODT (ed.), *Regulatory Property Rights, The Transforming Notion of Property in Transnational Business Regulation*, Brill/Nijhoff, Leiden/Boston, 2017, 207.

<sup>110</sup> B. AKKERMANS, ‘The Numerus Clausus Principle’, in M. Graziadei/L. Smith (eds), *Comparative Property Law – Global Perspectives*, E. Elgar, Cheltenham, UK/Northampton, US, 2017, 100–120; B. AKKERMANS (2008, *supra* fn. 103), p. 500.

<sup>111</sup> This observation supports C. Reid’s analysis on limits of property rights in environmental law as merely supporting instruments, cp. C. REID (2017, *supra* fn. 98), at p. 188.

<sup>112</sup> The one and only exception is the fideicomis, an isolated legacy of the fading (but lasting) influence of aristocratic families (Art. 59 Introduction Law to the German Civil Code, EGBGB); on this institution: B. BAYER, *Sukzession und Freiheit. Historische Voraussetzungen der rechtstheoretischen und rechtsphilosophischen Auseinandersetzungen um das Institut der Familienfideikomisse im 18. und 19. Jahrhundert*. Duncker & Humblot, Berlin 1999.

<sup>113</sup> Labour servitudes were abolished (in most European states against compensation) between 1793 and 1817, see C. GODT, ‘“Regulatory Property Rights”: New Insights from Private Property Theory for the Takings Doctrine’, *EPLJ* 2017, 158, at p. 173 fn. 61. The abolition included use rights which were beneficial to formerly dependent farm workers. On commons: P. CANKIK, *Verwaltung und Öffentlichkeit in Preußen*, Mohr Siebeck, Tübingen, 2007, pp. 319 *et seq.*

of workers.<sup>114</sup> Whereas the drafters of the French Code Civil were preoccupied with conceptualising the individual will as opposed to feudal bounds<sup>115</sup>, the BGB is all about facilitating trade (abstraction principle<sup>116</sup>) and industrial development (§950 BGB). The BGB is criticized for being a ‘belated child’ of the 19<sup>th</sup> century<sup>117</sup>, just because the industrial revolution was already a fact when the BGB entered into effect in 1900. Legal principles safeguarding against feudal restraints had fallen into oblivion. Positive duties were allowed, but scrutinized as constraints on competition, e.g. purchasing obligations. A straightforward prohibition of positive obligations was felt to be a restriction of freedom. Therefore, the legal reasoning turned to an open reflection on competition rules, geared towards a fine-tuning of terms.

In explicit opposition to the political stance of the French Civil Code<sup>118</sup>, the BGB was strongly influenced by the scholarly reception of the Roman Law. The positivistic legacy of the Pandectic School was the German way<sup>119</sup> to support the social transformation towards market organisation. Roman law acknowledged positive duties for owners of neighbouring buildings. Therefore, pandectist scholars felt no immediate resistance against positive duties.

In addition, by the end of the 19<sup>th</sup> century the German parliament had already gained full sovereignty over doctrinal thinking: the democratic sovereign deliberately changed the legal references between instruments, including the one of the ‘restricted personal easement’ (*supra* II.3).

This is the background for the BGB’s relaxed attitude towards positive duties.

## 2. CIRCUMVENTING THE NUMERUS CLAUSUS?

Today’s environmental land burdens in form of ‘restricted personal easements’ are ‘hybrids’. They are part of the increasingly blurred line between property and contract.<sup>120</sup> Today, jurisdictions face a continuum between contracts and *in rem* rights, which is adjudicated by courts.

<sup>114</sup> U. WESEL, *Juristische Weltkunde*, Suhrkamp, Frankfurt, 1984, pp. 99–110.

<sup>115</sup> A. BÜRGE, *Das Französische Privatrecht im 19. Jahrhundert*, V. Klostermann, Frankfurt a.M., 1991.

<sup>116</sup> For a critical note about this typical German dogma, U. WESEL (1984, *supra* fn. 114), pp. 92 *et seq.*

<sup>117</sup> G. BRÜGGEMEIER, ‘Probleme einer Theorie des Wirtschaftsrechts’, in: H.-D. ASSMANN/G. BRÜGGEMANN/D. HART and C. JOERGES (eds.), *Wirtschaftsrecht als Kritik des Privatrechts*, Athenäum, Königstein/Ts., 1980, 9–81, p. 41 ‘verspätetes Recht’.

<sup>118</sup> D. SCHWEITZER, Diskursanalyse, Wahrheit und Recht: Methodologische Probleme einer Diskurstheorie des Rechts, Discourse analysis, truth and law: Methodological problems of a discourse analysis of law, *Zeitschrift für Rechtssoziologie*, 2015, 201–221; S. MEDER, *Urteilen*, Klostermann: Frankfurt/M. 1999.

<sup>119</sup> Central are Carl Friedrich Savigny and Paul Laband. On the former: D. SCHWEITZER (2015, *supra* fn. 118), p. 210; on the latter: U. WESEL (1984, *supra* fn. 114), p. 90.

<sup>120</sup> As carved out by S. van Erp as early as 1990: S. VAN ERP, *Contract als rechtsbetrekking*, W.E.J. Tjeenk Willink, Zwolle, 1990, p. 275 *et seq.*, 283, 288 *et seq.*; 18 years later elaborating: B. AKKERMANS (2008, *supra* fn. 103), pp. 3, 148ff., 235ff., 298ff, p. 482.

In case of the environmental burdens described above (II. 1 and 2), the central rule of transparency is safeguarded. For climate change policies, the terms of the deed mirror the requirements of the subsidy programmes as published in the Official Journal. For compensation measures, the register entry mirrors the permit terms. The permit terms on the compensation measure mirror the requirements stipulated in compensation ordinances. Administrations work on public registries, which preserve the link between the permit (the loss of ecological value, respectively) and the compensation measure (conservation or promised improvement of ecological value) in order to make it accessible to administrations and the general public. Ideally, the entry in the land title register refers to the permit's file number and the administrative register accessible under states' freedom of information acts.

The legal challenge is not the assault on property principles, but the interface between private and public regulation. In both examples analysed in this paper, public regulation plays a key role. In climate change regulation, it is the subsidy which incentivizes the voluntary behaviour. In the case of offsets, the compensation for caused ecological damage is imposed during and embedded in a public planning process.<sup>121</sup> This administrative environment has decisive repercussions on how conservation easements are perceived. In essence, they are accessory and subordinate to the administrative decision. It is therefore that all concerns resulting from the bipolar private law relationship relating to perpetuity, agency, legitimacy, transparency and justice<sup>122</sup> do not play a role. The central question is if constitutional safeguards in administrative law are observed when employing private law instruments (*infra* 4).

### 3. THE MODERN REGULATORY STATE

The decisive characteristic of environmental land burdens in Germany, as discussed in this article, is the dominant role of the state (federal, 'Länder' or communal level) when compared to other states in Europe and in North-America. The German legal landscape was not instigated by non-governmental organisations, and is not driven by a discourse about private ordering substituting an arguably fading regulatory power of the state.<sup>123</sup> It is the state which employs 'restricted personal easements', and it does so not only in

<sup>121</sup> B. HOLLIGAN (2018, *supra* fn. 1), p. 59 stresses the categorial difference between these two forms of conservations covenants.

<sup>122</sup> As brilliantly described for the UK-debate by B. HOLLIGAN (2018, *supra* fn. 1), pp. 68–80; on 'agency' see *ibid* p. 75, fn. 152.

<sup>123</sup> An argument most prominent in the US and Australia, cp. N. GUNNINGHAM, Environment Law, Regulation and Governance: Shifting Architectures, 21 *Journal of Environmental Law* 2009, 179.

environmental policy, but also in social policy.<sup>124</sup> In contrast, the US debate has centred around NGOs. In the UK, the debate had started out with NGOs, but shifted to an entitlement of ‘responsible bodies’, a term which includes e.g. profit-making bodies such as water companies (provided that they are listed).<sup>125</sup> In Canada and France, state agencies and NGOs appear to be on an equal footing.<sup>126</sup> In Germany, in contrast, environmental NGOs play a minor role in conservation easements. German nature conservationists and environmental organisations have traditionally focussed on administrative decisions<sup>127</sup>, not on private law instruments. Their mission and their governance structure are distinct, especially compared to US and UK organisations.<sup>128</sup> They did not grow out of large and wealthy philanthropic estates organised by way of common law trusts.<sup>129</sup> German NGOs, in their majority, are organised as a ‘*gemeinnütziger Verein*’<sup>130</sup>, thus tax-privileged organisations based on personal membership. Their central organisational element are tax-deductible donations by which projects are funded. For them, capital is not the institutional base (as compared to a trust). There is no institutional long-term commitment, in contrast to ‘*Stiftungen*’ (‘foundations’). From a notarial perspective, they would not provide the necessary long-term stability to be eligible for a long-term easement. If ‘*Vereine*’ acquire property, they do so for the purpose of acquiring standing

<sup>124</sup> WILHELM (2016, 5<sup>th</sup> edn [!] *supra*, fn. 3), p. 927, fn. 3053a (footnote text was changed in the 6<sup>th</sup> edn) reports the registered easement assigned to the local community to allocate elderly and care-needing people to buildings maintained on the land (BGH NJW 2013, 1963).

<sup>125</sup> See N. HOPKINS, in this volume.

<sup>126</sup> G. GIDROL-MISTRAL (2017, *supra* fn. 16, p. 691) clarifies that the conceptual basis of conservation servitudes in Canada is the ‘public domain doctrine’, which legitimizes both, the state (examples reported by J.-F. GIRARD [2012, *supra* fn. 16, p. 140]) and NGO’s (examples reported by J. TRUDELLE [2014, *supra* fn. 16]). The Report of the French Government to the Parliament, submitted 20.6.2018, available under: <[www.assemblee-nationale.fr/15/rap-info/i1096.asp#P1869\\_475888](http://www.assemblee-nationale.fr/15/rap-info/i1096.asp#P1869_475888)>, para. 174 explicitly refers to the ‘anglo-saxon inspiration’ (‘un outil contractuel innovant, plutôt d’inspiration anglo-saxonne’).

<sup>127</sup> Thus is the origin of the German *Verbandsklage*, which is limited to registered organisations with a long activity record, and to the opposition of specific administrative decisions or omissions in specific matters of nature conservation.

<sup>128</sup> On the economic power of US-environmental organisations G. KORNGOLD, ‘Globalizing Conservation Easements – Private Approaches for International Environmental Protection’, 28 *Wisconsin Int’l Law Journal* 2011, 585, at 614–615; comparing those to UK-NGOs B. HOLLIGAN (2018, *supra* fn. 1), p. 65.

<sup>129</sup> The typical triangle form of trusts with split property titles is rejected by German law. The closest equivalent would be the foundation governed by the foundation codes (*Stiftungsgesetze*) of the regional states (*Länder*). Their structure is modelled on large cooperations with managing board and advisory council, avoiding the dominance of a single person. In the field of environmental protection, a prominent example is the German *Umweltstiftung* which pools 3.513 donors (as of 17 July 2019). Its motto is ‘*Hoffnung durch Handeln*’, and it funds projects which change environmental behaviour proactively.

<sup>130</sup> E.g. Deutsche Umwelthilfe, Verein für Umweltrecht, even Greenpeace Germany (also Greenpeace International is a charity incorporated under Dutch law); BUND (Bund für Umwelt- und Naturschutz Deutschland), NaBu (Naturschutzbund Deutschland), to name a few.

in a court procedure.<sup>131</sup> ‘Stiftungen’ might purchase ecologically valuable property.<sup>132</sup> ‘Stiftungen’ and ‘Vereine’ might engage in organising conservation measures (*supra*). However, no intention on their part of attempting to become the owner of a conservation easement has transpired.

The role of NGOs reflect differences in the organisation of Western states. The constitutional weight of each separated power differs<sup>133</sup>; so does the trust of society in the executive branch. In contrast to many countries, the German state is perceived to be the central entity to provide for the public good. Two historic elements account for this. First, the economic systems’ conflict from the early 1920s until the end of the cold war prevented the evolution of a distinct notion of public or state property. Instead, the equation of property held by private entities and property held by the state became a foundation of the German market order. Second, the country never went through an elaborated public debate about diffuse interests (witnessed by many European and Southern American countries)<sup>134</sup>, nor did it embrace a doctrine similar to the US public trust<sup>135</sup> or stewardship.<sup>136</sup> Instead, the discourse remained a bi-polar one, between the state and the individual. It is against this background that legal standing of environmental non-governmental organisations in administrative courts has long been opposed (something which was softened only recently under the pressure of the European Court of Justice).<sup>137</sup> The representation of the public good by individuals (via stewardship, like in the US) or by collectives remains

<sup>131</sup> Although inquired for potential ‘misuse’ by the German Federal Administrative Court (BVerwG) decision of 27. 10. 2000, BVerwGE 112, 13.

<sup>132</sup> Such as the Helversen’sche Stiftung für Arten- und Biotopschutz.

<sup>133</sup> Compare Germany and the Netherlands: the legislative in the Netherlands is not (as in Germany) submitted to a strong Constitutional judiciary.

<sup>134</sup> For Italy: M. CAPPELLETTI, *Public interest parties and the active role of the judge in civil litigation*, Giuffrè: Milano, 1975; most articulate in Brazilian legal theory since the concept was adopted by the modern Brazilian Constitution after the military dictatorship (1964–1985), institutionalised by the ‘ministério público’ and the ‘ação civil pública’, R. MANCUSO, *Interesses Difusos*, Revista dos Tribunais: São Paulo, 9<sup>th</sup> edn 2019; É. MILARÉ, *A ação civil pública na nova ordem constitucional*, Saraiva: São Paulo, 1990; H.N. MAZZILLI, *A defesa dos interesses difusos em juízo*, Revista dos Tribunais: São Paulo, 31<sup>st</sup> edn 2015; for the European Union: N. REICH, *Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften*, Nomos: Baden-Baden, 1987; as an interest in consumer protection and functional competition, J. DREXL, ‘Les Principes de Protection des intérêts diffuse et des biens collectifs. Quel ordre public pour les marchés globalisés?’, *Revue Internationale de Droit Economique (RIDE)* 2003, 387–409.

<sup>135</sup> Seminal J. L. SAX, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’, *68 Michigan Law Review* 1970, 471–566; M.C. WOOD, *Nature’s Trust: Environmental Law for a New Ecological Age*, Cambridge University Press, Cambridge, 2014.

<sup>136</sup> E. BARRITT, ‘Conceptualising Stewardship in Environmental Law’ *26 JEL* 2014, 1.

<sup>137</sup> Standing is limited to certified NGOs under §64 BNatSchG; it is the *lex specialis* exception to the so-called Schutznormtheorie under §42 Administrative Procedure Act. This legal set-up got challenged by the CJEU, starting with the watershed decision C-115/09, CJEU of 21.5.2011, ECLI:EU:C:2011:289 – *Trianel*.

strictly regulated.<sup>138</sup> It remains to be seen, if so-called 'climate change litigations' will change the legal picture.<sup>139</sup>

While US, UK and Canadian publications emphasise the decreasing role of the modern state, and understand conservation covenants as supplementary market-based instruments<sup>140</sup>, the practise of environmental burdens in Germany serves as an example of a more complex phenomenon which portrays the modern regulatory state as Janus-faced. On the one hand, new governance schemes emphasise the decreasing role of the public state, giving way to private actors.<sup>141</sup> On the other hand, the modern state reaches beyond its administrative instruments, employs traditional private law instruments, and transforms their rules.<sup>142</sup> The two portrayed areas of law (climate change regulation and nature compensation measures) typify exactly these two faces of the modern state. Climate change subsidies set *incentives* for climate friendly behaviour; the citizen submits 'voluntarily' to the contract terms; the chain clause is being secured by the land burden. In nature conservation law, the duty to restore is *linked to the permit* to impair the environment. The real burden simply secures the administrative condition of the license (which, again, is often orchestrated by the state, *supra*). In both cases, the comparative success of land burdens for environmental purposes depends on the incentivisation embedded in public law<sup>143</sup> (which – in contrast to the US – is not tax based). In Germany, environmental land burdens supplement public ordering. It is bare of any aspiration to have private actors participating in the public interest as discussed in the UK and France.<sup>144</sup> It is only 'voluntary' as far as it relates to a privilege being pursued. It has nothing to do with market approaches for financialisation, commodification and trade.<sup>145</sup>

<sup>138</sup> Legal standing for environmental NGOs is strictly limited, mainly to registered organisations with a track record in the given field, similarly on the Federal and the state level, see only §64 Fed. Nature Conservation Law (BNatSchG).

<sup>139</sup> With open prospects (see the Courts rejection in T-330/18 on 9.5.2019, ECLI:EU:T:2019:324), on this very procedure G. WINTER, 'Armando Carvalho et alii versus Europäische Union: Rechtsdogmatische und staatsrechtliche Probleme einer Klimaklage vor dem Europäischen Gerichtshof' (2019) *Zeitschrift für Umweltrecht (ZUR)* 259; In opposition of such NGO-Climate change litigations (and on the decision of the Dutch Gerechthof in Den Haag in particular), B. WEGENER, 'Urgenda – Weltrettung per Gerichtsbeschluss?' (2019) *ZUR* 3. For an international perspective: J. PEEL and H.M. OSOFSKY, *Climate Change Litigation – Regulatory Pathways to Cleaner Energy*, Cambridge University Press: Cambridge, 2015 (paperback 2017).

<sup>140</sup> B. HOLLIGAN (2018, *supra* fn. 1), p. 56.

<sup>141</sup> In other areas, industrial self regulation plays a bigger role than NGOs. The literature on 'Corporate Social Responsibility (CSR)' is exploding. The library search on CSR-titles produces 2408 publications between 1966–2019.

<sup>142</sup> The interplay of public and private instruments is also emphasized for the US by A. VINSON (2006–07, *supra* fn. 15).

<sup>143</sup> The lack of incentives is identified by C. Reid is reason for the lack of use of the Scot's Law of 2003, REID (2014, *supra* fn. 1), p. 109.

<sup>144</sup> B. HOLLIGAN (2018, *supra* fn. 1), p. 56; DEFRA, *The Natural Choice: securing the value of nature*, White Paper, Cm 8082, 2011.

<sup>145</sup> B. HOLLIGAN (2018, *supra* fn. 1), p. 61, pp. 65–70.

The trust in the state has historic roots. Constitutional thinking in Germany is strongly influenced by philosophers from Hegel (1770–1831) to Max Weber (1864–1920). Early on, Hegel envisioned a modern bureaucratic state and found a language to describe the mutual relationship between the state and markets (different to the US or the UK).<sup>146</sup> Weber further elaborated this conceptualisation. It was the Prussian state which fostered land registries with a public faith notion for the sake of easing the transfer of immovables; the first Federal Framework Code was (only) enacted in 1897.<sup>147</sup> By the mid of the 20<sup>th</sup> century, ‘public land burden registers’ complemented the (traditional) land title registers for the sake of urban land use planning, driven by increasing urban density in the 1950s.<sup>148</sup> Their ubiquitousness (though strictly public) contributes to explaining why positive obligations are not questioned when drafted in the sibling (private) land register, where the state is the beneficiary.

#### 4. REGISTRATION

The central function of ‘restricted personal easements’ for the two areas of law discussed in this article, is to secure a public obligation to ‘run with the land’ (the chain clause). In principle, the administrative decision is addressed to an individual or an operator as a legal person. It is ‘personal’ in nature and binds only the addressee. However, by law, the duty to compensate is transferred to the successor (§15 section 4 sentence 3 BNatSchG). The function of the ‘restricted personal easements’ is to bind the ‘land owner’ upon transfer of a title. It objectifies the duty. The administrative duty (binding on the successor) finds a corollary in property law by way of the *in rem* effect of the register. The duty is being attached to the land. The rationale is proprietary.<sup>149</sup> The leading idea is to secure the burden against burden free land acquisition, a corollary of the German principle of public faith (§892 BGB).

However, this explanation is not fully convincing. It appears path-dependent, consistent with the private law framework, securing the chain clause, but it is doctrinally false. For duties related to climate-friendly houses, the legal duty is rooted in the public law subsidy programme. For off-sets, the burden is rooted in the correlating administrative permission to impair the environment in a different location. These land burdens are *not* rooted in a private agreement, but in public law. The main fault line in these cases is not between property and contractual autonomy, but between private property and public regulation. The

<sup>146</sup> C. JOERGES, ‘Die Wissenschaft vom Privatrecht und der Nationalstaat’, in: D. SIMON (ed.), *Rechtswissenschaft in der Bonner Republik*, Nomos, Baden-Baden, 311–363.

<sup>147</sup> C. STEWING, ‘Geschichte des Grundbuchs’, *Rechtspfleger* 1989, 445–447.

<sup>148</sup> In 1960, the legal competence to regulate was formally assigned to the states, and a model decree enacted, G. WENZEL (2012, *supra* fn. 82), p. 13.

<sup>149</sup> In France, the rationale of the ‘*obligation réelle environnementale*’ is rather contractual. Therefore, the leading idea would be to secure the obligation against the exchange of a party.



agreement on the land burden is an addition to the preceding administrative agreement. It aims at *in rem* effects to safeguard the agreement in commercial transactions. The restricted personal easements transforms the personal duty of the addressee and the successor into a duty attached to the land.<sup>150</sup> The idea is to change the characteristics of the object (comparable to zoning), not the link between person and object.<sup>151</sup> The burden absorbs some of the public nature of the preceding agreement. Therefore, the public faith rationale of the German land register (§892 BGB) does not fit. Its rationale is third party protection by way of good faith acquisition. Here, the burden is not rooted in privacy and its specific risks of betrayal. In our environmental cases, we do not see ‘*une recomposition économique*’.<sup>152</sup> Here, the rationale is transparency about the characteristics of the object (and the resulting entitlements and duties of title holders) – very similar to public burdens registered in separate registers.<sup>153</sup>

Private and public registries are technically delineated by way of the (private or public) nature of the obligation<sup>154</sup>, and the respective horizontal or vertical relationship.<sup>155</sup> For both types of registers, public and private, the applicable rule is that obligations, which usually cannot be registered as a burden, cannot be entered on the respective register. Therefore, the good faith principle for the land register under §892 BGB cannot relate to information which cannot be registered.<sup>156</sup> As to their content, public land burdens and burdens which can be stipulated between private parties are identical to a wide extent (right of way, parking lots, height limitations, distance space, the duty to build on the boundary).<sup>157</sup>

<sup>150</sup> In France, the nature of the ‘*l’obligation réelle environnementale*’ is contested. A minority view (W. Dross) conceptualises it as a ‘*contract accessoire*’ which is ceded by law when the land is transferred – comparable to art. 1743 Code Civil/Art. 566 BGB. In addition, Dross opinions that not only the owner, but also the holder of an usufruct right can stipulate the ‘*obligation réelle environnementale*’, W. DROSS (2017, *supra* fn. 79), at p. 56 para. 16, p. 57 para 19, p. 58 para. 23. This view, however, is opposed by L. NEYRET and N. REBOUL-MAUPIN, ‘*Droits des biens*’, *Recueil Dalloz* 2017, 1789 and N. REBOUL-Maupin and B. GRIMONPREZ, ‘*Les obligations réelles environnementales: chronique d’une naissance annoncée*’, *Recueil Dalloz* 2016, 274, at p. 2078.

<sup>151</sup> This is why the idea of a ‘*cession de contrat accessoire à l’immeuble*’ (proposed by DROSS 2017, *supra* fn. 79, at p. 55) cannot be transposed to the German context of §1090 BGB.

<sup>152</sup> DROSS (2017, *supra* fn. 79), at p. 55 perfectly depicts the modern function of (normal) land servitudes as recomposition, which the appurtenant rule in the original type of real servitude secures and which legitimises its perpetuity, namely to link ‘*les utilités naturellement offertes par les fonds dominants et celles qui sont ajoutées*’. Yet, the rationale of the restricted personal easement is to shape the content of the property entitlements on *one* plot of land.

<sup>153</sup> WENZEL (2012; *supra* fn. 82).

<sup>154</sup> WENZEL (2012, *supra* fn. 82), p. 23.

<sup>155</sup> WENZEL (2012, *supra* fn. 82), p. 37.

<sup>156</sup> WILHELM (2019, *supra* fn. 3), p. 344, para. 576, fn. 1082; p. 420, para. 700.

<sup>157</sup> WENZEL (2012, *supra* fn. 82), lists nine types of public burdens: right of way, lines of gas/electricity/telecommunication, union of lots, distance space, the duty to build on the boundary, common constructions, fire safety, parking lots, playgrounds.

I submit that the public law origin of entries in the property title register is to be acknowledged. Considering the double structure of the (proprietary) land registry on the one hand, and public registries such as the public burden register, the cadastre, and databases such as NATUREG, two legal principles become evident. First, the public faith notion as stipulated in §892 German Civil Code (BGB) is made for private transactions and (private) property titles for the sake of protecting the faithful acquirer. This speciality of German land law is a corollary of the abstract title transfer. This is the deeper cause why notaries are not obliged to check the *public* burden registry. The knowledge of the public burdens would not change anything. Second, due to the nature of administrative burdens, the notion of public faith in §892 BGB *cannot* apply to them. They exist because of a state decision; good faith cannot have a purgative effect. Thus, it is only consequent that the public land burden registry is not attributed an effect equivalent to §892 BGB. Inversely, property owners burdened with a restricted personal right of way easement can be forced to consent to a public burden as well – out of good faith (§242 BGB).<sup>158</sup> I submit, as far as burdens of public nature in the property title land registry are concerned, that the registry provides ‘relative faith’ just as neighbouring states of Germany conceptualise faith for their land registries. That means, faith can be invested as far as information is provided. Burden free land acquisition with regard to public restrictions based on the lack of an entry is impossible.

##### 5. CIRCUMVENTION OF THE RULE OF LAW (HERE: PLANNING LAW)?

From a modern constitutional perspective, the central concern is not the *numerus clausus* but the circumvention of the rule of law. Does the state avoid the regulatory limits of construction law illegitimately when it contracts for ecological duties? Does the state violate the economic freedom of the free movement of capital when it goes beyond public construction law, which might restrict the discretionary power in favour of a more predictable decision?<sup>159</sup> Does the state circumvent the inbuilt assumption of personal restricted easements that the burden will last maximally a lifetime of a human being?

Nature conservation laws stipulate that the restricted personal easements is to be limited in time. The expiration time is linked to the end of the projected impairment of the environment. Permits usually stipulate a term of 25–30 years. In climate change subsidies, the take of practitioners is that the state will waive its right once a policy change occurs. The idea is that the deed only

<sup>158</sup> WILHELM (2019, *supra* fn. 3), para. 1956, fn. 3001.

<sup>159</sup> See the long list of case law of the European Court of Justice (CJEU) departing from C-302/97, CJEU 1.6.1999, *Konle* ECR I, 3099 to C-197/11 und C-203/11, *Libert et al.* (only digital: ECLI:EU:C:2013:288).

mirrors the conditions stipulated by the public subsidy programme. Once the political preferences change, the administrations will transpose the change. From a constitutional perspective, this answer is reasonable but not satisfactory. It leaves too wide a leeway for the administration. This concern appears to be the core of a recent decision of the Superior Regional Court which emphasises that obligations must be precise and determinable.<sup>160</sup> The problem parallels the concerns as regard to perpetual duties. An answer can be the scholarly interpretation of Article 132–3 section 3 French Code de l'Environnement.<sup>161</sup> A parallel reasoning could refer to the rule against perpetuities and its ubiquitous base principle that 99 years are the limit. It is to be expected that courts will infer an inherent limitation, depending on the measure, between 30 and 99 years.

The discussed cases constitute a specific category of land burden: the entry to the register does not execute a mere private arrangement, but the preceding decision based on public law. The registered burden has a public law origin, but the entry itself still secures a voluntarily agreed upon obligation, which is connected to a counter-performance. The registered duty itself is not imposed by the sovereign will of the state, but through the sovereign will of the proprietary title holder. This category of land burdens is a servient measure to the primary administrative regulation. The additional securisation by means of private law is prescribed by the implementing rules. Content and limitation are predetermined by those rules. As long as the content and the limits of the duties are sufficiently detectable in public law<sup>162</sup>, the rule of law is not violated.

## §5. CONCLUSION: EUROPEAN HARMONISATION NEEDED?

A last question suggests itself: is there a need for European harmonisation? It is most likely that the questions discussed in this article will soon emerge in European Courts, either prompted by Article 4 and Article 21 section 1 EU-Succession Regulation 650/2012<sup>163</sup>, or simply when a piece of land located in Germany, which is burdened with an environmental easement, shall be

<sup>160</sup> Superior Regional Court Munich (OLG München), decision of 13.2.2019, Agrar- und Umweltrecht 2019, 218–221 (at 220) requires that the purpose must be precisely defined. The simple words 'strip of brushes and wood' do not suffice, instead the territorial limits must be determined. The administrative measure to set deadlines, after which the obligation can be enforced by commissioning a third party payed by the owner ('execution by substitution') cannot be secured by the register.

<sup>161</sup> REBOUL-MAUPIN and B. GRIMONPREZ (2016, *supra* fn. 55) (under II.A. headword 'Durée de contrat').

<sup>162</sup> Superior Regional Court Munich (OLG München), decision of 13.2.2019 (*supra* fn. 160) (p. 220), 'content and scope of the burden need to be determinable by objective circumstances'.

<sup>163</sup> Reg. (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and

transferred to a person from elsewhere in the EU. Let us assume that a Belgian inherited a plot of land in Germany, burdened with a ‘restricted personal easement’ and that this person wants to sell it to a fellow Belgian. Let us further assume that both have read Siel Demeyere’s article in EPLJ and question the validity of the burden. Inspired by the *Kubicka*-case<sup>164</sup>, which holds that national rules of where the land is situated have to respect the notions of legitimacy of complementing policy areas of other member states, they claim that the German environmental ‘restricted personal easement’ must be invalid because it violates basic property principles. Could the owner ask for a correction of the land registry (§894 BGB)?

It should be clear from the preceding analysis that the answer is ‘no’. Classical property principles are not violated. The appurtenant rule, the praedial rule, the caveat against positive duties (*numerus clausus*) cannot be assumed to be ubiquitous principles of land burdens in Europe. The rule against perpetuities is respected. In their functions for the market economy (commodification as a precondition for transfer, the buyer’s protection in commercial transactions, the seller’s ability to act), these property principles have to be reflected against the goals of other, here environmental, policies. The assumption of a given priority of property protection over public regulation has long been overcome. Thus, the validity of land burdens serving environmental policies emerges as a contingent policy decision. At this point, fundamental differences in property structures (again) come to the foreground. Everywhere, with the exception of Germany, the debate is driven by environmental organisations. While the US American-Australian debate is cushioned in a reflection on the market economy as such (‘substituting’ the state), the European debate seems to be interested in actors complementing the state.

Do we need minimal standards in this situation, which provide for some harmonisation? While the recent French law is the most interesting model, two questions must be differentiated. First, for what reason do we need harmonisation? Second, which minimal standards are needed?

First, we need to ponder about the purpose of harmonisation, since harmonisation is tricky. On the one hand, a European legislative debate on environmental land burdens has the potential to modernise property law. A reflection on the procrustean bed of property law principles is to be welcomed. The current environmental pressures demand a debate on the relationship of property law and environmental regulation. Two streams of thought have already commenced preparing the debate. First, there is a contested debate on ‘*propriétés de volume*’.<sup>165</sup> Second, a thoughtful reflection on the promises and pitfalls of

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enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134. It is effective since 2015.

<sup>164</sup> C-218/16; decision of 12.10.2017 – *Kubicka* (only digitally published: ECLI:EU:C:2017:755).

<sup>165</sup> SAGAERT/DEMEYERE (2019, *supra* fn. 6), p. 314.

conservation easements was submitted by Bonnie Holligan.<sup>166</sup> She questions to which extent private law institutions are attached to private economic interests, and to what extent public environmental interests can be infused. This question is being encapsulated in the application of the appurtenant rule to conservation offsets: is the 'dominant' plot of land truly 'benefitting' in the private law sense? With raising this question, she unveils that it is a *public* interest to maintain the ecological value through compensation. The very reason of environmental offsets is not an economic transaction, but the public interest in environmental services. The integration of the environmental interest will transform modern property law. Constitutional questions then follow. How long will the burden persist? Who decides?

On the other hand, there are substantive risks. Due to the strong role of doctrinal thinking in the professional legal formation in Europe and strong economic interests, the willingness to attenuate property principles appears slim. Property shields private actors from constitutional pressures, such as fundamental rights, proportionality and legitimacy. The current state of the professional art risks an oversimplified debate in which special interests either hide or become driving forces. I therefore caution against a straightforward European initiative and advocate an intermediary approach. For the time being, there is no immediate pressure to harmonize European jurisdictions. With regard to legislation, more experimental regulation on the member state or regional level should be encouraged and its scope should be fully exhausted. In parallel, we need a scholarly debate, based on empirical *and* comparative research.

A second step may then lead us to a comparatist exercise to formulate future minimal standards. It appears most promising to observe and analyse the implementation of the novel French law<sup>167</sup> and the soon to be adopted English law. From the German perspective, three questions appear interesting. (1) What is the role of NGOs? Are they stronger actors than administrations? What is the *relative* impact of state agencies and NGOs: can we identify characteristics of the projects, which each actor engages in? (2) Do the new regulations in France and England truly contribute to secure environmental quality? Especially with regard to nature compensation measures, do they reduce the *enforcement gap*? (3) For '*obligations réelles*' agreed upon by NGOs, did tax cuts and the remission of registration costs have an incentivising effect?<sup>168</sup>

The comparative analysis should address the following questions. What are the *practical* differences in Germany and in France with regard to the registered rights? Does the doctrinal difference (contracts versus property) matter in

<sup>166</sup> HOLLIGAN (2018, *supra* fn. 1).

<sup>167</sup> As of March 2018, '*seuls quelques contrats d'obligations réelles environnementales auraient été signés à ce jour*' (Report of the French Government to the Parliament, submitted 20.6.2018, available under: <[www.assemblee-nationale.fr/15/rap-info/i1096.asp#P1869\\_475888](http://www.assemblee-nationale.fr/15/rap-info/i1096.asp#P1869_475888)>, para. 174.

<sup>168</sup> REBOUL-MAUPIN and B. GRIMONPREZ (2016, *supra* fn. 55), at last page.

practise? How is the ‘actors’ pentagon’ structured, which includes competent agencies, NGOs, operators, contractors, and eventually third-party land owners who agree to the land burden? Does the legal set-up appropriately reflect the interests involved? Does the black letter law function in practise? We have to envision that public administrations might not always want to or can enforce the law. And we have to project future corporate restructuring and insolvencies, with regard to the developer *and* the contractor. It is exactly this vision of the future, which is the core value of property law.

The experiences currently under way in Scotland, France and England invite a juxtaposition with the German experience. In Germany, the pressing enforcement deficit has become the central question.<sup>169</sup> Against this background, a lesson to be learnt for Germany is how to integrate NGOs institutionally. Could they have a positive effect? *De lege lata*, *Stiftungen* could already be registered as benefitting parties of environmental burdens. A question to be inquired is: can *Stiftungen*/NGOs and the state be jointly registered for the sake of mutual control in the interest of enforcement?<sup>170</sup>

Scrutiny of the law on the books is indicated. It might prove helpful for other countries to look at the German rules contained in climate change programmes and nature conservation laws and learn from the mistakes made. In this regard, the wide range of stipulated exemptions call for thorough analysis: do these exemptions undermine the idea of securisation? The German state-centred implementation raises the question why the enforcement deficit is so striking. As long as everyone ‘does the job’, meaning that public developers (where exempted from securisation) implement the conservation measures, competent authorities enforce the environmental burden, and contractors fulfil their contractual obligations, the problem seems contained. But usually, reality looks different. Agencies might not only be understaffed, they may also side with the developer, be it public<sup>171</sup> or private.<sup>172</sup> The contractor may go bankrupt in a situation where the developer was discharged from the duty to compensate: who is to be held accountable?

Future minimal standards should address these questions and provide for ‘corridor answers’ which most likely include an institutionalised role for NGOs.

<sup>169</sup> For references see *supra* fn. 33; confirmed by the practitioner Anne Schöps, CEO Flächenagentur Brandenburg GmbH, Interview on 6 August 2019: The numbers are especially bad for large public infrastructure projects; she refers to the ICE-railway track between Berlin and Hannover which was built 1995. Only after 2–3 years, 75% of the compensation measures got invisible.

<sup>170</sup> That would require the non-identity of the beneficiary of the easement and the contractor. Considering that ‘certified agents’ can also be *Naturschutzstiftungen*, there is a risk of overlap.

<sup>171</sup> Then, political reasons will most likely impede the enforcement.

<sup>172</sup> Investments might be encouraged; the compliance with the compensation duty facilitated. The support for developers to meet their compensation duties was the driving idea for privileges attached to contracts with ‘certified agents’ which pool land and perform compensation measures (*supra* fn. 38).

That environmental burdens become another narrative of green washing should be avoided; enforcement should not be left to competition agencies, which inquire into compensation measures as hidden subsidies. Instead, good law-making requires to structure conflicts of interests openly, and to provide for proper language by way of principle formation.

Therefore, academics need to further engage in a debate about the links between public and private law. How do we conceptualise public accountability in private law? These principled questions are reflected in concrete property rules in land register and insolvency laws. Is the traditional ranking of land burdens in land registries based on temporal priority appropriate for environmental duties? Under the current insolvency law, environmental burdens would be subordinate to credit securities.<sup>173</sup> This appears to violate the public character of environmental burdens. What about the position of contractors? If they become an integral part of the permit-compensation complex (and are being recorded in the documentation), is their role appropriately defined by the contract with the developer? Most likely not. What about the tension between long term conservation and limitations in time? The task in front of us is to come up with a more complex structure beyond the public-private divide, one which accommodates the various interests of the actors involved. These questions are at the centre of the transformation of property into an institution for a sustainable 21<sup>st</sup> century.

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<sup>173</sup> For tax duties, the priority principle of securities is not accepted, C-69/88, ECJ of 07.03.1990, ECR 1990 I-583 – *Krantz*.

CONTRACT AND PROPERTY  
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## Contract and Property with an Environmental Perspective

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