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Private Property in Natural Resources and The Public Weal in German Law—Latent Similarities to the Public Trust Doctrine?

ABSTRACT

The German legal system has established the framework of the "Öffentliche Sache" in order to conceptually describe the interplay between private ownership rights in natural resources and restrictions on their exclusive use for the benefit of the public. The constitutionality of resource-protecting "Öffentliche Sache"-restrictions is determined by the very abstract notions of the "Sozialpflichtigkeit" and the "Situationsgebundenheit" of property. A closer analysis of relevant cases demonstrates that these notions only become operable when substantive value-judgments are introduced into the balancing process. The content of these value-judgments depends on the importance assigned to specific public interests at any given moment of time. After the promulgation of the Federal Water Code in 1957 and particularly after the adoption of amendments in 1976 and 1985, the concrete arguments put forward to illustrate the content of "Sozialpflichtigkeit" and "Situationsgebundenheit" in the context of water law reveal the underlying substantive value-judgments inherent in the abstract terms. The effect of these value-judgments is that little attention is actually being paid to the extent to which private property rights are being restricted, considerations focus on the public interest in the specific resources. A current trend in German natural resources law openly recognizes the importance of these underlying value-judgments by positively assigning natural resources to the public and thereby negatively defining the possible scope of private property. This evolving concept in German law has striking similarity to the American public trust doctrine. Further investigation of the structural parallels between the concepts might not only improve the understanding of German law, but also reveal new insight into the nature of the public trust doctrine.

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A. THE DEMARCATION OF LEGITIMATE PRIVATE AND PUBLIC INTERESTS: IN SEARCH OF THE BALANCE

In Germany and America unanswered questions persist about the proper balance between public and private interests in natural resources. Private property holders invoke their vested rights in the goods at stake; society at large asserts its dependence on the resources involved for its survival and well being.

Embedded in their own historical, cultural and political circumstances the German and the American legal systems developed very different concepts to address the problem of demarcating legitimate interests of private resource owners and the public. While the American law focuses on preserving private property rights through the takings clause, the German law has established a systematic framework for regulating and restricting these rights. The following overview is intended to introduce this system to the American reader and to outline current trends in German law that begin to openly take account of value judgments actually underlying the established abstract framework. These trends show strong parallels to the American public trust doctrine.

B. PRIVATE PROPERTY IN NATURAL RESOURCES AND THE PUBLIC WEAL IN GERMAN LAW

I. EARLY APPROACHES

1. The concept of "Regalien"

German property law during the Middle Ages comprised very few concepts of the old Roman law.[1] The legal regime governing property in natural resources was rooted in the Germanic law concept of "Regalien." According to this concept, the nobility owned many natural goods, which could, however, be used by the citizens.[2] The concept of "Regalien" reconciled the ownership interests of the sovereigns with the concrete usufructuary interests of the citizens.

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1. Otto Kimminich, *Eigentum*, *in* STAATSLEXIKON DER GOERRESGESELLSCHAFT 162 (7th ed. 1986).

2. Edzard Schmidt-Jortzig, *Vom öffentlichen Eigentum zur öffentlichen Sache*, 1987 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1025, 1026.

2. Impact of the Roman law

After the revival and the adoption of Roman law in Germany the sophisticated, abstract Roman ideas of "dominium" and "proprietas" were introduced, but the old Germanic property concepts in many cases remained codified in statutes.[3] However, the lawyers, now educated in the Roman law, gave those Germanic statutes new interpretations. Thus, a new property regime emerged, combining Germanic and Roman law concepts. Particularly in the larger cities, property now became an extensive individual right. The Roman law idea of "dominium" extended beyond the sovereign, to the free citizens.[4] With the rise of the "Rechtsstaat" (rule of law) in the middle of the 19th century, the status of individual owners was once more strengthened. Legal restrictions were gradually imposed on administrative curtailments of property rights, finally resulting in the concept of compensation for takings.[5]

However, different more specific regulatory structures evolved for many natural resources, because vesting individual "dominium" rights in them was particularly critical. The Prussian General Code of 1794, for example, states that "the roads, the navigable streams, the shores of the sea and the harbors are common property of the state."[6] Therefore, despite the general rise of individual exclusive property rights, the concept of "Regalien" as applied to natural resources was widely sustained.

Finally, towards the end of the 19th century, also natural resources increasingly became subject to private, individual ownership.[7] Because of the importance of these resources to the community, however, restrictions on the extent of such private property rights were soon introduced. On the constitutional level, this is reflected in Art.153 of the Weimar Constitution (1919), that underscores that individual "property obliges. Its use shall equally serve the public weal." This formulation can be found today in Art.14 II Basic Law (Grundgesetz), at the heart of the constitutional codification of property law. Hence, whether within the concept of "Regalien" or as restrictions on private ownership, the public interest in natural goods was recognized.

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3. Kimminich, *supra* note 1, at 162.

4. This is reflected in codifications such as § 362 ABGB (1811) or in II ch. 2 § 1 BAVARIAN CODEX MAXIMILIANEUS BAVARICUS CIVILIS (1756).

5. *See* § 164 FRANKFURT CONSTITUTION (1849) or §§ 74, 75 INTRODUCTION TO THE PRUSSIAN GENERAL CODE (1794).

6. *See* § 21 II 14 PRUSSIAN GENERAL CODE (1794).

7. This will be exemplified below in the area of water law; *see* discussion *infra* Part B.IV.1.

3. The emergence of fiscal ownership of natural resources

Although "Regalien" became an anomaly with the rise of the constitutional state and the idea of "Rechtg-staat," in some cases the concept survived the privatization of many natural goods in the end of the 19th century. Around the year 1900, Courts[8] as well as legal scholars[9] increasingly used the forms of the private law to explain the relationship of the state to "Regalien." This was one of the first applications of the concept of "fiscal property" which describes the idea that the state is owner of private property just like any other individual owner. Although the state property in "Regalien" was at that time formally called "public property," "public" only signified that the "fiscal" power, i.e. the power of the state to dispose of the property in the forms of the private law, was restricted to the benefit of the public weal.[10] Likewise, the private law was more and more often employed to describe the usufructuary interests that were vested in the citizens.

4. Public ownership

The idea of a "truly public" state ownership of natural goods, distinct from the forms of the private law, was subsequently developed. Otto Mayer, one of the major protagonists of this development, mainly drew from French sources.[11] He postulated that goods with vital importance to the public could only be subject to a form of public property, which "does not have anything to do with private property."[12] Once a good is dedicated to the public, it becomes subject to full public ownership. Any kind of private property, whether by the state as fiscal property or by individuals, becomes impossible. According to Mayer, the public/private separation applies to goods that had remained "Regalien" as well as to goods vested in individuals.

However, Mayer's theory of a "truly public" ownership of all goods with specific importance to the public did not prevail. The concept of private, i.e. fiscal, state property that is restricted to the benefit of the public weal was so successful that a new approach was not considered necessary. Probably, Mayer's theory was founded on a conception of government that was too authoritative for the political atmosphere of the period.[13]

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8. *See* the decisions of the Reichsgericht RGZ 3, 236 (238) or RGZ 40, 280 (285).
9. *See* Schmidt-Jortzig, *supra* note 2, at 1026.
10. *Id.*
11. OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT VOL. II 46 (3rd ed. 1924).
12. Schmidt-Jortzig, *supra* note 2, at 1026.
13. *Id.*

In certain specific areas, however, the concept of a "truly public" ownership became law. Some statutory provisions of the Länder today provide for a distinct public state ownership in, for example, waterbeds in Baden-Württemberg[14] and dikes in Hamburg.[15] This public state ownership is expressly distinguished from private, fiscal state ownership. The resources are not subject to the regime of the private law[16] and disputes are settled in administrative law courts, not private law courts.[17] The Federal Constitutional Court has confirmed this form of state ownership under certain conditions.[18] However, today most natural goods are not subject to public state ownership as provided for by the cited Länder statutes.

II. THE CONCEPT OF THE "ÖFFENTLICHE SACHE"

1. Concept

As the idea of restricting private property in natural resources for the public benefit developed, a new concept evolved: The "Öffentliche Sache." Fully disregarding ownership, the "Öffentliche Sache" regulates only the use of the resource. This currently prevailing approach for the legal management of natural goods is conceivable for all goods which "have an existential value for a great number of the members of the community and which are therefore to be regulated regarding their use."[19] The concept, therefore, covers goods in individual ownership, in state ownership, and also goods that have no owner at all.

The key to understanding the idea of the "Öffentliche Sache" is the concept of "Widmung" ("dedication to the public"). The dedication is an administrative act which is a necessary requirement subjecting a resource to restrictions in the interest of the public weal. Traditionally, dedications originating in the "natural disposition" of a good are generally not accepted in German law.[20] However, dedications resulting from custom, as for example in the case of beaches and tidelands, are recognized.

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14. *See* § 4 Water Code of Baden-Württemberg (1988).

15. *See* § 2 I, III Dike Regulation Law of Hamburg (1964).

16. *See* § 5 Water Code of Baden-Württemberg (1988).

17. In Germany, administrative law courts are a distinct part of the judicial branch deciding upon questions of the public law.

18. *See*, for example, the decision of the Federal Constitutional Court BVerfGE 24, 367 (382) (confirming the constitutionality of the form of a "truly public" ownership for resources, which had previously been privately owned).

19. Schmidt-Jortzig, *supra* note 2, at 1027.

20. *Id.* at 1028.

The consequence of a dedication is that the private owner (if there is one) loses the power to use or even to dispose of the property to the extent to which the resource has been dedicated. The concept of the "Öffentliche Sache" supplants the private powers with state management to the extent necessary.[21] The restriction following the dedication, the "öffentlichrechtliche Dienstbarkeit,"[22] directly attaches to the resource itself and is independent of the property holder. It is therefore comparable to servitude in American property law. Hence, the dedication runs with the property, and restricts subsequent buyers, for reasons of public interest.

What had above (B.I.4.) been described as the transfer to a "truly public ownership," as provided for in certain Länder statutes, can be understood as the most extreme example of a "Öffentliche Sache"-application. Here the dedication supplants all private powers. The state becomes manager and "public" owner of the resource.

2. Applications on the statutory level

Examples of "Öffentliche Sachen" are to be found in numerous statutes of the public environmental law. Such statutes generally authorize agencies to issue administrative regulations, which dedicate a part or the whole of a resource's uses to the public or which restrict private owners in other ways to the benefit of the public. The following statutes illustrate the principle:

Environmental protection laws in combination with dedications to the public prohibit, for example, recreational land uses, fishing, hunting, or road construction in areas expressly deemed to be of particular environmental significance.[23]

Air pollution legislation restricts the scope of possible uses of plants that produce polluting substances by generally requiring permits.[24]

Water laws prohibit the use of surface water and groundwater by landowners, unless explicitly and individually allowed to do so by the administration.[25]

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21. Fritz Freudling, *Eigentum an Gewässern*, 1976 BAYERISCHES VERWALTUNGSBLATT 141 (referring to a decision of the Bavarian Administrative Law Court (BayVGH of 12.6.1974).

22. HANS J. WOLFF ET AL., VERWALTUNGSRECHT I, § 42 n.6 (10th ed. 1994).

23. Compare the regulations in the Bundesnaturschutzgesetz and in the Landesnaturschutzgesetze.

24. Compare the regulations in the Bundesimmissionsschutzgesetz.

25. Compare the regulations in the Wasserhaushaltsgesetz and in the Landeswassergesetze.

3. Regulatory power: the duty to regulate?

The authority of administrative agencies to issue dedications of privatized resources to the benefit of the public is based on federal and state statutes. But this is only the case if the statutes themselves are constitutional. For the statutes to be constitutional the promulgating legislature needs to have the authority to vest the power to dedicate in executive agencies.[26]

The authority of the federal parliament to issue legislation in the area of natural resources is generally founded, unless explicitly stated in the Constitution,[27] on the argument that the scarcity of publicly valued natural goods implies a parliamentary right to assume responsibility to distribute and manage the resources.[28] To the extent that publicly valued natural goods are considered to be scarce, the parliamentary statutes conferring power to the executive agencies to dedicate these resources to the public are thus insofar constitutional.[29]

Does parliament's responsibility include a duty to sustain and distribute publicly valued scarce natural goods? A decision of the Federal Constitutional Court in the context of land use planning appears to indicate an affirmative answer: "The impossibility to increase the area of land as well as its absolute importance to everybody prohibit leaving its use completely to the management through market forces."[30] Likewise, many legal scholars base an affirmative parliamentary obligation on the limited availability of natural goods as well as on everybody's dependence on them.[31]

A new and very strong argument for the assumption of a parliamentary duty to sustain and distribute natural goods is based on the recently promulgated Art.20a Basic Law. This provision makes state action to protect the environment an important objective.[32] Further clarification as

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26. This is due to the German concept of the "Gesetzesvorbehalt": A state entity is only legitimized to act, if it has explicitly been authorized to do so by law.

27. *E.g.*, Art.74 Nr.24; Art.75 Nr.3, 4 Basic Law.

28. Wilfried Berg, *Verwaltung des Mangels*, 1976 DER STAAT, 1, 11, with further references.

29. *Id.* at 12 n.45.

30. *See* the decision of the Federal Constitutional Court BVerfGE 21, 73 (82).

31. *See* Berg, *supra* note 28, at 12f.; *see also* ERNST FORSTHOFF, LEHRBUCH DES VERWALTUNGSRECHTS 397 (10th ed. 1973) (applying the idea to the limited capacity of roads and resulting state duties concerning their management).

32. For a general discussion, *see* Karl E. Heinz, *Staatsziel Umweltschutz in rechtstheoretischer und verfassungstheoretischer Sicht*, 1994 NATUR UND RECHT 1ff.; Arnd Uhle, *Das Staatsziel Umweltschutz im System der grundgesetzlichen Ordnung*, 1993 DIE ÖFFENTLICHE VERWALTUNG 947; Klaus Meyer-Teschendorf, *Verfassungsmässiger Schutz der natürlichen Lebensgrundlagen*, 1994 ZEITSCHRIFT FÜR RECHTSPOLITIK 73; Hans-Gunter Henneke, *Der Schutz*

to the scope of duties implied in Art.20a Basic Law will be necessary. However, the general assumption of an affirmative parliamentary obligation to protect natural resources is strongly reinforced by this new provision.

III. DEFINITION OR CURTAILMENT: THE TAKINGS PROBLEM

The dedication of a resource to the public, whether total or only partial,[33] poses questions about possible conflicts with Art.14 I 1 Basic Law, the constitutional protection of private property.[34] These questions are at the heart of judicial and scientific discussion in Germany. Similar questions arise in the United States in the debate over public regulation and loss of private property rights.

In Germany the contents and limits of property are defined by statutes (Art.14 I 2 Basic Law).[35] For many years an owner was compensated for a taking whenever a redefinition or other infringement burdened him in a disproportionate way or with particular intensity (Art.14 III Basic Law).[36] In 1981, however, the Federal Constitutional Court drew a clear line between Art.14 I and III Basic Law and stated that a taking has certain formal prerequisites.[37] If those prerequisites are not met, Art.14 III Basic Law cannot come into play. Therefore, an unduly burdensome redefinition of property does not automatically become a taking. However, even though not a taking, an unduly burdensome redefinition of property is, of course,

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der natürlichen Lebensgrundlagen in Art.20a GG, 1995 NATUR UND RECHT 325ff.; Dietrich Murswiek, *Staatsziel Umweltschutz (Art.20a GG)*, 1996 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 222ff.

33. As was shown above, dedications in the framework of the concept of the Öffentliche Sache can affect private property rights to different degrees, up to the point, where the private rights are completely supplanted by state management.

34. Art.14 Basic Law:

> (I) Property and inheritance are guaranteed. Contents and limits are determined by law.
>
> (II) Property obliges. Its use shall equally serve the public weal.
>
> (III) A taking is only permissible for reasons of the public weal. It has to be based on a law that regulates the kind and extent of the compensation. The compensation has to be determined based on a just balancing of the interests of the public and the concerned persons. Regarding the extent of the compensation in case of conflict the civil law courts offer legal redress.

35. *Id.*

36. *Id.*

37. This is the so-called Nassauskiesungsurteil; BVerfGE 58, 300. The Court underscored that Art.14 III Basic Law requires a law, a parliamentary decision, as the basis for any taking. Any unduly burdensome infringement of a property right that is not based on a takings law cannot be accepted by the owner in exchange for a compensation. Such an infringement remains unconstitutional and has to be attacked in an administrative law court.

unconstitutional in the framework of Art.14 I Basic Law and cannot serve as a basis for constitutional state action.

When analyzing the constitutionality of regulatory state action the first step is therefore to determine whether the specific redefinition of property, in our context the dedication of a privatized natural resource to the public, is unduly burdensome. The major German courts, the Federal Constitutional Court, the Federal Administrative Court and the Federal Supreme Court have developed different criteria for distinguishing constitutional from unconstitutional dedications within the framework of Art.14 I Basic Law.[38]

1. "Sozialpflichtigkeit"

The Federal Constitutional Court finds a proper balance between public and private interests in natural resources and an adequate definition of the "limits" of property (Art.14 I 2 Basic Law) by focusing on the concept of "Sozialpflichtigkeit" ("social obligation"). "Sozialpflichtigkeit" is a general recognition that property, even though private, must be seen in a social context, with the potential to benefit the public. This concept is expressly formulated in Art.14 II Basic Law. The Federal Constitutional Court thus draws directly upon Art.14 II Basic Law in order to decide upon the constitutionality of property-restricting regulations.[39]

As a base norm, the private use and disposition of property is constitutionally guaranteed.[40] Those property interests, which are of elementary importance for the use and enjoyment of the property and which are an inherent constitutional liberty, cannot be taken away at all according to Art.14 I Basic Law.[41] However, peripheral aspects of the property right may be considered public according to Art.14 II Basic Law.

The concept of "Sozialpflichtigkeit," which defines the scope of possible restrictions of the ownership right around the central "core," has different consequences for different kinds of property.[42] If the object is of

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38. As there is no comprehensive hierarchical relationship between the Federal Supreme Court, the Federal Administrative Court and the Federal Constitutional Court, the approaches of all three Courts are relevant. Even though the Federal Constitutional Court generally has the authority to interpret the Constitution with binding effect for all other courts, questions concerning the extent of the compensation in the context of Art.14 III Basic Law are dealt with by the civil law courts. *See* Art.14 III Basic Law.

39. *See* Hans W. Rengeling, *Das Grundeigentum als Schutzobjekt der Eigentumsgarantie (Art.14 GG) und als Gegenstand verwaltungsrechtlicher Planung, Gestaltung und Schrankensetzung*, 105 ARCHIV DES ÖFFENTLICHEN RECHTS 423, 435.

40. *See* BVerfGE 24, 367 (389).

41. *See* BVerfGE 24, 367 (389); 42, 263 (295); 50, 290 (341).

42. *See* BVerfGE 21, 73 (83); 50, 290 (341).

particular importance to the public, i.e. if the public is relying on the possibility of its continued use, the power of the redefining legislator is more extensive.[43] Furthermore, the legislature may redefine the contents of property in natural resources "to adapt to changing social and economic circumstances."[44] Provisions allocating use and enjoyment rights in natural resources to the public are thus consistent with Art.14 I 1 Basic Law as long as serve the public weal on the basis of Art. 14 II Basic Law ("Gemeinwohl").[45, 46]

The concept of "Sozialpflichtigkeit" has been used relatively consistently. The reason for this consistency may be that "Sozialpflichtigkeit" is an extraordinarily wide and comprehensive criterion, which can easily adapt to changing judicial motivations.

2. "Situationsgebundenheit"

The Federal Supreme Court formally uses the "Sonderopfertheorie" ("theory of unequal sacrifice") to determine the constitutionality of property restrictions according to Art.14 I 2 Basic Law. As its name implies, the theory centers on equality. In practice, however, the Court increasingly considers factors such as the intensity and the bearing of the regulation as well as its proportionality. These latter criteria, focusing on the gravity of the encroachments, are also central to many decisions of the Federal Administrative Court that formally bases its rulings on the "Schweretheorie" ("theory of particular gravity"). In order to make these factors more operable both courts employ the so-called concept of "Situationsgebundenheit" ("situational commitment"). "Situationsgebundenheit" describes the idea that private property is interwoven with its physical and social surroundings and that a particular environmental context determines the scope of admissible restrictions.

Early decisions of the Federal Supreme Court held restrictions of private property in a natural resource which prohibit the use of a resource that is irreconcilable with the resource's "Situationsgebundenheit" to be constitutional if the contested use is only prospective and not yet exercised.[47] If a usufructuary right has already been exercised, it could not

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43. *See* Rengeling, *supra* note 39, at 437.

44. *See* BVerfGE 24, 367 (389).

45. *See* Rengeling, *supra* note 39, at 431. This relates to the introduction of "truly public" property as in the example of the water law of several Länder. *See supra* B.I.4.

46. For a general introduction to the idea of the public weal (Gemeinwohl) in Germany see Walter Kerber, *Gemeinwohl, in* STAATSLEXIKON DER GOERRESGESELLSCHAFT 857ff. (7th ed. 1986).

47. *See* the decisions of the Bundesgerichtshof in BGHZ 23, 30 (Grünflächenurteil): 1956; BGH DVBl. 1957, 861 (Buchendomurteil): 1957; BGH MDR 1959, 558 (Gipsabbauurteil): 1959.

be prohibited without violating Art.14 I 1 Basic Law with the exception of a possible formal taking according to Art.14 III Basic Law that has to be compensated). The constitutional scope of property restrictions was judicially extended, however, when the Federal Supreme Court subsequently also held executive dedications to the public, which restrict already exercised usufructuary rights of the owner, to be reconcilable with the constitutional protection of property. The criterion of "prior use" had diminished in importance. The modified concept of "Situationsgebundenheit" tested whether a "reasonable owner, from an economic point of view, would use a resource in a particular way."[48]

The ambiguity and fuzziness of "Situationsgebundenheit" became even more apparent, when the Federal Supreme Court subsequently used the concept against the protection of natural resources. In the context of water law, the Court stated that it would be irreconcilable with Art.14 I 1 Basic Law according to "Situationsgebundenheit", if a "naturally given" even if unexercised "possibility of use and economic exploitation of a resource is prohibited, from a reasonable and economic point of view."[49] However, the Federal Supreme Court partially revoked this extreme view[50] after the Federal Constitutional Court had overruled earlier Federal Supreme Court decisions in the "Nassauskiesung"-case of 1981.[51] The concept of scrutinizing constitutional redefinitions of property rights according to the property's "Situationsgebundenheit" has therefore experienced considerably varying interpretations and has become an often cited, but rather arbitrary[52] criterion.

IV. THE DEVELOPMENT OF RIGHTS IN WATER

The way in which the courts adjudicate water law uncovers the actual considerations and value judgments underlying the abstract judicial notions of "Sozialpflichtigkeit" and "Situationsgebundenheit."

Water law presents a good example of a legal regime, which takes societal interests and the public weal into account. The trend in German

48. *See* the decisions of the Bundesgerichtshof in BGHZ 54, 293 (Altes Wasserrechtsurteil): 1970; BGHZ 48, 193 (Kölner Hinterhausurteil): 1967.

49. *See* the decision of the Bundesgerichtshof in BGHZ 60, 127, (133) (Erstes Nassauskiesungsurteil); *see also* BGHZ 60, 145.

50. *See* BGHZ 84, 223 (226); 90, 4, (g); *See* MICHAEL KLOEPFER, UMWELTRECHT, 52 n.78 (1989).

51. BVerfGE 58, 300 (Nassauskiesungsurteil); the discussion of the case follows in the case study *infra* Part B.IV.3.c.

52. HANS J. PAPIER, KOMMENTIERUNG ZU ART.14 GG n.397 (THEODOR MAUNZ ET al. eds., 1994).

water law is toward the "de-individualization of a legal framework",[53] the promulgation of the Federal Water Code (Wasserhaushaltsgesetz; WHG) in 1957 may have been the first step in the "transfer of water into collective ownership."[54] Because of its long history, water law in Germany can serve as a model for other areas of natural resources law.

1. Early legislation

Before the Federal Water Code was promulgated in 1957, 19 different water law regimes were in force in Germany. Each varied substantially as to the attribution of ownership in waterbeds and of the rights to make use of the water.[55] These variations were due to the aforementioned emergence of private ownership in natural resources (B.I.2.) in the second half of the 19th century; private ownership in water and waterbeds was introduced in some, but not in all of the states.

For example, legal approaches to surface water varied. Some regimes used the private law and considered the right to use water as a right annexed to the private ownership right in the waterbed (comp. § 903 Civil Code). Even if the state intervened to allow for the use by someone other than the owner of the watershed, this intervention had to be classified in private law categories.[56] Some regimes, on the other hand, considered surface water to be a public good and did not provide for the possibility of any private usufructuary rights in this resource. According to this conception, usufructuary rights were granted by the executive as rights of the public law below the constitutional level (subjektive öffentliche Rechte).[57] Whether riparian owners, the owners of the waterbeds, or other particularly situated parties had a claim to such public law rights depended on the respective statutes.

Groundwater approaches were similarly non-uniform. Some Länder codifications around the turn of this century recognized a right of land owners to make use of the groundwater beneath their lands as being part of their private land right (comp. § 903 Civil Code).[58] Again, restrictions were considered to be of a private law character.[59] Other regimes provided

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53. *See* KLOEPFER, *supra* note 50, at 603.

54. Paul Klemmer, *Wasser*, *in* STAATSLEXIKON DER GOERRESGESELLSCHAFT 884, 890 (7th ed. 1986).

55. Ed Dellian, *Gewässereigentum und Gewässerbenutzung*, 1g67 NEUE JURISTISCHE WOCHENZEITSCHRIFT 520, 521.

56. As an extreme example *see* §§ 40, 46, 81 PRUSSIAN WATER CODE (1913).

57. *See* in particular the WATER CODE OF BADEN-WÜRTTEMBERG (1900).

58. Dellian, *supra* note 55, at 522.

59. A good example of a private law restriction again provide §§ 196, 200 PRUSSIAN WATER CODE (1913).

for a comprehensive management and distribution of groundwater through public law mechanisms.[60] Here, the discussion of whether landowners had a general entitlement to be granted a public law permit to use groundwater was particularly controversial.[61]

For both surface and groundwater, all regimes thus provided for certain restrictions of individual property rights to the benefit of the public, whether those restrictions originated in the public law or the private law. The difference lay in whether or not the owners of water beds or riparian owners had a general usufructuary right (following their private law ownership rights) or a claim to be granted a permit to use water (in the framework of the public law). Whatever the system, the Länder statutes were often disputed. With the promulgation of the Federal Water Code in 1957 this disparity came to an end.

2. The Federal Water Code (Wasserhaushaltsgesetz)

a) Parliamentary decision for water as a "Öffentliche Sache"

In the beginning of the 1950s the German Federal parliament realized that the contemporary water law regime had become obscure and unsatisfactory. Also, the Länder legislatures saw the general need for more comprehensive planning and for foresight and precaution in regulation of the elementary bases of life.

Consequently the Federal parliament made use of its constitutional authority to enact a skeleton law in the area of water resources according to Art.75 Nr.4 Basic Law. The result was the Federal Water Code promulgated in 1957. The objective of the code was and still is, as stated in the parliamentary debates, "the attainment of a sensible and useful distribution of the surface water and of the groundwater regarding quantity and quality in the whole of the Federal Republic."[62] This aim can only be reached, it was perceived, "if the free disposition by private owners is restricted and if the consideration of the public weal is the starting point of all action."[63] The Federal parliament was aware of the diverse regulations in the Länder and proceeded pragmatically by stating that "it is unnecessary and constitutionally problematic to abolish these differences completely in a skeleton law." Legislators used the concept of the

60. *See*, Art.19 BAVARIAN WATER CODE(1907).

61. Horst Sendler, *Wassernutzung und Eigentum*, (1975-76) ZEITSCHRIFT FÜR WASSERRECHT, at 7.

62. *See* the parliamentary statement in Schriftlicher Bericht des 2.Sonderausschusses - Wasserhaushaltsgesetz -, Bundestags-Drucksache 2/3536 (1953) at 4.

63. *Id.*

"Öffentliche Sache" as a basis for the general scheme. As the lawmakers explained, the concept allows for "significant administrative influence on the use of water."[64] While the Länder statutes had provided for either private usufructuary rights in water resources or for public law entitlements to the use of water, the new Federal Water Code abolished this distinction, introducing an overarching, resource-distributing and -managing public law regime according to the concept of the "Öffentliche Sache."

Within this framework a prospective water user must obtain a permit to use water.[65] A land property owner has no claim to receive such a permit. Section 6 WHG expressly provides that in cases, in which a permit would negatively affect the public weal, especially in regard to sufficient amounts of water for the public, this permit must not be granted. No provision positively obliges the administration to issue a permit. Lobbied by industry interest groups[66] several members of parliament attempted to change the formulation of § 6 WHG from "must be denied if" into "can only be denied if."[67] The majority of the house, however, recognized that the individual entitlement arising as a consequence of such a change in words would completely undermine "the bitterly needed protection of the water resources."[68]

Therefore, in the final version of the Code, § 6 WHG was founded on the belief that "regarding the importance of the supply with water for the general public, any negative effect on this supply will normally have to lead to the denial of a permit."[69] An entitlement to be granted a permit "appears to be irreconcilable with the already now extraordinarily critical situation of the water supply. This situation can only be dealt with, if the currently available resources are being used with the greatest-possible future-oriented and planning efficiency."[70]

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64. *Id.*

65. Such uses are listed in § 3 WHG and comprise not only diverting the water itself, but also the discharge of materials into the water. Exceptions to the requirement of a permit can be found in, for example, §§ 23ff. WHG, allowing for the free use of water, if the amounts used are very insignificant.

66. *See supra* note 62.

67. *See* Änderungsantrag zum Entwurf eines Gesetzes zur Ordnung des Wasserhaushalts, Stenogr. Ber. Bd.37, 216. Sitzung, p.12848.

68. *See supra* note 62.

69. *Id.* at 10.

70. *Id.*

b) Constitutionality of the new regime in general

aa) Scholarly opinions

To some authors, the new federal water law regime seemed irreconcilable with Art.14 I 1 Basic Law, the constitutional protection of property. Dellian asserts that if private property in a waterbed was previously recognized as the substantive basis for the right to use water this right must be valid despite the new regulation.[71] According to Dellian, the proper constitutional interpretation of the permit requirement is that the permit is of merely declaratory character. The property owner has a claim to receive a permit, unless very important reasons concerning the public weal legitimize a denial. Similarly, Papier holds that the one-sided consideration of the public weal in the new statute completely ignores legitimate interests of the land owners.[72] He agrees that it is the legislator's task to define property rights according to Art.14 I 2 Basic Law, but he equally asserts that a water permit system, which does not as a general rule provide for entitlements for the land owners, transgresses the boundaries of "Sozialpflichtigkeit." Employing the concept of proportionality he comes to the same conclusion as Dellian: The Federal Water Code must be interpreted as generally providing for entitlements of the land owners to be granted a permit to use water.

The great majority of authors, however, approves of the new system and considers it to be in consistence with Art.14 I 1 Basic Law. Rights to use water generally do not arise from land property or from other private law powers after the redefinition according to the Federal Water Code, holds Breuer.[73] The rights arise from the distributive decisions of the executive branch on the basis of the public law regime: "Because of their vital importance to the well-being of the community and because of their current scarcity water resources need state planning and care."[74] The various and sensitive relationships between different water bodies, it is argued, require a comprehensive and understanding management. For these reasons the property restrictions following the Federal Water Code are constitutional from the perspective of "Sozialpflichtigkeit," "Situationsgebundenheit" and the concept of proportionality. According to

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71. Dellian, *supra* note 55, at 523, 524. Dellian actually argues along the lines that he could not find the necessary dedication of water to the public in the new statute.

72. PAPIER, *supra* note 52, at n.435; RUDOLF WENDT, EIGENTUM UND GESETZGEBUNG 249 (1985); HERBERT KRÜGER, GRUNDFRAGEN EINER RECHTSSTAATLICHEN WASSERGESETZGEBUNG 27 (1957) (who likewise sees a collision with the concept of proportionality).

73. Rüdiger Breuer, *Die Verfassungsmässigkeit der wasserwirtschaftsrechtlichen Benutzungsordnung*, 1979-80 ZEITSCHRIFT FÜR WASSERRECHT, at 78, 79, with further citations.

74. *Id.* at 97.

the majority opinion, they are therefore consistent with Art.14 I 1 Basic Law.[75]

bb) The judiciary

The major courts similarly hold the new regime generally to be constitutional. Soon after the adoption of the Federal Water Code the Federal Constitutional Court decided that a "well-ordered water distribution system is necessary for the general public as well as for the economy."[76] The Federal Supreme Court, even though it held an ambiguous position in the special case of groundwater (see below B.IV.3.a), stated that the new regulation is justified, "because the natural supply of water, quantitatively and qualitatively, is of paramount importance for the economic development of the country as well as for the sustenance of life in general."[77] Finally, the Federal Administrative Court ruled that the reason, why the strict regime does not violate Art.14 I 1 Basic Law is that "the water resources are particularly vulnerable regarding pollution."[78]

cc) Evaluation

The excerpts presented above from scholarly comments on the constitutionality of the Federal Water Code of 1957 as well as the quotations from court decisions on the subject demonstrate the actual motives and considerations that underlie concepts like "Sozialpflichtigkeit" and "Situationsgebundenheit," when they are used to demarcate public and private interests in an individual case. When applied to a specific situation and a particular natural resource conflict, the abstract notions become more concrete and operable. Recurring formulations like the following emphasize that the concepts mainly focus on the perceived public need:

> "... Of vital importance to the well-being of the community ...", "... of paramount importance for the economic development ... as well as for the sustenance of life in general ...", "... regarding the importance of the supply with water for the general public ...", "... affect the public weal ..." etc.[79]

By using terms like "Sozialpflichtigkeit" and "Situationsgebundenheit" judges and scholars actually introduce substantive values into the process

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75. *See also* FRANK SIEDER ET AL., WASSERHAUSHALTSGESETZ, KOMMENTAR, München, 1994, § 1a, n.24; PAUL GIESEKE ET AL., WASSERHAUSHALTSGESETZ, KOMMENTAR, München, 1992, § 1a, n.29.

76. BVerfGE 10, 107 (113) (1959).

77. BGHZ 49, 72 (1967).

78. BVerwGE 55, 231 (1978).

79. *Id.* and accompanying text.

of delineating public and private claims in natural resources. These substantive values that are concealed by the abstract wording of the concepts converge, in the case of water, into one common perception: Water as a natural resource is so important to the well-being of the whole community that the uncompensated denial of its use by individual owners must be possible. *"Sozialpflichtigkeit" and "Situationsgebundenheit" are therefore in practiceless concerned with the "social obligation" or the "situational commitment" of a specific piece of property, and much more with the nature of the protected resource itself. Its attributed value to society overshadows even grave encroachments an individual owner suffers from a resource-protecting regulation.*[80]

The groundwater litigations during the 1970s and beginning 1980s further illustrate that substantive value judgments about natural resources themselves are implicit in the rationales underlying the concrete application of the concepts of "Sozialpflichtigkeit" and "Situationsgebundenheit."

3. Case study: The groundwater litigations

The exploitation of gravel from groundwater has long been a controversial topic in the framework of water law. Although water is not intentionally being used, the Federal Water Code nevertheless requires a permit because the process normally pollutes the groundwater as a consequence of the disturbance. Maybe particularly because the impairments in these cases are unintentional, many landowners seek judicial review of administrative denials of permits to use groundwater in these circumstances.

a) Early decisions of the Federal Supreme Court

Although the constitutionality of the Federal Water Code in general had long been accepted, the Federal Supreme Court in 1973 explicitly used the notion of "Situationsgebundenheit" in the specific case of a denial of a permit to exploit gravel from the groundwater to reach the opposite result.[81] The Court held that landowners could insist on compensation for permit denials in these circumstances. According to the Federal Supreme Court, these denials could not be justified along the lines of the "Situationsgebundenheit" of the land; hence, this application violated Art.14 I 1 Basic Law. The Court looked at previous uses and at the status quo to establish the scope of the "Situationsgebundenheit." However, contrary to previous analysis, the Court now asked whether possible future

80. Scrutinizing the quotations there also seems to be an implicit judgment that the market cannot be relied on to serve the public interest with regard to water.

81. BGHZ 60, 126 (Nassauskiesungsurteil) (without explicitly referring to Situationsgebundenheit already BGHZ 46, 17 (1966)).

"reasonable economic exploitation" of the land was restricted or prohibited by the water law regime.[82] As the exploitation of gravel was qualified as a "naturally given" possibility of future use of the land, permit denials without compensation were held to be unconstitutional.

This was a radical departure from established policy. The Federal Supreme Court had previously even considered curtailments of already exercised resource uses to be compatible with Art.14 I 1 Basic Law.[83] Now the Court held that unexercised "reasonable economic exploitations" could not be restricted by the water law regime. This change in policy once again demonstrates the flexibility and vagueness of a concept like "Situationsgebundenheit."[84]

b) Legislative amendment of the Federal Water Code (§ 1a III WHG)

Clearly concerned with these shifts in the case law and as a response to the ever-increasing scarcity of water, the federal parliament in 1976 enacted an important amendment to the Federal Water Code.[85] Legislators added several provisions. For example, any administrative decisions leading to a deterioration of the quality of water were prohibited (§ 36b VI WHG) and the general use of water to the highest possible benefit for the public was required (§ 36b I WHG). But most importantly in the context of the groundwater litigations, § 1a III WHG explicitly clarified that the ownership as such does not entitle a landowner to the use of surface water or groundwater.

Despite this very clear legislative confirmation that Art.14 I 1 Basic Law is not violated by any of the requirements of the permit system in the Federal Water Code, the Federal Supreme Court, in 1978, again held that the denial of a permit to exploit gravel from the groundwater on the basis of the water law regime cannot be brought in line with Art.14 I 1 Basic Law. The Court further held that the newly introduced § 1a III WHG itself is unconstitutional, because the law illegitimately encroaches upon Art.14 I 1 Basic Law.[86]

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82. BGHZ 60, 126; *see* PAPIER, *supra* note 52, at n.395.

83. *See* BGHZ 48, 193 (1967) (Kölner Hinterhausurteil).

84. Strongly criticizing these U-turns in the case law Hermann Soell, *Die Bedeutung der Sozialpflichtigkeit des Grundeigentums bei der Landschaftspflege und dem Naturschutz*, 1983 DEUTSCHES VERWALTUNGSBLATT 241, 245.

85. For a discussion of the motives for the enactment *see* Bericht und Antrag des Innenausschusses, Bundestags-Drucksache, 7/4546 (1976).

86. BGH NJW 1978, 2290.

c) The "Nassauskiesung" decision of the Federal Constitutional Court

The Federal Constitutional Court is the final arbiter for evaluating the constitutionality of statutes. Thus, the Federal Supreme Court had to submit the case for review. In one of its most important and influential decisions the Federal Constitutional Court confirmed its earlier rulings, holding the water law regime to be constitutional even when the law denies a landowner the necessary permit to exploit gravel from the groundwater.[87] Referring to its concept of "Sozialpflichtigkeit" to delineate public and private interests in natural resources on the constitutional level, the Federal Constitutional Court stated that property rights are not unconstitutionally infringed, where "goods of vital importance to the community are subjected to a discretionary permit system in order to secure the public weal . . . Water is one of the most important prerequisites of all life . . . An ordered distribution of it is vital for the community."[88] Repeating the wording of earlier decisions the Court held that "such a comprehensive task relating to the public weal belongs to the typical tasks of the public law. It is not the unilateral interest of the state that is being furthered, rather the public weal is being protected by the water law regime." Once again the Federal Constitutional Court used the abstract notion of "Sozialpflichtigkeit" in a concrete application to introduce substantive value judgments about a resource itself and about its significance to society. The Court held for public interest despite grave encroachments upon the interests of the individual owner.

4. Further amendments of the Federal Water Code: Ecosystem protection

In the early 1980s, the German public became more aware of the significant interconnectedness and interwovenness of natural processes. With regard to water, topics like the "Waldsterben" (the dying of forests due to acid deposition) increased the public attention on these relationships. The United States at the same time experienced a similar shift in consciousness.

Recognizing the necessity for a more comprehensive environmental law regime that would better reflect the perceived interrelationships, the German parliament in 1985 again amended the Federal Water Code. Among other modifications, the parliament added a clause requiring the water administrators to consider water to be part of an integral ecosystem.[89] Even though it is commonly held that this amendment did not change the

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87. BVerfGE 58, 300 (Nassauskiesungsurteil).
88. *See also* SIEDER ET AL., supra note 75, at n.25a.
89. *See* § 1a I WHG as amended by 4. ÄndG, Bundestags-Drucksache 10/3973.

substantive content of the Federal Water Code, the "public weal" as mentioned in § 1a I WHG is now interpreted to embrace purely ecological values. For example, water managers may consider the sustenance of water resources without any direct reference to human uses.[90]

5. Public values

The substantive value judgments underlying the constitutional analysis of resource-distributing regimes are strongly dependent on public opinion, the "Zeitgeist." Ideas like "Sozialpflichtigkeit" and "Situationsgebundenheit" are so abstract that they actually invite changing social and political views to enter the considerations. Thus, the constitutional delineation of public and private interests in natural resources is a function of the values the public assigns to different goods at different times.

The formal move towards a comprehensive public management of water resources in Germany occurred with the enactment of the Federal Water Code in 1957. However, despite this early start, litigation in the area of groundwater demonstrates that the public failed to recognize and support the early legislative decision until the end of the 1970s, when public awareness of environmental problems and the limited availability of natural resources emerged. Only then did the controversies about the regime in its application to groundwater come to an end. Only then did the judgments confirming the constitutionality of the discretionary water-distributing regime based on "Sozialpflichtigkeit" and "Situationsgebundenheit" achieve general acceptance and support. The interdependence of public opinion and judgments about the constitutionality of environmental regulations of private property rights can again be detected in the mid-1980s. Social and political forces were a decisive factor in the development of the 1985 amendment of the Federal Water Code introducing more comprehensive ecosystem protection.[91]

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90. *See* GIESEKE ET AL., *supra* note 75 at nn.3, 5.

91. Interestingly, environmental consciousness seems to evolve and expand roughly at the same pace in Germany as in the United States. When controversies about the constitutionality of the Federal Water Code came to an end in Germany, the U.S. legislature had just amended the Clean Water Act, introducing a water permit system in 1972. The important "Nassauskiesung"-decision of the Federal Constitutional Court, BVerfGE 58, 300, (see *supra* at B.IV.3.c.) more or less coincides with the influential Mono Lake holding of the California Supreme Court that was called the "high water mark" of recent public trust law regarding water; National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (1983). Finally, the move towards more comprehensive ecosystem protection, marked by the amendment of the Federal Water Code in Germany in 1985, occurred at about the same time as in the United States, when the recognition of ecosystems as natural resources developed. *See* Alison Rieser, *Ecological preservation as a public property right: An emerging*

C. CURRENT DEVELOPMENTS IN GERMAN NATURAL RESOURCE LAW-LATENT SIMILARITIES TO THE AMERICAN LAW

I. A NEW PERSPECTIVE ON THE NATURE OF THE PUBLIC INTEREST

As the analysis of the motivations and value judgments underlying the concepts of "Sozialpflichtigkeit" and "Situationsgebundenheit" in the concrete application to natural resource conflicts has illustrated, the decision, whether a particular dedication of a good to the public is in consistence with Art.14 I 1 Basic Law, depends less and less on the gravity of the encroachment and more and more on the question of the importance to society of a specific natural resource. Recent developments in the German law-interpreting discourse openly acknowledge the existence of these underlying value judgments by explicitly considering whole categories of natural goods themselves to be assigned to the public. When such a public interest is recognized, the resource is, as a whole or in part, considered inappropriate for private property. According to this currently developing perspective, no private property exists at all from the outset, where a natural resource is statutorily assigned to the public. *The extent of private property is, according to this view, negatively defined by an explicit positive definition of public environmental interests. Based on the particular importance of specific natural goods to the public these goods are taken out of the scope of private property.* It is therefore impossible to vest rights in them to private individuals.

Bosselmann, for example, holds that private property in land, plants, or animals should only comprise the "fruits" that these resources carry, and not the natural capital itself.[92] He therefore endorses a distinction between the inalienable substance and the alienable use value, which extends to the natural "fruits" of the goods. Czybulka wants to redefine constitutional private property to comprise only those uses of natural goods that are reconcilable with their social or ecological functions.[93] Isensee summarizes the trend by stating that "the recent legal development tends to exclude the bases of life a priori from the scope of private property . . .

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doctrine in search of a theory, 15 HARVARD ENVTL. L. REV. 393, 432 (1991).

92. Klaus Bosselmann, *Vom Umweltrecht zum Ökorecht - Skizze eines grundlegenden Wandels*, 1994 JAHRBUCH DES UMWELT- UND TECHNIKRECHTS 3, 17.

93. Detlef Czybulka, *Eigentum an Natur*, 1988 NATUR UND RECHT, 214, 216.

This is not to be understood as a mere restriction of given and remaining private property, but as a negative definition of its content."[94]

II. THE PUBLIC TRUST DOCTRINE IN THE FRAMEWORK OF AMERICAN ENVIRONMENTAL LAW

This trend in German law of negatively defining the possible scope of private property by explicitly postulating interests of the public in natural goods is in fact not unknown in law. Already the Roman law considered some resources inappropriate for private ownership because of their importance to the public.[95] The idea was carried over into the English and American law, where it evolved to become the public trust doctrine.[96]

The public trust doctrine holds that certain natural resources are inherently public. They are inalienable. Because of their importance for the common weal it is impossible to vest private property rights in them. At the same time, the government as trustee for the public has to assume the

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94. Josef Isensee, *Die Ambivalenz des Eigentumsgrundrechts, in* EIGENTUMSGARANTIE UND UMWELTSCHUTZ 3, 14, 15. (FRITZ OSSENBÜHL, ed. 1990).

95. The sea, running water, air, shores, beaches, swamps and the like were, according to Roman understanding, common to all (res communes). These resources were either res extra commercium and thereby by definition nobody's private property. This mainly applied to running water, air, beaches and swamps. *See* Schmidt-Jortzig, *supra* note 2, at 1026. Or, as seems to have been the case for banks of rivers in particular, private property rights were formally permitted, but at the same time all persons had the right to make use of the banks, i.e. to bring vessels to them, to fasten the vessels by ropes and to place any part of their cargo there. *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197 (1980). These rather vague and undefined rights of use and enjoyment of the public are the origins of the public trust doctrine, which found its earliest concise expression most clearly in the work of Justinian: "By natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea." *See* JUSTINIAN, THE INSTITUTES, book 2 title 1 point 1. Although this declaration is by some authors considered to reflect rather Justinian's own idealization of a legal regime than the true nature of public rights in the Roman empire, *see* Richard J. Lazarus, *Changing Conceptions Of Property And Sovereignty In Natural Resources: Questioning The Public Trust Doctrine*, 71 IOWA L. REV. 631, 634 (1986), his rules found their way into subsequent eras and societies.

96. For a good overview, *see* Joseph L. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Joseph L. Sax, *Liberating The Public Trust Doctrine From Its Historic Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Stevens, *supra* note 95; Gary D. Meyers, *Variations On A Theme: Expanding The Public Trust Doctrine To Include Protection Of Wildlife*, 19 ENVTL. L. 723 (1989); Harrison C. Dunning, *The Public Trust Doctrine: A Fundamental Doctrine Of American Property Law*, 19 ENVTL. L. 515 (1989). More critical: James L. Huffman, *Trusting The Public Interest To Judges: A Comment On The Public Trust Writings Of Professors Sax, Wilkinson, Dunning And Johnson*, 63 DENV. U. L. REV. 565 (1986); James L. Huffman, *Avoiding The Takings Clause Through The Myth Of Public Rights: The Public Trust And The Reserved Rights Doctrines At Work*, 3 LAND & ENVIRONMENTAL LAW 171 (1987); Lazarus, *supra* note 95.

responsibility of managing, maintaining and, to the extent appropriate, distributing the trust resources.

The public trust doctrine in American law—like trespass as well as public and private nuisance—is a common law concept. Common law augments statutory regimes. Due to the large number of statutory regulations today the public trust doctrine is only one of many ways to delineate public and private interests in natural goods. However, in our context the public trust doctrine is of specific interest because it argues on the constitutional level. Public trust focuses on the question of public versus private property, whereas many of the statutory approaches fail to explicitly curtail private property interests. However, recent statutes have taken the public trust doctrine into account, integrating it into their normative structure.[97]

III. LATENT SIMILARITIES

The public trust doctrine explicitly recognizes inalienable public interests in natural goods with a corresponding impossibility of private property in these goods. According to a current trend in German environmental law private property rights in natural resources should be defined by referring to the specific public interests in these resources; the extent of private property is thus negatively defined by positively defining environmental claims of the public. The similarity of the conceptual structures seems striking. A further investigation of this correspondence might well lead to a better understanding of the patterns of argumentation underlying resource-distributing decisions.

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97. Federal statutory enactments confirming public trust interests include the National Environmental Policy Act of 1969 (NEPA), which provides, inter alia, that it is the continuing responsibility of the Federal Government to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. National Environmental Policy Act of 1969 §101(b)(1), 42 U.S.C. § 4331(b)(1) (1994); *see* PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY, 897ff. (1994). Another very significant recent statutory expression by Congress occurred in 1980 with the promulgation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and with amendments of the Clean Water Act; Congress thereby ordered federal and state authorities to sue to recover damages to public trust resources caused by releases of oil or other hazardous substances. According to the relevant provisions, CERCLA §§ 107(a)(4)(C), (f)(1), 42 U.S.C. §§ 9607(a)(4)(C), (f)(1) (1988); Clean Water Act §§ 311(f)(4),(5), 33 U.S.C. §§ 1321(f)(4),(5) (1988), federal and state officials "shall act on behalf of the public as trustee to recover natural resource damages."

D. CONCLUSION

The formal German "mechanism" of relating private property rights in natural resources to public interests in the use or preservation of these resources, the concept of the "Öffentliche Sache," is unknown in the United States. The abstract criteria for deciding upon the constitutionality of "Öffentliche Sache" regimes that are employed in the German legal system ("Sozialpflichtigkeit" and "Situationsgebundenheit") do not have a direct counterpart in American constitutional law. Even so, the analysis of the motivations underlying decision-making in this area of law in Germany has revealed that in effect the two legal systems are not as far apart as it might seem at a first glance. A current trend in German environmental law explicitly acknowledges that the analysis of the constitutionality of resource-protecting regulations is not based primarily on the gravity of infringements in individual property rights but rather on the question to what extent some natural resources are positively assigned to the public. As in public trust law, private property is thus considered to be negatively defined by positive assignments of goods to the public, which do-a priori-not require compensation according to the takings clause. This new understanding of the bearing of environmental law on private property clearly shows that not only in the United States, where the public trust doctrine is explicitly recognized, but also in Germany, value judgments about and assignments of natural resources themselves are the bases for deciding upon the proper delineation between private property interests in these resources and the public weal.