Lundmark/Herrmann Takings for Climate in Germany

This chapter illuminates and critiques the implications of expropriations or takings jurisprudence in Germany in light of the fight against the climate crisis. The focus of this chapter is on the constitutional protection of private property rights in the scenarios listed in the call for papers. In the discussion that follows, these scenarios are divided into three groups: the expropriation of all or part of private property; the revocation and phasing out of existing uses of private property; and the imposition of obligations that impose burdens on landowners.

The legal bases for such measures are spread throughout the German legal system in various individual statutes, as climate protection law cuts across the legal spectrum.[1] One example of the phasing out of existing uses that is currently much discussed, both by experts and the public, is the German coal phase-out with the Coal-Fired Power Generation Termination Act (Kohleverstromungsbeendigungsgesetz, KVBG),[2] which will receive increased attention in the course of this chapter due to its interesting property law issues. Obligations for land and building owners can be found in particular in planning, building, and environmental energy law: urban land use plans under the Federal Building Code (BauGB) can provide for areas in which owners must incorporate flood protection measures when constructing structural facilities.[3] New buildings must comply with certain energy requirements under the Building Energy Act (Gebäudeenergiegesetz, GEG). Owners of existing buildings are also bound by this law in the case of modernization measures. Private planning law (Neighborhood Laws of the Länder, NachbarG) stipulates toleration obligations for neighboring properties with regard to corresponding superstructures (thermal insulation for existing buildings).[4] By contrast, the (partial) deprivation of property rights as expropriation is - as in German environmental law as a whole - the exception in climate protection law. For the development of wind energy plants, and for the land requirements of general electrical grid,[5] expropriation is possible in individual cases under the Energy Industry Act (EnWG)[6] and the Grid Expansion Acceleration Act (NABEG)[7]. Expropriation is also envisaged for flood protection (Water

[1] The Federal Climate Protection Act (KSG), which came into force at the end of 2019, is designed only as a framework law, not as a law directly shaping property. However, with its translation of international and European climate protection targets into sectoral annual emission levels, it establishes benchmarks (also) for property-relevant climate protection measures and regulations, cf. *Franzius*, ZUR 2021, 131 (131). On the legal foundations of German climate protection law, *Kahl/Gärditz*, Umweltrecht, 12th ed. 2021, 211 et seq.

[2] By the end of 2038 at the latest, the last coal-fired power plants (and e.g. opencast lignite mines) are to be shut down (in some cases in return for compensation). In the Rhenish coalfield, the coal phase-out has been brought forward to 2030. Outside of such sector-specific special laws, the revocation of approved uses harmful to the climate is possible, for example, on the basis of Section 21 of the Federal Immission Control Act (BImschG) or Sections 48, 49 of the Administrative Procedure Acts of the Länder (VwVfG).

[3] Section 9 I No. 16 lit. c), d) BauGB.

[4] Cf. only Section 16a NachbarG Berlin. In addition now BGH of July 1st 2022, V ZR 23/21 - (Cross-border thermal insulation).

[5] *Hansmann/Wichert*, Agrar- und Umweltrecht 4/2017, 121 (121 with additional reference).

[6] Cf. in particular Sections 44b to 45b EnWG. On expropriation pursuant to Section 45 I No. 2 EnWG now BGH of March 12th 2015, III ZR 36/14 - (Expropriation for wind farms).

[7] Section 27 NABEG.

Resources Act, WHG),[8] for CO_2 storage expansion (Carbon Dioxide Storage Act, KSpG),[9] and for the expansion of the cycle path network (under general planning law).[10]

Part A sketches the constitutional basis for the protection of private property in Germany, which is Article 14 of the *Grundgesetz,*[11] the German constitution, and the judicially developed principles that the confrontation between public purpose (and climate protection) and private property rights gives rise to:

- Article 14 as a weak defense against governmental climate protection
- Compensation awarded only in exceptional circumstances
- The broad, statute-influenced, and "climate-driven" concept of ownership:
    - The broad constitutional concept of property
    - The legislator largely determines the scope of protection itself, even with climate protection law
    - Land, facilities, and certain uses (including those that are harmful to the climate) are protected
    - Not protected are profit expectations, permits, and (domestic) legal entities with state participation
- Climate protection interventions into property rights.

Parts B surveys and evaluates the tests that have been developed and applied by judges, and some that have been articulated by commentators, to distinguish between governmental measures that merely define the "content and limitations" (*Inhalt und Schranken*)[12] of property ownership (Article 14 I 2) from expropriations (Article 14 III).[13] For (also) in climate protection law only expropriations are to be compensated; restrictions of property are in principle to be accepted without compensation, the question of demarcation is not only of a dogmatic nature. The prevailing judicial tests can be roughly systematized into four categories. These will be discussed in order in the context of their application to restrictions on property rights that are imposed on private property in order to protect the climate:

- special-sacrifice test (*Sonderopfertheorie*)
- theory of magnitude (*Schweretheorie*)
- situational test (*Situationsgebundenheit*)
- separation model (*Trennungsmodell*).

Part C is devoted to the constitutionality of restrictions of property (Article 14 I 2). Since it is now strongly influenced by climate protection law concerns, special attention is paid to the principle of proportionality, which is of fundamental importance to German constitutional law. The principle of proportionality necessitates four levels of scrutiny: (1) the constitutionality of the purpose; (2) the appropriateness of the means; (3) the necessity for the incursion; and (4) the balancing test.

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[8] Sections 71, 71a WHG.

[9] Section 15 KSpG.

[10] *Saurer*, EurUP 2022, 332 et seq.

[11] Basic Law for the Federal Republic of Germany of May 23, 1949 (BGBl. 1). Unspecified Articles are those of the Basic Law.

[12] For better readability hereinafter referred to as „restrictions of property".

[13] According to the doctrine of property rights (*Eigentumsdogmatik*) expounded by the German Federal Constitutional Court, one must strictly distinguish takings under Article 14 III from property content regulations under Article 14 I 2, although both may give rise to a claim for damages. On the distinction between expropriations and restrictions of property, see *Björn Hoops*, Taking Possession of Vacant Buildings to House Refugees in Germany: Is the Constitutional Property Clause an Insurmountable Hurdle?, 5 EPLJ 26 (2016).

The authors of this chapter argue that neither the function nor the dogmatic structure of Article 14 stands in the way of current or future, even more effective, climate legislation, up to and including more climate protection-motivated expropriations. In this context, for example, it is to be welcomed that any political will within the framework of Article 14 remain largely untouched, since the legislature has broad assessment prerogatives at its disposal when it comes to the legal formulation of climate targets and also property measures, and these can only be reviewed by constitutional courts within narrow limits. Although property owners are entitled to have their fundamental rights weighed against those of climate protection, for example, in accordance with the rule of law, the constitutional right to property is likely to be weakened in the future, lessening the likelihood of judicial awards of compensation and of judicial declarations of unconstitutionality.

A.

I. Article 14 as a weak defence against governmental climate protection measures

Article 14 (Property, inheritance, expropriation):

(1) Property and inheritance rights shall be guaranteed. The content and limitations shall be determined by law.

(2) Property shall give rise to duties. The use of property shall at the same time serve the public good.

(3) Expropriation shall be possible only for the public good. Property may only be expropriated by or on the basis of a law regulating the type and amount of compensation. Compensation shall be determined by weighing the interests of the general public and the owner. Disputes over the amount of compensation shall be decided by the ordinary courts.

Article 20a (protection of natural resources and animal welfare):

The state, also in responsibility for future generations, protects the natural foundations of life and animals within the framework of the constitutional order through legislation and, in accordance with law and justice, through executive power and the administration of justice.

Article 2 II 1 (protection of life and physical integrity):

Every person has the right to life and physical integrity.

The fact that climate protection measures must increasingly be directed against private property owners can be seen by Germany's need to reduce CO_2 emissions.[14] Article 14, which protects property from governmental intervention, can be used as a defense against such measures.[15] Climate-relevant property use is also fundamentally subject to fundamental rights protection, which subjects corresponding governmental restrictions to a constitutional burden of justification.[16] Owners should therefore be able to expect that the limitations imposed on private property by any climate-protective legislation, including any subsidiary administrative regulations, will remain within the framework of the social obligation of property (Article 14 II), of the requirements of Article 14 III, and also of the other constitutional principles.

However, if climate change worsens as expected, the constitutional protection of private property in Article 14 will increasingly be confronted with, and likely curtailed, by the consideration of other important constitutional provisions. In 1994, climate protection was accorded constitutional status in Article 20a as a "high-ranking"[17] governmental objective, forming a potential barrier against the protection of Article 14.[18] The fundamental rights of third parties (Article 2 II 1, Article 14), which according to the Federal Constitutional Court[19] are also becoming increasingly important in climate protection, can also be employed to legitimize minor or even severe encroachments on the fundamental right to property. Last but not least, the extent of the social obligation of property (Article 14 II) and the requirement that expropriations be for the "common good" (Article 14 III) will depend in large measure on whether any particular use of any particular property can be considered to be harmful to the climate.

The question raised in the call for papers as to whether climate change already lowers the threshold of intervention for restrictions of property and expropriation in national legal systems can be answered in the affirmative at this point for two reasons. First, Article 14, as a rather weak defence against climate-protective and other environmental measures, has not had any significant effect on environmental and climate-protective legislation to date due to the fact that judicial decisions, for decades, have generally upheld legislative measures that impose economic burdens on private property owners for environmental and climate-protective purposes.[20] Second, legal doctrine and, not least, the Federal Constitutional Court emphasize that, with advancing climate change, property owners will have to accept more and more severe burdens on their property.[21]

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[14] The CO_2 quantities caused in Germany, by far the largest European CO_2 emitter, in 2021 originate from the energy sector (33 %), industry (24 %), transport (19 %), buildings (14 %) and agriculture (8 %), among others (Umweltbundesamt, Treibhausgasemissionen in Deutschland 2021, Bericht v. 15.03.2022) and are thus in each case also a consequence of the use of "property".

[15] "Primary Function and Center of the Liberal-Legal System of Fundamental Rights Protection," *Gärditz*, in: *Landmann/Rohmer*, UmweltR, 99th EL September 2022, GG Art. 20a para. 73. The *protection dimension* of Article 14 (as well as that of other fundamental rights) is only weakly developed in German constitutional law.

[16] *Durner*, in: *Herdegen/Masing/Poscher/Gärditz*, Handbuch des Verfassungsrechts, 2021, § 26 Umweltverfassungsrecht para. 42.

[17] Cf. only BVerfGE 102, 1 (18) - (Legacy burdens).

[18] *Jarass/Pieroth*, GG, 17th ed. 2022, Article 20a para. 15 (also on the opposing view).

[19] Cf. now BVerfGE 157, 30 - (Climate decision).

[20] *Durner*, in: *Herdegen/Masing/Poscher/Gärditz*, Handbuch des Verfassungsrechts, § 26 Umweltverfassungsrecht, para. 44 with reference to BVerfG 52, 1 (27) (Allotment garden); 58, 300 et seq. (Wet graveling).

[21] Cf. BVerfGE 157, 30 - (Climate decision); *Britz*, NVwZ 2022, 825 (832).

II. Compensation awarded in only exceptional circumstances

The conclusion in the preceding paragraph is further supported by the rather weak role played by compensation[22] as a result of climate-protective state interventions into property rights. The recent expropriation jurisprudence of the Federal Constitutional Court has the consequence that the vast majority of property-relevant regulations of German climate-protective law do not constitute expropriations in the sense of Article 14 III, but only restrictions of property according to Article 14 I 2. Even the partial or complete deprivation of a property right potentially caused by climate-protective regulations will only held to constitute an expropriation under constitutional law within the meaning of Article 14 III in exceptional circumstances. As a matter of textual interpretation, this follows from the fact that Article 14 III only guarantees compensation in the case of expropriations; there is no corresponding guarantee for restrictions of property. Consequently, compensation for burdens imposed by such measures is only awarded in exceptional cases.[23]

Furthermore, an obligation to award compensation is subject to a legal proviso: Without a legal basis, courts may not award compensation, even to the owner affected by an unlawful climate-protective measure. For the courts have held that Article 14 does not serve as a basis for claims for compensation, either directly or by analogous application.[24] Furthermore, the owner affected by a climate protection regulation must always first challenge the so-called primary legal act (e.g. the official refusal of a permit to use a climate-damaging installation) in the administrative courts: an action for compensation "isolated" from procedure is not legally possible.[25]

III. The broad, statute-influenced, and “climate-driven” constitutional concept of ownership

Assessing the constitutionality of a climate-protective restriction of property or expropriation first requires that the measure affects "property" within the meaning of Article 14. In this context, the following topics are relevant to climate protection law:

- The broad constitutional concept of property
- The legislator largely determines the scope of protection itself, even with climate protection law
- Land, buildings, facilities, and certain uses (including those that are harmful to the climate) are protected
- Not protected are profit expectations, permits, and (domestic) legal entities with governmental participation

1 The constitutional concept of property is broader than that of the civil law, which recognizes property only in movable and immovable property,[26] including animals.[27] The constitutional concept of property is

[22] German legal doctrine makes a conceptual distinction between “compensation” (reserved for expropriation) (Article 14 III) and “financial compensation” (Article 14 I, II) in the case of financial compensation for encroachments on property. In the following, both are used synonymously for better readability.

[23] BVerwGE 134, 355, para. 16. The consequence of disproportionate (unreasonable) restrictions of property is not *eo ipso* the obligation to pay compensation, but “only” its unconstitutionality.

[24] BVerfGE 100, 226 (245) - (Protection of historical monuments); BVerfGE 46, 268 - (Land reform legislation in Bavaria).

[25] If the owner fails to make such a defense and the primary legal act becomes final, compensation can no longer be claimed, BVerfG 100, 226 (246) - (Protection of historical monuments) following BVerfGE 58, 300 (324) - (Wet graveling).

[26] Cf. Section 90 of the German Civil Code (BGB).

[27] Cf. Section 90a BGB.

also broader than that of the public law[28].[29] For the constitutional concept of property of Article 14 belongs to the rights of individuals to exercise their freedom. Consequently, according to the Federal Constitutional Court, property under Article 14 encompasses "every property right that is assigned to the entitled person by the legal system for private use and for his own disposal."[30] Protected are – in addition to the "classically" assigned land, buildings, facilities, etc.[31] – also tenant's rights,[32] mining rights (e.g. for the exploitation of lignite),[33] and even ownership of shares (e.g. of the shareholders in *RWE Power AG*).[34]

2 This broad constitutional concept of property is not, however, autonomous vis-à-vis the formulation of property by statutory law: the restrictions of property are indeed to be "determined by [statute] law" (Article 14 I 2).[35] This power of the legislature to define property means that "property" within the ambit of Article 14 is ultimately that which is determined, case-by-case, by the totality of the constitutional and statutory provisions.[36] The changeability of the concept of property as a result of societal views, which goes hand in hand with its statute-based character, is particularly evident in climate protection law, where the legislature can shape the concept of property by enacting statutes and, in doing so, can link the concept to real-life circumstances, including those circumstances caused by climate change.[37] In the case of CO_2 emissions, the Federal Constitutional Court has embraced a budget approach, according to which only a certain residual amount of CO_2 is available. While CO_2-relevant individual behavior continues to be protected by fundamental rights, it must be limited *a priori* by the fixed total budget of CO_2 emissions.[38] In addition, the legislature has further leeway in shaping the budget: In conjunction with the climate protection requirement of Article 20a, the legislature has the power to define private property as to exclude the "natural foundations of life" (Article 20a) from the definition of private land ownership or to make them "unavailable" to private owners.[39]

3 The foregoing remarks should not be interpreted to mean that the legislature can redefine the concept of property in Article 14 as it pleases.[40] For in defining the restrictions of property, the legislature remains subject to certain constitutional restraints, including restraints that emanate e.g. from Article 14.[41] One important such restraint, especially in climate protection law, is the doctrine of grandfathering, i.e. the

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[28] So-called *public law property*, on this *Papier/Durner*, in: *Ehlers/Pünder*, Allgemeines Verwaltungsrecht, 15th ed. 2016, 815 et seq.

[29] BVerfGE 95, 267 (300) - (Old debts).

[30] Cf. only BVerfGE 97, 350 (371) - (Euro); 101, 239 (258) - (Key date regulation).

[31] Cf. Section 903 et seq. BGB.

[32] BVerfGE 89, 1 (5 et seq.) - (Tenant´s right of possession).

[33] According to the Federal Mining Act (BBergG).

[34] Cf. only BVerfGE 14, 263 - (Feldmühle).

[35] *Bryde*, in: *vMünch/Kunig*, 7th ed. 2021, GG Art. 14 para. 25.

[36] *Bryde*, in: *vMünch/Kunig*, 7th ed. 2021, GG Art. 14 para. 25.

[37] *Frenz*, Klimaschutzrecht, 2022, 154.

[38] Cf. *Frenz*, Klimaschutzrecht, 2022, 113: "Budgeted freedom takes the place of the freedom, unlimited in its starting point, of the liberal understanding of fundamental rights."

[39] *Blasberg*, Inhalts- und Schrankenbestimmungen des Grundeigentums zum Schutz der natürlichen Lebensgrundlagen, 2007, 102 with additional reference.

[40] See *Ossenbühl*, Staatshaftungsrecht, 6th ed. 2019, 164 et seq.

[41] The legislature would not be authorized to abolish private property as an institution (*institutional guarantee*) or to affect its essence (Article 19 II). The actual meaning of the constitutional concept of property lies in this limiting function.

judicially recognized right to maintain and use a climate-damaging facility (coal-fired power plant,[42] oil-fired heating system, etc.) that was begun as a legal use of property, even if the factual or legal situation has changed in the meantime and the use has become illegal.[43]

4 Despite the fact that the Federal Constitutional Court emphasizes the close relationship of Article 14 to the "free development" of one's personality (Article 2 I)[44] and to the "inviolability of the dignity of mankind" (Article 1 I),[45] this emphasis is not understood to exclude forms of ownership from the concept of property in which the personal relationship of the owner to the property is less personal than, for example, than the relationship between a homeowner and the homeowner's home. Indeed, ownership of even large companies is also covered by the constitutional concept of ownership. Excluding such ownerships from the concept of property would be inconsistent with, among other things, the history of the origin of the Basic Law.[46]

5 The protective effect of Article 14, as distinguished from occupational freedom (Article 12), extends only to existing property uses, not to the opportunities, hopes, and potentially profitable future uses associated with the present uses.[47] In the case of coal phase-out measures (KVBG), any governmental measures that limit or prohibit pre-existing, legally conforming uses of land or facilities for climate protection purposes, or which subject such uses to restrictive conditions, are likely to be viewed as encroachments on property rights protected by Article 14.[48] On the other hand, measures that merely diminish the economic viability or profit expectations without, for example, at the same time imposing restrictions on the permit itself will not constitute encroachments on property rights.[49] A loss of sales opportunities for the lignite extracted from coal mines caused by the closure of lignite-fired power plants would not trigger the protection of Article 14 I.[50] Nor would a CO_2 tax constitute an encroachment of rights protected by Article 14.[51]

6 Privately owned land and the structures on that land – which are common subjects of climate protection and other environmental measures – fall unproblematically within the purview of "property" for purposes

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[42] See *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 172 et seq.; *Klinski*, Juristische und finanzielle Optionen der vorzeitigen Abschaltung von Kohlekraftwerken, Rechtsgutachten 2015, 21.

[43] *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14 para. 190. However, grandfathering can also be overcome by law, see Part C.

[44] Article 2 I: "Everyone has the right to free development of their personality as long as he does not violate the rights of others and does not violate the constitutional order or the moral code."

[45] Article 1 I: "The dignity of mankind is inviolable…."

[46] However, the "net freedom" (*Morlok*) of Article 14 is determined by the fact that in individual cases the personal relationship of corporate property is lower: the legislator can (or maybe must) take the concrete degree of private utility of the property as a reason for differentiating between "large" and "small" property. Such considerations, however, are not to be realized at the level of the scope of protection, but only at the level of justification. See Part C. II.

[47] BVerfGE 143, 246 (para. 240) - (Nuclear phase-out I); *Klinski*, Juristische und finanzielle Optionen der vorzeitigen Abschaltung von Kohlekraftwerken, Rechtsgutachten 2015, 23 with additional reference.

[48] *Klinski*, Juristische und finanzielle Optionen der vorzeitigen Abschaltung von Kohlekraftwerken, Rechtsgutachten 2015, 23.

[49] *Id.*

[50] *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 24.

[51] Here, protection is only provided by the general freedom of action (Article 2 I). Only in the case of a "strangling" effect of a tax Article 14 is relevant. See BVerfGE 75, 108 (154) - (Artists` social insurance).

of Article 14.[52] According to the case law of the Federal Constitutional Court, this applies in particular to the land and facilities of power plant operators.[53] But what of the ground below the land and facilities and the airspace above them? According to the Federal Constitutional Court, while the owner's rights in a parcel of land do indeed extend to the "space above the surface and to the earth below the surface," this space does not extend "to such a height or depth that the owner has no [legitimate] interest in excluding others."[54] Consequently, owners of land have no interest, and therefore no property right, to object to a power cable being buried in the ground more than four meters below the surface.[55]

7 Article 14 also protects legally conforming uses of land, buildings, and facilities.[56] Therefore, in principle, the operators of climate-damaging power plants, if built and operated legally,[57] hold property rights to continue operating their plants.[58]

A legal “climate obligation” of landowners’ right to use their property does not already result from the social obligation of property (Article 14 I, II) without legal concretization. It does not, for example, give third parties the right to house-squat. Nor does Article 14 II create an obligation for power plant operators to tolerate the squatting of a climate-damaging power plant by climate activists. No direct “climate obligation” on the part of property owners can be derived from Article 20a/Article 14 without statutory elaboration. None of the attempts made in the legal literature and case law to exclude environmentally and climate-damaging uses of property from the protection of Article 14 is ultimately convincing.

Like the freedom of science (Article 5 III 1), the freedom of religion (Article 4 I, II), and the freedom to develop one’s personality (Article 2 I in conjunction with Article 1 I), the (climate-damaging) use of property does not require justification vis-à-vis the state, but conversely the freedom-restricting state must

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[52] BVerfGE 70, 191 (199) - (Fishing districts); 98, 17 (35) - (Property rights moratorium). Plots of land are delimited parts of the earth`s surface that are recorded in a land register.

[53] Thus for nuclear power plants BVerfGE 143, 57 - (Nuclear phase-out I). The “right to an established and practiced business” protected under civil law has never been recognized by the BVerfG as property within the meaning of Article 14 (*Bryde,* in: *vMünch/Kunig*, 7th ed. 2021, GG Art. 14 para. 36). In any case, it does not extend further than the protection enjoyed by its economic basis and only covers the concrete stock of rights and goods, on this point again BVerfGE 143, 246 (para. 240) - (Nuclear phase-out I). In principle, environmental media such as air (wind), groundwater and the climate itself are not capable of being owned and are also not protected under Article 14. In accordance with the legal system (permits, authorizations, etc.), only a (limited) right of use can exist for these.

[54] Section 905 BGB.

[55] LG Köln v. 06.08.2013, 5 O 221/13. In earlier times, such an interest was denied in the case of deep storage tanks (BGH of October 23rd 1980, III ZR 146/78), supply lines in 2.3 m (BGH, NJW 1994, 999) or 3m (OLG Düsseldorf of November 11th 1990, 9 U 109/90) depth or if the owner is concerned about obstructing competing competitors (examples according to *Palandt/Bassenge*, BGB, 70th ed. 2011, Section 905, para. 2). In civil proceedings, the interfering party bears the burden of proving that the circumstances alleged by the owner for its interest in exclusion do not exist (*Palandt/Bassenge,* loc.cit., para. 2), which from a (civil) procedural point of view is advantageous for the owner, but not for the grid expansion or the realization of the energy transition sought here.

[56] Cf. only BVerfGE 143, 246 (para. 228) - (Nuclear phase-out I); BVerfGE 101, 54 (75) (Law of Obligations Adjustment Act). *Movable* property (*vehicles*) is also protected by Article 14, but not its use, since this is more appropriately covered by general freedom of action (Article 2 I) due to its high connection to the development of personality, and otherwise every encroachment on the use would also be an encroachment on property. Location-based driving bans and the designation of car-free city centers are therefore regularly not encroachments on the scope of protection of Article 14.

[57] Approximately in accordance with the BImschG, cf. *Kahl*, in: *Paal/Poelzig/Fehrenbacher*, Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (473). The relevant legal and actual situation at the time of the (climate-protective) intervention is decisive.

[58] BVerfGE 143, 246 (para. 227 et seq.) - (Nuclear phase-out I). On the other hand, the rights of use and consumption of nuclear fuel under EU law are not subject to the protection of property under the Basic Law (under Article 87 of the Euratom Treaty). The right to use nuclear fuel under EU law is accessory to the national use regime: In individual cases, it only extends as far as its use is factually and legally possible under national law, BVerfGE 143, 246 (para. 241) – (Nuclear phase-out I).

justify its measure vis-à-vis the holder of the fundamental right to property (*in dubio pro libertate*).[59] To exclude actions of individuals that endanger the environment (or even those that merely use the environment) from the scope of protection under Article 14 would mean circumventing the protections accorded all fundamental rights, such as the proportionality test and the rule of law (Article 20).

8 In an important case, operators of nuclear power plants challenged the constitutionality of the Thirteenth Act Amending the Atomic Energy Act (AtomG) before the Federal Constitutional Court, claiming that the granting of a permit to operate their nuclear power plants[60] had created a property right that is protected by Article 14. Such a permit, or a permit under the Federal Emissions Control Act,[61] undoubtedly represents a certain economic value, since the operators make considerable investments in reliance on the permit. If one agrees with the Federal Constitutional Court and with voices in the legal literature that the essential characteristics of constitutional property are the power of disposal and not inconsiderable personal contributions, one cannot, however, grant any protection to public-law permits via Article 14. For such a permit cannot be disposed of, and the acquisition of the permits was not based solely on the permit-holders' contributions.[62] Therefore, commentators generally agree that applying these principles from the Atomic Phase-out opinion to coal-fired power plants is inappropriate.[63] However, Article 14 does indeed protect the private property interests created by the granting of a permit to some extent, for the grant of a permit only relevant to the issue of justification in the context of a weighing competing interests in cases of grand-fathering.[64]

9 The subjects of fundamental rights under Article 14 are natural persons (including foreigners) and, under Article 19 III, all (domestic) legal persons under private law.[65] Legal persons under public law are generally not entitled to fundamental rights, even if they are not performing a public task.[66] The reason for this, roughly speaking, is that the state, which has an obligation to protect fundamental rights under Article 1 III, cannot at the same time logically be entitled to exercise fundamental rights against itself.[67] The same reasoning extends to mixed-economy companies under private law with state participation: The emergency application brought before the Federal Constitutional Court against the KVBG by *Steinkohlen-Elektrizität AG* (STEAG)[68], a company organized under private law and predominantly owned by municipalities, was dismissed on the grounds that STEAG lacked the capacity to exercise fundamental rights due to its state participation.[69] In contrast, the Federal Constitutional Court, in its Nuclear phase-out

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[59] This is the prevailing opinion in German environmental constitutional law, cf. instead of many *Durner*, in: *Herdegen/Masing/Poscher/Gärditz*, Handbuch des Verfassungsrechts, § 26 Umweltverfassungsrecht, para. 43 with additional reference.

[60] Section 7 I AtomG.

[61] Sections 4, 7 BImSchG.

[62] The BVerfG therefore also denied the protectability of e.g. nuclear licenses in the Nuclear phase-out decision I (BVerfGE 143, 246).

[63] Cf. only *Kahl*, in: *Paal/Poelzig/Fehrenbacher*, Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (473 with additional reference).

[64] *Id*., 474.

[65] *Jarass/Pieroth*, GG, 17th ed. 2022, Article 14, para. 22 et seq.

[66] *Id.,* para. 23 et seq.

[67] However, the lack of property protection under constitutional law does not prevent the legislator from granting legal persons under public law the same property rights via statutory law. See e.g. BGH of March 12th 2015, III ZR 36/14 - (Expropriation for wind farms).

[68] This is Germany´s fifth-largest power producer.

[69] BVerfG of August 18th 2020, 1 BvQ 82/20 - (STEAG KVBG).

decision I, considered *Vattenfall* to have fundamental rights as an exception, even though its shares are indirectly held entirely by the Swedish state.[70] The decisive argument for this was the freedom of establishment (Article 49 TFEU), which in the opinion of the 1st Senate of the Federal Constitutional Court would be violated if a public company from another EU state were denied the possibility of a constitutional complaint.[71]

IV. Climate protection interventions in property

If a protected property position exists, it must also have been encroached upon in the constitutional sense in order for a constitutional claim to arise. The most practically significant types of encroachment among those that are dealt with in this chapter[72] are restrictions of property (Article 14 I 2) and – though rather rare – expropriation (Article 14 III).[73] It should be remembered that such encroachments that raise constitutional issues are those attributable in some way to action by the state. Impairments of property that originate from private individuals are in principle not encroachments within the meaning of constitutional law. The same applies to changes in external circumstances, such as when the location of a plot of land on the waterfront becomes a burden due to increased heavy rainfall.[74]

[70] BVerfGE 143, 246 (para. 184 et. seq.) - (Nuclear phase-out I).

[71] *Roller*, ZUR 2017, 277 (285).

[72] Furthermore, German law recognizes two kinds of inverse condemnation actions, both of which enlarge the opportunity to receive compensation for injury to property rights. One of the forms resembles the Anglo-American law of tort and the other, a traditional inverse condemnation for external effects of public projects. Strictly speaking, however, these figures do not belong to the dogmatics of Article 14, since they are not "interventions of a third kind" but plain legal institutions of statutory law, i.e., claims for compensation that the civil courts grant (in a constitutionally questionable manner) to owners in the case of certain impairments of property even without a statutory basis, *Lege*, ZJS 2012, 44 (47). Claims of expropriation-equivalent and expropriatory intervention are not very promising vis-à-vis climate-protection measures and are probably mostly conceivable only in the case of concrete property damage due to *climate-damaging* behavior by Germany, *Böhm*, *Staatsklimahaftung*, 2021, 29; *Saurer/Purnhagen*, ZUR 2016, 16 (21 et seq.). Fears of future expropriation-like interventions exist in connection with the so-called Natura 2000 areas, should all permanent grassland here be subjected to strict protection regardless of its worthiness of protection, or in the case of the rewetting of peatlands, see *Zukunftskommission Landwirtschaft*, Empfehlungen, Stand August 2022, 145.

[73] *Jarass/Pieroth*, GG, 17th ed. 2022, Article 14, para. 24 et seq., also on other types of intervention.

[74] *Frenz*, Klimaschutzrecht, 2022, 156.

B.

This part surveys the tests that have been developed and applied by judges, and some that have been articulated by commentators, to distinguish between restrictions of property (Article 14 I 2) and expropriation (Article 14 III). The importance of the distinction for the question of compensation has already been presented.[75] A distinction is also necessary because the constitutional requirements for expropriation and restrictions of property differ significantly.[76]

Since Article 14 III 4 assigns the question of compensation to the ordinary (civil) courts, but property-restricting state measures typically have to be defended by administrative law, under the Basic Law both the Federal Court of Justice and the Federal Administrative Court, each as the court of last instance, have developed dogmatic theories and criteria for the demarcation between expropriation and restrictions of property.[77] The dissolution or expansion of the "classical" concept of expropriation,[78] which began in the Weimar Republic, was understandable as a reaction to an increasingly intrusive state, but was abruptly ended by the Federal Constitutional Court with its famous wet gravel extraction decision (*Nassauskiesungsbeschluss*),[79] among other things, by largely returning to the criteria of the "classical" concept of expropriation.[80] The criteria formerly used by the Federal Court of Justice and the Federal Administrative Court to draw the line between expropriations and restrictions of property, such as the severity of the encroachment or the inequality by the encroachment on the particular property owner, were thereafter considered to have no relevance to drawing the line between expropriation and restrictions of property.[81]

This far-reaching renunciation of substantive demarcation criteria by the Federal Constitutional Court may seem counterintuitive. However, this model, which is called "separation model" because of its factual and textual separation between Article 14 I 2 and Article 14 III, offers numerous advantages, not least when applied to property-relevant climate protection law. This is true for climate legislators and property owners alike. In the following, this issue will be discussed for the constellations mentioned at the beginning of this article on the basis of a necessarily superficial[82] discussion of the old and the new expropriation theories. Although the Federal Court of Justice[83] and the Federal Administrative Court[84]

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[75] Part A. II. and below B. IV. 2.

[76] BVerfGE 58, 300 (331) - (Wet graveling). For more details, see BVerfGE 134, 242 (182 et seq.) - (Garzweiler II) and Part C.

[77] *Rossi*, in: *Steinbach*, Verwaltungsrechtsprechung, 2017, 349.

[78] The "classical" concept of expropriation developed in the 19th century was characterized as a *(partial) deprivation* of real property or limited real rights thereto in favor of an undertaking for the public good, carried out by the *administration,* combined with the *transfer of* the deprived property to the beneficiary undertaking, *Papier,* in: *Depenheuer*, Eigentum, Ordnungsidee, Zustand, Entwicklungen, 2017, 93 (94), original emphasis; *Cornils*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 137 (144 with additional reference).

[79] BVerfGE 58, 300 - (Wet graveling). See also the decision issued only one day earlier in BVerfGE 58, 137 - (Mandatory copy).

[80] Cf. *Schlick*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 111 (113): "‚Renaissance' of the classical concept of expropriation."

[81] Cf. only BVerfGE 83, 201 (211 et seq.) - (Federal Mining Act). A very descriptive demarcation in the present context can be found in the first of two decisions of the BVerfG on the nuclear phase-out (BVerfGE 143, 246 (para. 142 et seq.) - (Nuclear phase-out I).

[82] For a comprehensive account of the various theories of demarcation and their historical course, see *Depenheuer/Froese*, in: *vMangoldt/Klein/Starck*, 7th ed. 2018, GG Art. 14 para. 260 et seq.

[83] Cf. only BGHZ 99, 24 (28 et seq.).

[84] Cf. only BVerwGE 48, 143, (147 et seq.).

have now largely followed the Federal Constitutional Court, the previously advocated theories have not become obsolete. To understand German property dogmatics, they are still considered to have a "heuristic value"[85] that should not be underestimated.[86] However, the weaknesses of the old theories are apparent, especially in their application to property-relevant climate protection law, which ultimately makes the separation model appear preferable for issues arising from climate protection measures.

In the order discussed below, the tests chosen for this brief discussion are referred to as the

- special-sacrifice test (*Sonderopfertheorie*)
- theory of magnitude (*Schweretheorie*)
- situational test (*Situationsgebundenheit*)
- separation model (*Trennungsmodell*).

I. The Special-Sacrifice Test of the Federal Supreme Court

Before establishment of the Federal Republic of Germany, the Imperial Court (*Reichsgericht*) had developed the so-called single-act test.[87] According to this test, when private property is taken, in whole or in part, for a public purpose, or when the enjoyment of the property is thereby eliminated, a taking exists if the state action amounts to a special sacrifice.[88] The expropriation was thus characterized by the fact that it constituted a single encroachment on the rights of certain persons or a certain limited group of persons.[89]

After the establishment of the Federal Republic of Germany in 1949, the Federal Supreme Court found a constitutional basis for continuing to apply the single-act test in the equal-protection clause of the Basic Law (Article 3). The court reasoned: if a restriction failed to affect all owners of comparable property in a similar fashion, then the restriction constituted a taking as to those who were having to make a special sacrifice (*Sonderopfer*).[90] The payment of compensation functions to restore equality.[91]

The difference between restrictions of property and expropriation was thus only gradual; restrictions of property burdening contrary to equality could "turn" into an expropriation above a certain limit.[92] This concept forms the constitutional underpinning of the special-sacrifice test,[93] also known as the modified

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[85] *Ehlers*, in: VVDStRL 51 (1992), 211 (226).

[86] The various criteria continue to be used in today`s property dogmatics, for example in the context of the proportionality test.

[87] See only RGZ 128, 165 (171). Further case law cited above and in *Ossenbühl*, Staatshaftungsrecht, 6th ed. 2019, 192 (Fn. 204).

[88] The Reichsgericht based its decision on Sections 74, 75 Introduction to the General State Laws for the Prussian States. See *Ossenbühl*, Staatshaftungsrecht, 6th ed. 2019, 192.

[89] *Id.*

[90] See BGHZ 6, 270 (280); 15, 268 (271). Subsequently, the Federal Court of Justice used additional criteria for a special sacrifice, such as the severity and scope of the encroachment, *Papier*, in: Dürig/Herzog/Scholz, GG, 99th EL September 2022, Art. 14 para. 465 with additional reference; *Ossenbühl*, Staatshaftungsrecht, 6th ed. 2019, 193. According to the special-sacrifice theory, an expropriation always existed (even beyond a violation of equality) if the essence of property was affected (Article 19 II GG), BGH, VerwRspr 1973, 801 (803).

[91] Cf. *Maurer*, Verwaltungsrecht AT, 20th ed. 2020, § 27 para. 16.

[92] So-called "turnover theory", see only *Roller*, ZUR 2017, 277 (279).

[93] *Depenheuer/Froese*, in: *vMangoldt/Klein/Starck*, 7th ed. 2018, GG Art. 14, para. 265.

single-act test[94]. Thus, in the area of agriculture, limitations on use and management of land did not constitute takings, according to the Federal Supreme Court, as long as the limitations applied generally and did not single out specific property owners.[95]

Superficially, this test might seem to work well with climate-protective measures which, by their nature, have broad application. The larger the circle of affected parties, the more likely it is that the climate legislator can assume that property is socially bound without compensation.[96]

From the perspective of the property owner, problems already arise in the present context with the concept of special sacrifice at the level of fundamental rights dogma.[97] As shown above, the areas of protection under fundamental rights are to be understood broadly in principle, and the climate-damaging use[98] of property (with the exception of chattels) is also covered by the area of protection of freedom of ownership, i.e. by a constitutional right to freedom. However, the application of the special sacrifice theory has now led to the fact that, contrary to the general rule, encroachments on fundamental rights (in property) are not qualified as severe (expropriation) or less severe (restriction of property) encroachments according to their relevance under constitutional property rights, but under the right to equal protection under the law.[99] The constitutional right to freedom, with its higher justification requirements compared to equal protection law, is intended precisely to protect the owner from the intrusive "climate state,"[100] should not be weakened by the concept of special sacrifice.[101]

Further important reasons against the application of the special-sacrifice theory in climate protection law are its lack of manageability in practice and - as a consequence - its lack of legal certainty for climate legislators and landowners alike. This is especially true in view of the imposition of obligations on landowners. Particularly in the case of today's typical regulations, which are usually directed neither exclusively to the general public nor to an individual, but rather to specific groups (such as the climate-protection regulations of building law that impose obligations on "builders"), the special-sacrifice theory "does not provide a criterion by which it can be determined when there is a special intervention that affects unequally and when there is a general limitation of the group of property that is being considered."[102] Therefore neither climate-protecting legislators nor affected land or building owners would be able to anticipate whether courts would (still) regard a certain climate-protective regulation as restrictions of property or (already) as (legislative) expropriation in the event of a dispute, or whether a regulation conceived as restrictions of property would not "turn into" expropriation "at the last minute" in court proceedings. As a result, the question of compensation - which is highly relevant for legislators (state budget) and owners alike, especially in the area of climate protection - would always remain in limbo until a court decision becomes legally binding, possibly many years or even decades later.

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[94] *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 463.

[95] See BGH, Betriebs-Berater 1956, 511 and BGH, NJW 1953, 582.

[96] Cf. *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 466.

[97] For fundamental criticism of the special-sacrifice theory, see *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 466 et seq.; *Depenheuer/Froese*, in: *vMangoldt/Klein/Starck*, 7th ed. 2018, GG Art. 14, para. 267.

[98] Regarding the opposing view, see above Part A. III.

[99] Cf. *Rossi*, (fn. 4), 349.

[100] Part A. I.

[101] Cf. *Rossi*, (footnote 4), 349.

[102] This was already the basic criticism of BVerwGE 5, 141 following *Forsthoff*, Lehrbuch des Verwaltungsrechts, 6th ed. 1966, Vol. I, 286.

The consequences of the special-sacrifice theory in terms of climate protection law also become apparent in the area of the energy transition, namely with regard to the phasing out of coal-fired power plants. Since the German electricity market in the area of electricity generation from fossil fuels is essentially made up of five large producers,[103] fundamental energy policy decisions in this area (such as the phase-out of coal) necessarily affect the ownership of individual players. According to the special-sacrifice theory, it would not be entirely impossible that the shutdown of certain coal-fired power plants (or mines) could be regarded as an expropriation because of the unequal distribution of burdens compared to other electricity producers (or even other types of power plants). In this case, however, the energy transition in the (fossil) power sector would sometimes be dependent on the strict expropriation requirements of Article 14 III. Furthermore, the legislature could not "benefit" from the significantly lighter intervention requirements of the restrictions of property in this area of climate protection either,[104] in the structuring of which it is entitled to a broad scope in terms of climate, energy and budgetary policy (also and especially in the structuring of possible compensation).

II. The test of magnitude of the Federal Administrative Court

The problems described in the preceding discussion ultimately led the Federal Administrative Court to turn away from the special-sacrifice test.[105] In its 1957 landmark decision in this regard, the Court stated, "[A] look at the property law provisions handed down from legal history shows that it is not the formal criterion of equal or unequal encroachment, but that of the material nature and severity of the encroachment that has been decisive for its character as a determination of the content of property or as an expropriation."[106] Therefore, the criterion of delimitation, even under the Basic Law, is not a special sacrifice, but "the material moment of the severity and scope of the encroachment."[107] To use solely formal criteria for delimitation, as the special-sacrifice test, would be inconsistent with the fact that the property guarantee aims to protect property as a "value-related cultural asset."[108]

According to the test of magnitude*,* an expropriation existed if the interference with the property affected the material existence and value of the property right guaranteed by Article 14 I so severely that the owner could not be expected to accept it without compensation.[109] Interferences below this threshold were merely restrictions of property without compensation.[110] Thus, it was still possible to "flip" a restriction of property into eminent domain.[111]

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[103] RWE, LEAG, EnBW, E.ON, and Vattenfall, see Federal Network Agency (*Bundesnetzagentur*), Monitoring Report 2022, 50. On RWE`s (now) dominant position, see *id*., 5.

[104] In "financial" terms, however, there would be no difference in the case of the coal phase-out, since the legislature has also provided for compensation in the context of the coal phase-out regulated by restrictions of property (and contracts).

[105] Fundamental BVerwGE 5, 143. But see *Cornils,* NJW 2017, 3100 (3100 et seq.) on the later convergence of the BverwG`s theory of magnitude with the BGH`s special-sacrifice theory.

[106] BVerwGE 5, 143.

[107] BVerwGE 5, 143.

[108] BVerwGE 5, 143.

[109] *Depenheuer/Froese*, in: *vMangoldt/Klein/Starck*, 7th ed. 2018, GG Art. 14, para. 270. Thus the theory of magnitude was in turn based on *Stödter*`s theory of reasonableness (cf. only *Stödter,* Öffentlich-rechtliche Entschädigung, 1933, 208).

[110] *Depenheuer/Froese*, in: *vMangoldt/Klein/Starck*, 7th ed. 2018, GG Art. 14, para. 270.

[111] In later times, the BVerwG (like the BGH) also resorted to the situational test discussed below, *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 508 with additional reference.

The problems of the magnitude test also become apparent when it is applied to the climate protection constellations of interest here. Since, according to this test, the qualification of an intervention depends on the individual severity of the owner's burden, this would ultimately lead to a far-reaching subjectification of the issue of expropriation and indirectly also of climate protection. A ban on the use of oil and gas heating systems, for example, might impose a severe economic burden on one owner, but constitute a relatively minor inconvenience to another.[112]

Another reason why the magnitude of the burden cannot be the sole deciding criterion is that it fails to consider the perspective of the legislators who are pursuing constitutionally mandated (Article 20a) objectives for the welfare of the broader public.[113] This is illustrated by the example of the coal phase-out, which is central to the energy transition: If, according to the magnitude test, the total cessation of power plant operation[114] by 2030 might constitute an expropriation to be assessed under Article 14 III due to its intensive impact, then an owner whose property would be seriously impacted might be able to subject the entire climate project, even one that is of paramount public interest, to the strict expropriation requirements.

Finally, according to German fundamental rights doctrine, criteria such as the severity and scope of an encroachment are not to be assessed at the encroachment level, but rather at the justification level (proportionality test). In all of the factual constellations discussed here, it is only at this level that the owner's interests can be properly assessed and weighed against the common good and opposing constitutional interests, such as the climate protection requirement (Article 20a).[115]

III. Situational test

In order to open up a broader, compensation-free scope for the legal order of land use under planning law, the Federal Court of Justice expanded the special-sacrifice doctrine to include the topic of the "situation-bound nature of property."[116] According to this doctrine, real property can already be burdened "by its nature" with a limited obligation to refrain from individual powers of use flowing from the property right that are incompatible with the location of the property (immanent restriction of the scope of protection) due to a special location (for example, in a nature reserve or on a dike). Since such uses are therefore not part of the property "from the outset," a prohibition of such uses directed into the future (such as a ban on construction) would not be an expropriation requiring compensation due to the lack of a deprivation of a property position, but merely a concretization of the owner's powers without compensation.[117] Stated in reverse, the dividing line between social obligation and expropriation is always traversed if the present

[112] The same could apply to a compulsory connection and use ordered by municipal law (bylaws) that does not provide for any exceptions or exemptions.

[113] For environmental law, see *Ehlers*, in: VVDStRL 51 (1992), 211 (226 with reference).

[114] Including e.g. opencast lignite mines, see above.

[115] For this purpose, Part C. II.

[116] *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 499. See also BGHZ 23, 30 - (Green space).

[117] The respective state regulation therefore merely "condenses" an already existing "obligation into a duty" (BGH, No. 18 VerwRspr 1961, 68 (69)). Thus, the situational test is based in essence on the principle set out in Part A. III. 7. already mentioned.

beneficial use (Privatnützigkeit) of the subject property (which is protected by Bestandsschutz, see above) is destroyed as a result of permanent limitations in use.[118]

The fact that property had not been devoted to a certain use in the past does necessarily mean that this use can be prohibited without compensation,[119] although many cases contain dicta to the contrary. This is illustrated by two cases. In one case, an owner whose land had never been developed, and was being used as a park, was entitled to compensation for downzoning (having had the right to develop the property taken away).[120] In another case[121], the court ruled that it constituted a taking to deny a permit for gravel extraction on property adjacent to a municipal drinking water well. Gravel extraction had never been conducted on the property. Yet gravel extraction would be consistent with the character and the natural attributes of the property, because there were other gravel operations in the area.

What, then, is the potential application of this test to the three groups of scenarios in the call for papers? Obviously, the test will have no application to outright expropriations, but it might find application to revoking permits and perhaps phasing out certain uses. The fact that even a substantial negative impact on land can be justified on the basis of situational ties is shown by the case law of the Federal Administrative Court on flood protection, a case that will become increasingly relevant[122] in the realm of climate protection law. In one such decision,[123] the Federal Administrative Court did not consider the raising and extension of a dike on riparian property to constitute an expropriation, even though the dike took up almost half of the property area after its extension and consequently prevented agricultural use of that half of the property.[124] Due to its location, the riparian property was exposed to an obligation from the outset through its necessary membership in a dike association. In addition, claims on riparian land, which, as in the present case, is exposed to certain stresses due to its location, are generally easier to bear. Therefore, the dike expansion was considered an uncompensated burden on the property.[125] Even if this decision was not issued for flood protection related to climate change, the "obligation by virtue of proximity to the shore" used, at least analogically, as a justification for modern climate protection measures. This is particularly true since climate protection, especially in its danger prevention variant (combating the consequences of climate change), has become much more important since its inclusion in the Basic Law in 1994 and because of the Federal Constitutional Court's climate decision[126].

From the perspective of the owner, the concept of the "situation-bound nature of property" is hopelessly nebulous.[127] This can be seen again in the case constellations concerning flood protection: When would legally mandated construction or removal of a dike be "situation bound" and when not? The decision will

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[118] *Nüßgens/Boujong*, Eigentum-Sozialbindung-Enteignung, 1987, 212. This test can be traced to the pre-Basic-Law reduced substance test (Substanzminderungstheorie), which defines a taking as a state action removing the material substance of the essence of ownership rights, destroying or decisively impairing their crucial economic functions. *Kimminich*, Article 14, 1992, 196.

[119] Cf. *Leisner*, Eigentumswende?, DVwBl 1983, 61 (67); *Ossenbühl*, Staatshaftungsrecht, 6th ed. 2019, 195; *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 500.

[120] BGH, NJW 1964, 202.

[121] BGH, NJW 1973, 623.

[122] Cf. only the possibility of "early transfer of possession" introduced in 2017 by the Flood Protection Act II in Section 71a WHG, which substantively constitutes expropriation within the meaning of Article 14 III.

[123] BVerwGE 15, 1.

[124] *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 508.

[125] *Id.*, para. 504.

[55] *Schneider*, DÖV 1965, 292.

[126] BVerfGE 157, 30 - (Climate decision).

[127] *Schlick*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 111 (113).

depend on factual circumstances such as the burden on the owner. This is always an evaluative, value-laden decision,[128] which is more appropriately to be decided at the level of justification.

III. Separation model or "narrow" concept of expropriation

The Federal Constitutional Court partially resolved the difficulties of the expropriation tests - dealt with here in a very cursory and excerpted manner - in 1981 with the wet gravel extraction decision (*Nassauskiesungsbeschluss*)[129] by effectively narrowing or "marginalizing"[130] the concept of expropriation. According to this theory, the majority of property-relevant regulations are to be qualified as (basically uncompensated) restrictions of property. Compensation is only to be granted in "exceptional cases." As shown below, which cases are "exceptional" and which are not remains unclear.

1. Marginalization of the expropriation

The Federal Constitutional Court responded to the Federal Supreme Court's referral in the wet gravel extraction case (*Nassauskiesungsbeschluss*) with two essential statements: First, an expropriation within the meaning of Article 14 III is exclusively the deprivation of a concrete property right,[131] not, for example, the consequences of (even severly burdensome) regulatory measures such as those under the Water Resources Act. Second, the courts may not award compensation for expropriation without statutory authority.[132]

The rigidity of this case law has the consequence that restrictions of property and expropriations are necessarily in an either/or relationship: the former practice of "flipping" an excessively burdensome restriction of property into an expropriation requiring compensation is no longer permitted.[133] Further, compensated expropriations and uncompensated restrictions of property are not to be differentiated according to factual criteria, such as the intensity of the burden on the owner, a violation of equal protection, or situation-relatedness, but rather according to formal criteria such as the form and purpose of the measure before the court.[134] It was obvious that the Federal Supreme Court was concerned with disempowering the specialized courts on the expropriation and compensation issue and wanted to preserve the relevant powers of the legislature.

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[128] Cf. *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 508.

[129] BVerfG 58, 300 (on the decision and the following *Schlick*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 111 (113)). A gravel pit operator had been refused the permission required under the Water Resources Act (WHG) to excavate gravel in the groundwater zone (so-called wet excavation) on the grounds that the property in question was located in the protection zone of a waterworks and that gravel exploitation could contaminate the water and endanger the water supply. The entrepreneur did not file an action for the granting of a permit, but directly filed an action for compensation. The BGH considered the provisions of the WHG, which denied any legally secured possibility of access to the groundwater without a claim for compensation, to be a transgression of the social obligation of property (Article 14 I 2, II) because of the associated severity and scope for the entrepreneur, which would indicate an obligation to pay compensation. The BVerfG, which dealt with the question after referral by the BGH, seized the favorable opportunity to bring down the expropriation doctrine of the BGH (see above), which in its view was problematic.

[130] *Cornils*, NJW 2017, 3100 (3101).

[131] *Schlick*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 111 (113).

[132] *Id*. On the whole, already above Part A. II.

[133] BeckOK *GG/Axer*, 53rd ed. (as of November 15th 2022), GG Art. 14 para. 12. The German separation model thus differs significantly from the expropriation-law jurisprudence of the ECtHR and the CJEU.

[134] Fundamental BVerfGE 53, 300 (330 et seq.) - (Wet graveling); 100, 226 (240) - (Protection of historical monuments).

According to the Federal Constitutional Court, a restriction of property is "the general and abstract determination of rights and obligations by the legislature with regard to such legal interest that are to be understood as property in the sense of the constitution."[135] Expropriation, on the other hand, is "directed at the complete or partial deprivation of concrete property interests in the sense of Article 14 I 1 for the fulfillment of certain public purposes."[136] In addition, e.g. in its first nuclear phase-out decision, the Federal Constitutional Court ruled that an expropriation must possess a "constitutive expropriation characteristic"[137] - like the "classical" concept of expropriation - a procurement of rights for the benefit of the public sector or an otherwise beneficiary of expropriation.[138] The consequence of this "narrow" concept of expropriation in climate protection law is that the vast majority of property-relevant regulations are merely restrictions of property that are to be tolerated without compensation.

2. Compensatory restrictions of property

In principle, the legislator is not precluded - especially in the area of climate protection[139] - from enforcing property-restricting restrictions of property that it deems necessary in the public interest, even in cases of hardship.[140] However, the legislature must avoid disproportionate burdens on the owner, or burdens that are contrary to equal protection, by means of provisions for the award of compensation.[141] By means of such compensation, the constitutionality of an otherwise disproportionate or inequitable restrictions of property in the sense of Article 14 I 2 can be ensured.[142]

The concept of restrictions of property with the potential of an award of compensation is of particular importance in cases in which a regulation does not constitute an expropriation, but, comparable to an expropriation, so intensively interferes with property rights protected under Article 14 that it devalues these rights. Such a constellation is, for example, the basis of the coal phase-out, in which the legislator provided for compensation in the amount of EUR 4.35 billion for the closing of lignite-fired power plants.

However, the concept of "restrictions of property providing compensation" should not open the door to blanket awards of compensation in cases of hardship. For the protection of private property ensconced in Article 14 I 1 requires only that the legislature take necessary precautions to avoid a disproportionate burden on owners and preserve the private beneficial use of private property as far as possible.[143] The legislature must therefore first resort to transitional regulations, exemption and exemption provisions, and the use of other administrative and technical precautions.[144] If an award of compensation is not

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[135] BVerfGE 52, 1 (27) - (Allotment garden).

[136] BVerfGE 70, 191 (199) - (Fishing districts).

[137] BVerfGE 143, 246 (para. 254) - (Nuclear phase-out I).

[138] BVerfGE 143, 246 (para. 251 et seq.) - (Nuclear phase-out I). Such a procurement of goods does not only lie in the (in practice most frequent case) of a transfer of land ownership, but also in the fact that other items capable of ownership (see above Part A.) are transferred to the state, such as claims, rights *in rem* or rights to companies, *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 645 et seq.

[139] BVerfG 57, 30 - (Climate Decision).

[140] BVerfGE 143, 246 (para. 259) - (Nuclear phase-out I).

[141] BVerfGE 143, 246 (para. 259) - (Nuclear phase-out I) following, inter alia, BVerfGE 58, 137 (149 et seq.) - (Mandatory copy).

[142] BVerfGE 143, 246 (para. 259) - (Nuclear phase-out I).

[143] BVerfGE 143, 246 (para. 259) - (nuclear phase-out I); 100, 226 (245) - (Protection of historical monuments).

[144] BVerfGE 100, 226 (245) - (Protection of historical monuments). Since a (hypothetical) complete ban on the use of vehicles with internal combustion engines that have already been purchased would probably fall within the scope of Article 14 (and not the general freedom of action under Article 2 I, see above) due to its burdening effect, the legislature would have to

possible in an individual case, or is only possible with unreasonable effort, the legislator might order that the property be purchased by the state at market value.[145] Financial compensation therefore remains - as in the case of the nuclear phase-out – only the *ultima ratio*.[146] However, it should also be noted in the present context that even in the case of a financial compensation obligation, according to case law, there is no claim to full amortization of the investments made.[147]

To determine whether a restriction of property will support a claim for compensation is determined by a "weighing of the intensity of the burden and the weight of the reasons to be cited to justify it."[148] Since the concept of "restrictions of property requiring compensation" is intended to ensure that the narrow concept of expropriation used by the Federal Constitutional Court does not preclude any necessary claims for compensation,[149] the courts have ultimately resorted to the substantive criteria already discussed in the context of this weighing process (the magnitude and scope of the encroachment, the degree to which private beneficial use is impaired, the situation-bound nature of the encroachment, and also the concept of special sacrifice).[150] Thus, the previously postulated strict separation between Article 14 I 1 and Article 14 III is at least partially relativized again.[151]

2. Separation model and climate protection law

In the wake of the rulings of the Federal Constitutional Court, the Federal Supreme Court and the Federal Administrative Court decided a number of cases concerning regulations that restricted the use of land for reasons of nature and landscape protection.[152] In general, such regulations are regarded by the courts as restrictions of property (Article 14 I 2) rather than as expropriations (Article 14 III).[153] Even in the factual scenarios dealt with here under climate protection law, the vast majority of regulations are to be regarded merely as restrictions of property (sometimes subject to compensation), not as expropriations.

The effects of the separation model on property-relevant climate protection are first evident in the obligations for landowners in building law. Limits on CO_2 emissions from buildings and other structures are generally to be classified as restrictions of property.[154] The vast majority of the provisions of urban planning law that are relevant to climate protection are also to be qualified as restrictions of property.[155] The same is true for climate protection provisions in property development plans.[156] Article 14 III would not be directly applicable to construction law relevant to climate protection even if, in the course of the

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provide for a staged conversion from vehicles with conventional to electric drives as compensation in the case of such a ban, cf. *Frenz*, Klimaschutzrecht, 2022, 159 para. 149.

[145] BVerfGE 100, 226 (245) - (Protection of historical monuments).

[146] On the subsidiarity of financial compensation in connection with the coal phase-out *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 189 et seq.

[147] *Federal Government*, Draft Coal Phase-out Act, BT-Drs. 19/17342, 88.

[148] BVerfGE 58, 137 (150) - (Mandatory copy).

[149] Fundamental to this, for example, BVerfGE 58, 137 (249 et seq.) – (Mandatory Copy); 79, 174 (192) – (Road traffic noise); *Rozek*, Die Unterscheidung von Eigentumsbindung und Enteignung, 1998, 76 et seq.

[150] See Part C.

[151] Critically, therefore, *Cornils*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 137 et seq.

[152] See generally *Thomas Lundmark*, Landscape, Recreation, and Takings in German and American Law, 1998.

[153] Constant case law, see only BVerwGE 94, 1; 84, 361 (370 et seq.); BGHZ 90, 17 (24 et seq.).

[154] *Gaßner*, Sanierungsvorgaben für bestehende Gebäude, Rechtsgutachten 2011, 10.

[155] *Battis*, Rechtsfragen zur ökologischen Stadterneuerung, Rechtsgutachten 2009, 52.

[156] Section 9 BauGB; *Battis*, Rechtsfragen zur ökologischen Stadterneuerung, Rechtsgutachten 2009, 53.

general reorganization of construction law, the legislature were to abolish existing rights for which there is no equivalent in the new law.[157]

The forced expiration of legally obtained permits does not constitute an expropriation despite the substantial economic effects for property owners who have lost the beneficial use allowed by the permits. This results from the narrowing of the concept of expropriation to the procurement of goods. Thus, since the decommissioning of coal-fired power plants does not constitute a procurement of goods, doing so does not constitute an expropriation in the constitutional sense.[158] On the other hand, the government or private entities regularly acquire easements to expand the electric power grid, [159] to store CO_2,[160] and to install flood-protection facilities.[161] These easements will ordinarily constitute expropriations, since the granting of rights *in rem* also constitutes a partial deprivation of property ownership.[162] The same reasoning would apply to the acquisition of easements for CO_2 storage facilities under the KSpG. Admittedly, there is legislative leeway here. Public rights to lay pipelines can be structured by the legislature in terms of easements constituting expropriations[163] or by regulations[164] that constitute restrictions of property.[165]

3. Advantages of the separation model for climate legislators and property owners

Notwithstanding the arguments of the critics,[166] the authors of this chapter contend that the separation model offers several advantages to climate legislators and also to property owners:[167]

- The separation model avoids leaving the balancing of the enhancement and protection of the climate and the protection of private property to the discretion of judges, something that would constitute a *gouvernment des juges*.[168] The often difficult issues of delimitation and compensation are largely removed from the courts and left to the democratically legitimized legislature. The legislature can decide in the first instance whether, and to what extent, climate

[157] BVerfGE 83, 201 (211 et seq.) - (Federal Mining Act).

[158] Only in the special case of assigning a strategic reserve function to a decommissioned power plant would the more extensive requirements of Article 14 III probably have to be met, *Klinski*, Juristische und finanzielle Optionen der vorzeitigen Abschaltung von Kohlekraftwerken, Rechtsgutachten 2015, 26.

[159] Cf. Sections 44b to 45b of the EnWG; Section 27 of the NABEG.

[160] Cf. Section 15 KSpG.

[161] Cf. Sections 71, 71a WHG.

[162] *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 645.

[163] Cf. Section 45 EnWG.

[164] Cf. Section 76 of the Telecommunications Act (TKG).

[165] *Ossenbühl*, Staatshaftungsrecht, 6th ed. 2019, 210 with reference.

[166] See only *Cornils*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 137 et. seq.; *Papier*, in: *Dürig/Herzog/Scholz*, 99th EL September 2022, GG Art. 14, para. 311 et seq.

[167] With similar findings on German environmental law *Winter*, in: Property and Environmental Protection in Europe, 2015, 181.

[168] In this respect, the VG Aachen aptly commented on the high-profile case in the matter of opencast lignite mining in the municipality of Lützerath (KlimR 2022, 125 para. 93): “The questions in the design of the climate protection instruments, in the context of which various fundamental rights positions are to be balanced both currently and intertemporally, are not yet to be decided by court decisions relating to individual projects, but by the legislature in the context of a holistic energy and climate protection policy.”

protection is to be implemented by means of expropriation (Article 14 III) or by restrictions of property (Article 14 I 2) without having to fear intervention by the courts many years later.[169]

- If the legislature employs restrictions of property, the legislation can address the issue of individual burdens with compensatory provisions. And the form of compensation, whether financial or a form of mitigations, is up to the legislature.[170]
- Under the separation model, the majority of climate protection measures constitute uncompensated restrictions of property and not expropriations, including the severe encroachments on property that will be increasingly necessary. Only in "exceptional cases" of unreasonable restrictions of property will individual landowners be entitled to compensation.
- For affected landowners, the separation model is accompanied by an increased degree of legal certainty. Since the German courts have followed the Federal Constitutional Court's concept of expropriation, landowners will be able to count on the fact that the legislative or regulatory classification of the encroachment as an expropriation on the one hand, or as a restriction of property on the other, will routinely be upheld in any court proceedings.
- Due to its fine-tuning, the proportionality test that is now to be employed is better suited to weighing the opposing interests (property ownership protection vs. climate enhancement and protection) against each other than if done on a case by case basis.[171]

[169] Thus, for property-relevant environmental law, also *Winter*, in: Property and Environmental Protection in Europe, 2015, 181. In the legislative practice of climate protection law, this leads to the fact that the legislator can be quite "self-confident" in the distinction between expropriation and restrictions of property; an illustrative example of this is the explanatory memorandum to the KVBG (BT-Drs. 19/17342, 87 et seq.), which states almost apodictically: "The measures of this law are [...] in the absence of a state procurement of goods, not expropriations subject to compensation within the meaning of Article 14 III 2, 3, but restrictions of property pursuant to Article 14 I 2."

[170] See also *Winter*, in: Property and Environmental Protection in Europe, 2015, 181.

[171] Cf. *id*.

C.

This part deals with the constitutionality of restrictions of property and expropriation. The legitimation basis for the climate-protection measures mentioned at the beginning are, in particular, the constitutional goods opposing the fundamental right to property, namely the climate protection requirement (Article 20a) and the fundamental rights of third parties (Article 2 II 1, Article 14) (I.). Essentially, restrictions of property are already constitutional if they pursue a reasonable public interest and comply with the principle of proportionality arising from fundamental rights and the rule of law (II.).[172]

I. Conflicting constitutional interests in climate protection

As a fundamental rights barrier of Article 14, Article 20a requires the state to protect "the natural foundations of life [climate] and animals, also in responsibility for future generations". Climate protection has constitutional status because a democratic political process is organized on a shorter-term basis via electoral periods, but thus structurally runs the risk of being more cumbersome in responding to ecological concerns that need to be pursued over the long term, and because the future generations that are particularly affected today naturally have no voice of their own in the political decision-making process.[173] Since Article 20a is not a fundamental right, but a state objective, third parties cannot derive from it an individual claim to legislative action - for example, to the enactment of climate-protective laws restricting property or even expropriation.

However, the provision contains a climate protection requirement (*Klimaschutzgebot*) that is binding for all state powers[174] and that will have a lasting impact on the scope of protection of Article 14 in the constellations discussed here. Article 20a obliges the legislature to take measures against anthropogenic global warming (*greenhouse gas mitigation burden*) and, in the alternative, to take adaptation measures.[175] In this context, internationally oriented action is also required.[176] However, Article 20a gives the legislature considerable leeway.[177] It has a broad prerogative to concretize its mandate, e.g. in the formulation of the climate protection targets in the KSG.[178] At the same time, Article 20a also forms the limit for encroachments on property; encroachments on fundamental rights in Article 14 are only permissible if they do not violate Article 20a.[179] An owner would not have to accept climate protection measures that are obviously misguided and incompatible with Article 20a.

In the Climate Decision, the Federal Constitutional Court also strengthened the fundamental rights of third parties affected by climate change - to be more precise - by the current inaction of the legislature in this regard and by more severe state intervention necessary in the future with regard to compliance with

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[172] Expropriations, on the other hand, must - in addition to a stricter proportionality test (for this see BVerfGE 134, 242 (182 et seq.) - (Garzweiler II) - correspond to an *urgent* public interest and legally establish compensation.

[173] BVerfGE 157, 30 (para. 206) - (Climate decision).

[174] BVerfGE 157, 30 (para. 205) - (Climate decision).

[175] *Jarass/Pieroth*, GG, 17th ed. 2022, Art. 20a para. 24 with reference to BVerfG 157, 30 (para. 149 et seq.) - (Climate decision).

[176] BVerfGE 157, 30 (para. 201) - (Climate decision). In this context, the state cannot evade its responsibility by referring to greenhouse gas emissions in other states, BVerfGE 157, 30 (para. 203) - (Climate decision).

[177] BVerfGE 157, 30 (para. 207) - (Climate decision).

[178] BVerfGE 157, 30 (para. 208) - (Climate decision).

[179] *Jarass/Pieroth*, GG, 17th ed. 2022, Art. 20a para. 16 with reference to BVerfGE 157, 30 (para. 190) - (Climate decision).

the CO_2 residual budget.[180] According to the Federal Constitutional Court, Article 2 II 1 (life, physical integrity) and Article 14 oblige the legislature to design the reductions in CO_2 emissions that are constitutionally required under Article 20a up to climate neutrality in a forward-looking manner in such a way that the associated losses of freedom continue to be reasonable despite increasing climate protection requirements and that the reduction burdens are not distributed over time and between generations unilaterally to the detriment of the future (*intertemporal* and *intergenerational safeguarding of freedom*).[181] It is obvious that this requires and will require interventions in property (both in the form of restrictions of property and expropriation).

II. Proportionality of property-relevant restrictions of property in climate change law

Any property-relevant climate protection measure (also) based on these constitutional goods must comply with the requirements of the proportionality test: (1) the constitutionality of the purpose; (2) the appropriateness *of* the means; (3) the necessity for the incursion; and (4) the balancing test, also called the *prohibition* against disproportionality and, confusingly, the principle of reasonableness in the *narrow* sense. In assessing the requirements of proportionality, the legislature has a broad scope (subject to only limited judicial review). In view of the overriding importance of climate protection (Article 20a), this applies in particular to basic energy policy decisions,[182] such as the phase-out of coal-fired power generation and its design (e.g. in the form of revoking/letting licenses expire).

1. Legitimate target

The climate protection legislator has a wide scope in assessing the legitimate objective,[183] which can only be reviewed by the courts to a limited extent, i.e. in terms of "evidenced lack of objectivity"[184] . Legitimate objectives include the implementation of the requirements of Article 20a, the protection of the fundamental rights of third parties and, last but not least, compliance with international and European climate protection requirements.[185] When assessing the legitimate objective, any exemplary effect of a climate protection project for other countries can also be taken into account.

In view of the great importance of climate protection and the protection of fundamental rights, as well as the broad scope for forecasting, the requirement of a legitimate objective hardly poses any problems in the case law on the constellations of interest here. A legitimate objective should regularly underlie the subsequent restriction (or letting expire) of even "cost-intensive" permits. The termination of coal-fired power generation by the KVBG serves climate protection under Article 20a because of the high GHG emissions it prevents, and the protection of the population under Article 2 I 1 because of the health

[180] Here, Article 20a can have a reinforcing effect.

[181] BVerfGE 157, 30 (para. 192) - (Climate decision). The climate protection requirement of Article 20a can have a strengthening effect on the fundamental rights protection of third parties, BVerfGE 157, 30 (para. 193) - (Climate decision).

[182] BVerfGE 134, 242 (para. 287) - (Garzweiler II).

[183] BVerfGE 143, 246 (282) - (Nuclear phase-out I); BVerfGE 128, 1 (39) - (Genetic Engineering Act).

[184] Cf. only BVerwGE 154, 153 (para. 12) - (Road planning and mining).

[185] For example, with regard to the Union-friendliness of the Basic Law and Article 191 of the Treaty on the Functioning of the European Union (TFEU).

hazards.[186] Last but not least, the coal phase-out also serves compliance with the Paris Agreement and thus the fulfillment of obligations under international law.[187] To deny the legitimate goal of the KVBG would mean to "constitutionally neglect the public interest of climate protection, which is strong with the ratification of the Paris Climate Agreement." [188]

In the area of obligations on landowners, a legitimate objective underlies, for example, a compulsory connection to and use of a district heating network, because efficient cogeneration can reduce CO_2 emissions by 20-25% compared with domestic heating and electricity generation in large power plants, and thus serves to protect the climate.[189] In a recent decision on (private) building law, the Federal Court of Justice (BGH) considered the provision in Section 16a NachbarG Berlin, which obliges property owners to tolerate thermal insulation subsequently installed by the neighbor over the adjacent property, to be covered by the legitimate objective of climate protection. The regulation is aimed at saving energy in existing residential buildings and thus at least indirectly serves the constitutionally required climate protection. [190]

2. Appropriateness

On the second issue, that of appropriateness, one ascertains whether the means bears a rational or logical relationship to the ends.[191] In other words, the proposed action must logically serve the attainment of the identified public purpose. At this level, too, the legislature has latitude, "which relates to the assessment and evaluation of the actual circumstances, to the prognosis that may be required, and to the choice of means to achieve the objectives of the law."[192] In the present context, it is of decisive importance that for suitability already the *possibility to* achieve the purpose of the law by means of the statutory regulation is sufficient.[193] A regulation is only no longer suitable if it can in no way promote the achievement of the purpose of the law or even has the opposite effect. [194]

Allowing permits to expire or imposing obligations etc. are not per se unsuitable (or not necessary) because the state does not take action against other polluter groups if only the (partial) measures taken are in themselves suitable for risk reduction and are in themselves proportionate.[195] Whether and to what extent the state sets priorities and which risk groups it takes action against is subject to its scope for assessment within these limits. [196]

Since target funding is already sufficient, the objection often heard in the public debate and especially from property owners that the CO_2 savings that could be achieved as a result of a (property-relevant) law are very small in relation to the total amount of CO_2 currently emitted globally does not speak against the

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[186] *Däuper/Michaels* EnWZ 2017, 211 (215); *Kahl*, in: *Paal/Poelzig/Fehrenbacher,* Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (476 with additional reference).
[187] *Däuper/Michaels* EnWZ 2017, 211 (215).
[188] *Franzius*, NVwZ 2018, 1585 (1586).
[189] *Kahl/Gärditz*, Umweltrecht, 12th ed. 2021, 240, para. 76.
[190] BGH of July 1st 2022, V ZR 23/21 (para. 31) - (Cross-border thermal insulation).
[191] BVerfGE 143, 246 (para. 285 et seq.) - (Nuclear phase-out I).
[192] Cf. only BVerfG, NVwZ 2022, 861 (870) - (Wind energy investment companies).
[193] *Id.*
[194] *Id.*
[195] *Appel*, in: *Koch/Hofmann/Reese*, Umweltrecht, 5th ed. 2018, § 2 para. 143.
[196] *Id.*

suitability of a climate protection measure.[197] "Such an objection could be raised against every national regulation, every state regulation, every municipal regulation, and a fortiori against every concrete climate protection measure of the administration and every climate protection-friendly legal interpretation of a specialized court in an individual case."[198] Fortunately, the Federal Constitutional Court made this clear in the climate decision and - due to the broad impact of the decision - also made it widely visible. Therefore, the objection raised in connection with the shutdown of coal-fired power plants that an individual causal immission contribution to climate change cannot be attributed to a single coal-fired or other fossil-fired power plant is not valid.[199] Neither the so-called "waterbed effect"[200] nor the "rebound or replenishment effect"[201] preclude suitability. [202]

3. Necessity

A restriction of property is required if there is no other means available that is equally effective but less restrictive of property.[203] Problems do not arise - not least because of the legislative leeway also at this level - in the vast majority of cases.

For example, the KVBG is necessary because other equally effective but less restrictive means of achieving the intended purpose are not available.[204] It is true, for example, that the inclusion of further conventional power plants (gas or oil-fired power plants) in the decommissioning-related legal regulations would probably be judged a milder means from the point of view of the operators of coal-fired power plants.[205] The inclusion of gas-fired power plants in the decommissioning would achieve further CO2 savings effects, but since these would be lower than the CO2 savings effects achievable through the (earlier) decommissioning of (additional or all) coal-fired power plants, this does not represent an "equally effective" (see above) means of achieving the target.[206]

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[197] *Britz*, NVwZ 2022, 825 (829).

[198] *Id.*

[199] Cf. *Rebentisch*, in: *Rosin/Uhle*, Recht und Energie, 2018, 288.

[200] This refers to the (alleged) ineffectiveness of national GHG reduction measures due to the Europe-wide emissions trading system, because the allowances no longer needed due to national GHG reduction measures remained available on the allowance market for other use, *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 139 with reference.

[201] What is meant by this variant of the "waterbed effect" is that possibly domestic or foreign conventional power plants that use fossil fuels generate more electricity due to the decommissioning of coal-fired power plants and emit more CO_2 in the process, so that the CO_2 apparently saved by the decommissioning of coal-fired power plants is nevertheless emitted (in electricity generation elsewhere), *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 142 et seq.

[202] In this regard, *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 139 et seq.

[203] Cf. only BVerfGE 143, 246 (para. 289) - (Nuclear phase-out I).

[204] *Schomerus/Franßen*, Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken, Rechtsgutachten 2018, 145.

[205] *Id.*

[206] *Id.*

Adaptation measures to climate change impacts will also prove necessary on a regular basis.[207] In view of the severity of the hazards, the level of evidence required for their occurrence is not too high.[208] The danger of future climate impacts in the form of floods, storms, drought, etc. is so strong that rather strong protective measures must be taken in order to take effective precautions against serious damage to life, health and property. [209]

4. Reasonableness

At the level of reasonableness, the opposing legal interests must be weighed against each other and brought to a fair balance.[210] If a burden proves to be unreasonable, the legislator must provide for financial compensation, but only after other possibilities have been exhausted (transitional arrangements, exemption regulations, exceptions). [211]

In order to weigh up the interests, the legislator can use the material criteria already mentioned, including the severity, intensity and scope of the encroachment[212] , an increased social commitment due to the increased climate relevance of a property use (Article 14 II), a low personal connection to the property object[213] or the situation-bound nature[214] of a property. While Article 20a does not enjoy *absolute* priority over other concerns in the balancing process, its *relative* weight in the balancing process continues to increase as climate change progresses (*relative balancing priority of the climate protection requirement*).[215] In practice, this will already lead to a "dominance"[216] of the climate protection requirement in the balancing process and will do so even more in the future.

Whether and to what extent transitional arrangements, hardship clauses and possibly financial compensation arrangements are necessary depends, for example, on a weighing of the extent of the loss of confidence and the importance of the general interest pursued by the restrictions of property.[217] A possible protection of confidence and continuance may therefore have an effect in favor of owners.[218] It would be inadmissible, for example, to abruptly prevent the continuation of land use for which extensive investments were necessary, and thus to devalue labor and capital investment from one day to the next.[219] In the area of climate protection in particular, however, there is a risk that overly intensive grandfathering could permanently prevent subsequent measures that are increasingly necessary in view of the dynamics

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[207] *Frenz*, Climate Protection Law 2022, 152.
[208] *Id.*
[209] *Id.*
[210] Cf. only BVerfGE 50, 290 (340) - (Co-determination).
[211] In contrast to the previous levels, there is an increased level of judicial review at the adequacy level.
[212] *Jarass/Pieroth*, GG, 17th ed. 2022, Art. 14 para. 40.
[213] E.g. in the case of large companies.
[214] Location on a riverbank or in a nature reserve, etc. (see above). Comprehensive references in *Czychowski/Reinhardt*, 12th ed. 2019, WHG § 52 para. 59.
[215] BVerfGE 157, 30 (para. 198) - (Climate decision).
[216] In this respect critically *Frenz*, Klimaschutzrecht, 2022, 141 et seq.
[217] BeckOK *GG/Axer*, 53rd ed. (as of November 15th 2022), GG Art. 14, para. 101.
[218] On this point, Part A. III. on the constitutional foundations *Ehlers*, in: VVDStRL 51 (1992), 211 (229).
[219] *Jarass/Pieroth*, GG, 17th ed. 2022, Art. 14 para. 46 with reference to BVerfG-K, NVwZ 2016, 1804 para. 64 – (Establishment of a burial ground).

of global warming, for example.[220] This is taken into account by the fact that grandfathering can also be overcome by law (within the framework of Article 14, in particular in compliance with proportionality).[221] There is already no general reliance on the continuation of the current legal situation and the preservation of profit opportunities.[222] In any case, in view of the now generally known causes and effects of climate change and in particular the CO_2 quota through the budget approach, it is increasingly questionable to what extent an "actual trust in continuity"[223] can still be formed with regard to the continuation of climate-damaging uses.

In the area of the coal phase-out, although the permits under immission control law are not protected as such (see above), the legitimate trust of the power plant companies in their continued existence is protected, since the permit (also) serves to protect the services that the plant operator himself provides in utilizing the permit.[224] It should also be noted that (as is the case here) permits initially granted by the state for an indefinite *period of time* increase the protection afforded, as they generally create a basis of trust "for an indefinite period of time".[225] Another argument in favor of the power plant operators is that the property in question is sometimes the (only) basis for the individual power plant operator's freedom and therefore, in terms of property law, his personal livelihood and basis of operation.[226] Against the background of the function of the fundamental right to property to secure freedom and income, as described in Part A, the complete deprivation of such a basis for existence represents a particularly severe encroachment. However, one of the arguments in favor of the power plant operators in the balancing process is that climate change and the contributory cause of the generation of electricity from fossil fuels lead to an increased social obligation of property in the area of the use of coal-fired power plants.[227] Since coal-fired power plants cause considerable environmental pollution, there is an overriding public interest in ending coal-fired power generation, not least in view of Germany's obligations under the Paris Agreement, pursuant to Article 20a and Article 2 II 1 in conjunction with Article 1 I 2. Article 1 I 2.[228] In the case of the coal phase-out, however, there was widespread consensus that the decommissioning of lignite-fired power plants by the KVBG constitutes (financially) compensatory restrictions of property because of the intensive burdens associated with it.

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[220] *Kloepfer*, Umweltrecht, 6th ed. 2016, § 2 para. 113. The protection of legitimate expectations and the protection of existing property is weaker in environmental law than, for example, in building law, since “environmental pollution does not tend to stop at the property boundary, the owners themselves benefit from the ecological measures and it is a matter of protecting the basis of life for all”, *Ehlers*, in: VVDStRL 51 (1992), 211 (226).

[221] *Klinski*, Juristische und finanzielle Optionen der vorzeitigen Abschaltung von Kohlekraftwerken, Rechtsgutachten 2015, 21; *Jarass/Pieroth*, GG, 17th ed. 2022, Art. 14 para. 46.

[222] *Kahl*, in: *Paal/Poelzig/Fehrenbacher*, Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (475 with additional reference).

[223] *Ehlers*, in: VVDStRL 51 (1992), 211 (226).

[224] *Klinski*, Legal and Financial Options for the Early Shutdown of Coal-fired Power Plants, Legal Opinion 2015, 21.

[225] *Kahl*, in: *Paal/Poelzig/Fehrenbacher*, Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (480 with additional reference).

[226] *Id.*

[227] *Franzius*, JuS 2018, 28 (29). *Kahl*, in: *Paal/Poelzig/Fehrenbacher,* Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (479 with additional reference): „ecology obligation“ (*Ökologiepflichtigkeit*).

[228] *Kahl*, in: *Paal/Poelzig/Fehrenbacher*, Deutsches, europäisches und vergleichendes Wirtschaftsrecht, 2021, 471 (480 with additional reference).

The amount of compensation is not necessarily based on the market value.[229] The compensation to be provided by the legislator need only reach the level required to establish appropriateness, which does not necessarily have to correspond to the full value replacement.[230] In cases of particular hardship, compensation in excess of the market value is also conceivable. [231]

A compensation scheme for the decommissioning of lignite plants is contained in Section 44 KVBG. According to this (and on the basis of supplementary agreements), compensation totaling EUR 4.35 billion is to be paid for the decommissioning of lignite-fired power plants by 2030: *RWE Power AG* receives EUR 2.6 billion, *Lausitz Energie Kraftwerk AG* EUR 1.75 billion. These regulations are under fire from various sides under European[232] and constitutional law .[233]

In contrast, however, the majority of other constellations, especially in the area of obligations for landowners or building owners, can be settled in the form of restrictions of property without (also financial) compensation. In problematic cases, climate-protective restrictions of property will usually prove to be appropriate for the very reason that in practice the legislature often provides for financial compensation for (otherwise *possibly* unreasonable) restrictions of property "as a precaution". Overall, it can be said that the proportionality test is usually no more than a "rough conclusiveness test" in environmental and climate protection court practice and thus ultimately does not stand in the way of effective environmental and climate policy.[234]

D.

This review of the German Basic Law, statutes, case decisions, and literature on the topic has shown that the constitutional right to property in the German Basic Law provides owners with fairly weak protection against governmental climate protection measures in general, and against the scenarios discussed here in particular. This generalization applies both to that availability of a judicial challenge at the primary level – as a defense against particular governmental climate protection measures – and at the secondary level – obtaining compensation.

At the primary level, the scope of protection of the right to private property is generally understood to be broad, and to extend beyond "classic" *in rem* interests such as ownership and easements. However, the legislature can impose restrictions of property, in particular via climate protection legislation, that define the legal boundaries of "property" and, in doing so, can significantly shape the concept of property in some case even invalidate the protection ordinarily accorded to existing legal uses of the property. In

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[229] On constellations in which precisely the fair market value is the only just compensation, *Lege,* in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 221 (229).

[230] BVerfGE 143, 246 (para. 404) - (Nuclear phase-out I).

[231] *Lege*, in: *Depenheuer/Shirvani*, Die Enteignung, 2017, 221 (229).

[232] The European Commission is currently examining whether the compensation payments are compatible with EU state aid law.

[233] Pleading for unconstitutionality of the compensation regulations of the coal phase-out *Büdenbender/Michaelis*, RdE 2020, 505 et seq.

[234] *Durner*, in: *Herdegen/Masing/Poscher/Gärditz*, Handbuch des Verfassungsrechts, § 26 Umweltverfassungsrecht para. 48 with additional reference.

principle, the legislature, in order to protect the climate, would even be entitled to "define away" existing beneficial uses of property.

Under German law, only the fewest climate-protective interventions into property rights constitute expropriations under Article 14 III. The vast majority of property-relevant climate protection measures fall within the scope of Article 14 I 2 as restrictions of property, even in cases where property rights are *de facto* devalued and practically reduced to zero, such as in the case of a complete ban on a particular use. The reason for this conclusion is the relatively recent expropriation jurisprudence of the Federal Constitutional Court, that, among other things, disempowers the specialized courts, such as the administrative courts; recognizes the power of the legislature on the question of compensation; and, roughly speaking, only recognizes as expropriations those governmental actions that purposefully vitiate interests in real property and transfer those interests to the state or to a a private beneficiary for public purposes. The proportionality test, especially when applied to restrictions of property, is usually readily satisfied in environmental and climate protection cases. For the Federal Constitutional Court acknowledges that the legislature enjoys broad discretion with regard to measures within the purview of Article 20a. In the judicial balancing process, Article 20a has *de jure* priority over rights of ownership, if not already *de facto* dominance. In view of rising global temperatures and rising CO_2 rising, landowners will have to accept significantly more restrictions on their right to property in the future.[235]

The weak protection at the secondary level is due to the fact that, according to Article 14, only expropriations are to be compensated, but not restrictions of property, such as those that have been instituted on behalf of protection of the climate. Even in the rare, exceptional case that a restriction of property results in compensation due to its unreasonableness, this compensation need only be monetary in nature in exceptional cases in which mitigation is inappropriate. Consequently, landowners will only receive compensation as a result of governmental action for protection of the climate in rare cases.

Whether Germany will meet the climate targets that it has announced remains to be seen.[236] Studies suggest that the targets will not be met.[237] For our purposes, if the targets are not met, it will not be because the constitution right to private property (Article 14) stands in the way.

[235] See only *Britz*, NVwZ 2022, 825 (832).

[236] Climate protection is also hampered by complicated and excessively long planning and application procedures (e.g. for the construction of wind turbines), the ensuing administrative court proceedings, resistance from industry and society (not least from private environmental associations), and changes of course by various federal and state governments.

[237] The *Federal Court of Auditors* is not alone in attesting to Germany's "inadequate implementation and control" of climate targets, *Bundesrechnungshof*, Bericht nach § 99 BHO zur Steuerung des Klimaschutzes in Deutschland, March 24th 2022.