

SYMPOSIUM ARTICLE

What If the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature^Ψ

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Abstract

Ownership has been a key tool in the exploitation of nature for centuries. However, ownership could also shield natural entities from extraction and pollution if it were vested in them, rather than in humans or corporations. Through a case study of German constitutional property law, this article examines the normative content of this constitutional right. It argues that in owning themselves, natural entities would have numerous tools to fend off human interference with their self-determination. Constitutional property law would require any harmful activity affecting the natural entity to be based upon legislation and necessary to achieve a public purpose. The natural entity would enjoy broader access to justice. Courts would also often award appropriate remedies; where the natural entity would be awarded only compensation, this would be unsatisfactory because money cannot replace nature. The article finds that constitutional property law offers the potential for further protection from human interference, which has not been realized because of anthropocentric value judgments prevalent in German legal doctrine. Ecocentric approaches to ownership and invalidity as a standard remedy would play an important role in unlocking the full potential of ownership for environmental protection.

Keywords: Environmental personhood, Rights of nature, Constitutional property law, Regulatory takings, Expropriation

1. INTRODUCTION

Imagine that the Black Forest in Germany were to be recognized as a legal person and declared to ‘own itself’, as is the case with Te Urewera, a former national park in

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Aotearoa New Zealand.¹ What would be the normative content of this right of ownership under the constitutional property law of Germany? To what extent could ownership – which has facilitated extractive capitalism in exploiting the planet for centuries – protect the Black Forest from extractive activities, if positioned as a ‘right of nature’?

This article argues that, in this hypothetical case, German constitutional property law would provide many useful tools to prevent the state from permitting or carrying out harmful activities to the Black Forest. The Black Forest owning itself could enforce higher protection standards and would have more remedies at its disposal than if owned by a human being, a corporate entity, or the state, with an environmental non-governmental organization (NGO) having to advocate its protection. The article further argues that there would be potential for even more protection and better remedies, which currently lies dormant as a result of anthropocentric assumptions and value judgments in the German legal order. Constitutional property law is, in essence, the piano for the Rights of Nature to play – a piano, however, that still needs to be tuned.

To give nature a voice of its own by declaring natural entities as legal persons, with standing before the courts and owners of themselves, is a paradigm shift away from the anthropocentric vision that nature is merely an object in need of protection against, by, and in the interests of humankind.² Proponents of this shift see it as a necessary response to the dominance of human needs in legal systems, and the failure of states to enact and/or enforce sufficient environmental regulation to protect nature from deterioration from human extraction and pollution.³ Recently, an increasing number of jurisdictions have adopted so-called ‘Rights of Nature’ in various forms.⁴ Particularly, legislatures and courts in Australia, Colombia, India, and Aotearoa

¹ Te Urewera Act 2014 (Aotearoa New Zealand), s. 12.

² S. Borràs, ‘New Transitions from Human Rights to the Environment to the Rights of Nature’ (2016) 5(1) *Transnational Environmental Law*, pp. 113–43, at 114 et seq.

³ C.D. Stone, ‘Should Trees Have Standing? Towards Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review*, pp. 450–501; K. Bosselmann, ‘Property Rights and Sustainability: Can They Be Reconciled?’, in P. Taylor & D.P. Grinlinton (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Brill/Nijhoff, 2011), pp. 23–42; G.J. Gordon, ‘Environmental Personhood’ (2018) 43(1) *Columbia Journal of Environmental Law*, pp. 50–91, at 50; Borràs, n. 2 above, pp. 114, 129; T.E. Johnson, ‘Enter Sandman: The Viability of Environmental Personhood to US Soil Conservation Efforts’ (2017) 20(1) *Vanderbilt Journal of Entertainment & Technology Law*, pp. 259–88. See, however, J. Bétaille, ‘Rights of Nature: Why It Might Not Save the Entire World’ (2019) 16 *Journal for European Environmental & Planning Law*, pp. 35–64, at 60 et seq.

⁴ C. Clark et al., ‘Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance’ (2017) 45(4) *Ecology Law Quarterly*, pp. 787–844; H. White, ‘Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States’ (2018) 43(1) *American Indian Law Review*, pp. 129–65; C. Iorns Magallanes, ‘From Rights to Responsibilities Using Legal Personhood and Guardianship for Rivers’, in B. Martin, L. Te Aho & M. Humphries-Kil (eds), *ResponsAbility: Law and Governance for Living Well with the Earth* (Routledge, 2019), pp. 216–39; S. Knauß, ‘Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India’ (2018) 31(6) *Journal of Agricultural and Environmental Ethics*, pp. 703–22; Borràs, n. 2 above, pp. 130 et seq. Note that in the meantime, however, the Indian Supreme Court has suspended one of the judgments that declared that the river Ganges was a distinct person: G. Eckstein, ‘Conferring Legal Personality on the World’s Rivers: A Brief Intellectual Assessment’ (2019) 44(1) *Water International*, pp. 1–26, at 3, 6.

New Zealand have assigned legal personality to specific natural entities, attaching all conventional rights, such as standing in court, and liabilities of legal persons to this ‘environmental personhood’.⁵ Environmental personhood turns a natural object into a natural subject – that is, an entity with legal rights and obligations. Just as human beings are ‘natural persons’ in law, this natural subject is embodied in law by the legal construct of an environmental person.⁶ Aotearoa New Zealand, in particular, is a special case in that the applicable legislation not only declares certain natural entities to be legal persons, but also vests ownership of the natural entity in the environmental person: here, the former national park Te Urewera owns itself and the river Te Awa Tupua owns its own riverbed through environmental personhood.⁷

This article focuses on the technicalities of German constitutional property law to examine the exact meaning and implications of an environmental person ‘owning itself’. This is a necessary step in assessing the extent to which recognizing environmental persons as owners promotes environmental protection. Property law concerns legal rights in objects, and the rights and obligations of the holders of these rights towards others; constitutional property law specifically governs the state’s power to limit or take these rights away.⁸ Constitutional property protection could fortify the position of the environmental person through safeguards against coerced state acquisitions in the public interest (expropriations) and disproportionate restrictions on the use, enjoyment or disposal of its ownership (excessive limitations). While it is feasible for a new political majority to weaken, or even abolish, rules of property law vesting and protecting the environmental person’s ownership, it is much more difficult to amend constitutional property clauses. Constitutional property law not only protects environmental persons from legal or physical acts of private parties and the state’s executive branch, but also from legislation that limits or takes away their ownership. If, for example, legislation allowed its river to be polluted, the environmental person as owner could challenge such legislation under the property clause.

This article analyzes the hypothetical situation where Germany, having expropriated the private owners if needed, has vested ownership of the Black Forest – a partly privately and partly state-owned forest with lakes and rivers flowing through it in south-

⁵ Australia: Water Amendment (Victorian Environmental Water Holder) Act, No. 50 of 2010; Colombia: Corte Constitucional 10 Nov. 2016, Ruling T-622 of 2016, Expediente T-5.016.242; India: High Court of Uttarakhand at Nainital, *Salim v State of Uttarakhand*, 20 Mar. 2017, Writ Petition (PIL) No. 126 of 2014, para. 19; High Court of Uttarakhand at Nainital, *Lalit Miglani v State of Uttarakhand and Others*, 30 Mar. 2017, Writ Petition (PIL) No. 140 of 2015, 66; and Punjab-Haryana High Court, *Court On Its Own Motion vs Chandigarh Admn*, 2 Mar. 2020, CWP No. 18253 of 2009, and other connected petitions; Aotearoa New Zealand: Te Urewera Act 2014 and Te Awa Tupua Act 2017.

⁶ A. Fischer-Lescano, ‘Natur als Rechtsperson’ (2018) 29(4) *Zeitschrift für Umweltrecht*, pp. 205–17, at 207–13.

⁷ The legislation in Aotearoa New Zealand vests fee simple in environmental persons; see s. 12 Te Urewera Act 2014 and s. 14 Te Awa Tupua Act 2017. For the sake of simplicity, this article uses the term ‘ownership’, which is the civil law equivalent of fee simple or freehold. In common law jurisdictions there is no legal concept of ownership; see J.H.M. van Erp & B. Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart, 2012), pp. 306 et seq.

⁸ B. Akkermans, ‘A Comparative Overview of European, US and South African Constitutional Property Law’ (2018) 7(1) *European Property Law Journal*, pp. 108–43, at 108; A.J. van der Walt, *Constitutional Property Law*, 3rd edn (Juta, 2011), pp. 1–11.

west Germany – in an environmental person. In this scenario, the Black Forest could own itself through the environmental person ‘Black Forest’.

Although German law has recognized neither rights of nature nor environmental persons,⁹ there is much to be learned from this case study. German constitutional property law is composed of a vast and very dense body of case law and literature, thanks in part to the intrusive review of infringements of property by the German Federal Constitutional Court (Bundesverfassungsgericht).¹⁰ German constitutional property law has inspired lawmakers and scholars in, for instance, South Africa¹¹ and the United States (US).¹² The level of detail allows for the identification of more potential sources of constitutional protection from extractive activities and more potential pitfalls than would be possible with material from other jurisdictions. Finally, this proactive legal analysis is timely because there are initiatives for rights of nature to be recognized in Germany.¹³ Of course, many international human rights treaties, other national Constitutions and Bills of Rights have a property clause¹⁴ and some of these national jurisdictions recognize environmental persons. A case study of such jurisdictions would require fewer hypothetical elements, but would be less insightful because their constitutional property doctrine is less well developed.¹⁵

Unlike the majority of existing literature on Rights of Nature – which highlights issues of standing and analyzes constitutional amendments, legislation and court judgments –¹⁶ this article explores the protection that an existing constitutional

⁹ M.W. Schröter & K. Bosselmann, ‘Die Robbenklage im Lichte der Nachhaltigkeit’ (2018) 4 *Zeitschrift für Umweltrecht*, pp. 195–205. On natural subjects under German law more generally, see S. Augsberg, ‘Der Anthropozentrismus des juristischen Personenbegriffs – Ausdruck überkommener (religiöser) Traditionen, spezieistischer Engführung oder funktionaler Notwendigkeiten?’ (2016) *RW Rechtswissenschaft*, pp. 338–62.

¹⁰ Bundesverfassungsgericht, 17 Dec. 2013, *NVwZ* 2014, p. 211, at 221 et seq.

¹¹ J. de Waal, ‘A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights’ (1995) 11(1) *South African Journal of Human Rights*, pp. 1–29, at 7 et seq; D.G. Kleyn, ‘The Constitutional Protection of Property: A Comparison between the German and the South African Approach’ (1996) 11 *South African Public Law / Suid-Afrikaanse Publikereg*, pp. 402–45.

¹² See, e.g., G.S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (The University of Chicago Press, 2006), Ch. 3.

¹³ Refer to the websites of such initiatives for more information, e.g., Netzwerk Rechte der Natur, available at: <https://gibdernaturrecht.muc-mib.de>; and Rechte der Natur Biokratie, available at: <https://www.rechte-der-natur.de/de/home.html>.

¹⁴ See, e.g., Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Paris (France), 20 Mar. 1952, in force 18 May 1954, available at: <https://www.coe.int/en/web/echr-toolkit/protocole-1>; Arts 2 and 17 of the French Declaration of Human and Civic Rights of 26 Aug. 1789 (Déclaration des droits de l’homme et du citoyen); Art. 300A of the Constitution of India; s. 25 of the 1996 Constitution of the Republic of South Africa; and the 5th Amendment to the US Constitution.

¹⁵ See, e.g., N. Wahi, ‘Property’, in S. Choudhry, M. Khosla & P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016), pp. 943–66. An analysis of the law of Aotearoa New Zealand would not be as fruitful because the state does not have a constitutional property clause and provides very little protection from limitations of property: L. Evans & N. Quigley, ‘Compensation for Takings of Private Property and the Rule of Law’, in R. Ekins (ed.), *Modern Challenges to the Rule of Law* (LexisNexis, 2011), pp. 233–62. For protection from expropriation in Aotearoa New Zealand, refer to the Public Works Act 1981.

¹⁶ See, e.g., Borràs, n. 2 above; Gordon, n. 3 above; Iorns Magallanes, n. 4 above; Stone, n. 3 above; E.L. O’Donnell & J. Talbot-Jones, ‘Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India’ (2018) 23(1) *Ecology and Society*, article 7, pp. 1–10, at 3 et seq.

right¹⁷ could offer to an environmental person. In order to capture the complexity surrounding these rights and their national doctrine, the article limits its scope to the German constitutional right of property.

The remainder of the article is structured as follows. Section 2 inquires whether an environmental person's property qualifies as constitutional property, and introduces expropriation and limitations as distinct categories of state action that affects property rights. Section 3 examines the protection of the environmental person's property against excessive limitations. Section 4 explores additional protection of the environmental person's property against expropriation. Section 5, based on the insights of the preceding sections, sketches a possible path towards better constitutional protection of the environmental person's property, through the adoption of an ecocentric approach.

2. THE STATE'S POWERS IN RELATION TO THE PROPERTY OF ENVIRONMENTAL PERSONS

Subsection 2.1 argues that the ownership held by the environmental person 'Black Forest' would qualify as property in terms of the Constitution (constitutional property) and that the environmental person could rely upon Article 14 of the German Basic Law. Subsection 2.2 defines and distinguishes the different types of state action against property needed for the analysis in Sections 3 and 4.

2.1. *Would the Black Forest Enjoy Constitutional Property Protection?*

Article 14, the property clause of the German Basic Law (Grundgesetz (GG)), provides:¹⁸

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

Article 14(1) GG guarantees 'property' (*Eigentum*). It is clear that ownership under private law qualifies as property under the Basic Law.¹⁹ When the German legislature vests

¹⁷ German law considers property a fundamental right (*Grundrecht*) and generally makes no distinction between fundamental and other constitutional rights: G.S. Alexander, 'Property as a Fundamental Constitutional Right? The German Example' (2003) 88 *Cornell Law Review*, pp. 733–78.

¹⁸ The official translation of Art. 14 GG, which entered into force on 23 May 1949, is available at: http://www.gesetze-im-internet.de/englisch_gg.

¹⁹ H.-J. Papier & F. Shirvani, 'Art. 14 GG', in M. Herdegen & H.H. Klein (eds), *Dürig/Herzog/Scholz, Grundgesetz* (C.H. Beck, commentary last updated July 2021), para. 161.

ownership in a human being, that person can automatically invoke Article 14. When ownership is vested in a legal person (in the sense of an artificial or juristic person), the legal person does not automatically enjoy constitutional property protection. It would first have to pass scrutiny under Article 19(3) GG, which stipulates that fundamental rights, such as property, apply to legal persons only to the extent that the nature of such right permits. In respect of property it is settled that, for example, limited liability companies and other legal persons with all conventional rights and liabilities under private law enjoy constitutional protection.²⁰

Environmental persons would pose a conundrum for Article 19(3). On the one hand, the criterion for a legal person to invoke constitutional property protection is that state or private activities similarly threaten ownership when a legal person is the owner compared with situations where a human being is the owner.²¹ As ownership held by environmental persons would be particularly exposed to degradation through extraction and pollution by state or private actors, they should be able to invoke Article 14 GG. On the other hand, the Federal Constitutional Court regularly holds that affording protection to legal persons under Article 19(3) GG is appropriate only where the legal person is a manifestation of the free development of humans.²² The obvious problem is that an environmental person would not be the manifestation of free human development, but would embody nature itself and need protection from free human development.

However, as Fischer-Lescano persuasively argues, environmental persons should still enjoy the protection of fundamental rights.²³ He refers to Article 20a GG, which entrenches the state's objective of preserving animals and the natural foundations of life, and the fact that the exercise of fundamental rights by human beings depends upon environmental protection. As environmental persons would protect the natural foundations of life and, indirectly, the fundamental rights of human beings, it would seem imperative that their ownership be protected by the property clause.

2.2. State Action Against the Black Forest's Property

Following this interpretation of Article 19(3) GG, vesting ownership in the environmental person 'Black Forest' would, at first glance, be a powerful means to protect it. German law assumes that owners are free to do as they please unless legal doctrine, state regulation, state expropriation, or entitlements of others establish limits to the owner's actions.²⁴ This is an expression of the principle that, in a constitutional democracy, the freedoms exercised by members of society do not require justification; rather, any limitations to those freedoms need to be justified.²⁵ Theoretically, the

²⁰ Papier & Shirvani, n. 19 above, para. 332.

²¹ B. Rimmert, 'Art. 19 Abs. 3 GG', in Herdegen & Klein, n. 19 above, para. 27.

²² Bundesverfassungsgericht, 2 May 1967, *BVerfGE* 21, p. 362, at 369.

²³ Fischer-Lescano, n. 6 above, p. 214.

²⁴ Papier & Shirvani, n. 19 above, para. 146. On other jurisdictions based on western-style legal thought: A.J. van der Walt, *Property in the Margins* (Hart, 2009), pp. 27 et seq; Iorns Magallanes, n. 4 above.

²⁵ M. Herdegen, 'Art. 1 Abs. 3 GG', in Herdegen & Klein, n. 19 above, para. 30. With regard to constitutional democracies more generally: I.B. Flores, 'Law, Liberty and the Rule of Law (in a Constitutional

owner's powers over their property could be almost boundless, and the natural subject could thus exclude virtually all human activity from it. However, in the reality of the administrative state all over the world, the owner's freedom is frequently curtailed. States have circumscribed or removed the powers of owners over their property through limitations and expropriation in the public interest.²⁶ The public interest includes environmental protection,²⁷ even though environmental regulation proves insufficient to protect nature.

In comparative property law literature, state action affecting property is divided into two categories: expropriation, and limitations of property.²⁸ This distinction is also made in German law, and is essential for analyzing the protection of property held by environmental persons. Each of these types is subject to different legal limits, explored in more depth in Sections 3 and 4.

Article 14(3) GG provides the legal basis for expropriation (*Enteignung*). Expropriation is defined as unilateral state action whereby the state acquires specific property rights to use them in the public interest or to transfer them to a third party for use in the public interest.²⁹ For instance, if the state wished to build a road through the Black Forest owned by itself and the environmental person refused to sell the land, the state would first have to obtain ownership of this land by means of expropriation.

The purpose of the term 'expropriation' in the legal system is to delineate a category of state action for which the state *always* has to pay compensation, mostly in money but possibly also in the form of replacement land, and the law prescribes stricter requirements and special procedures. These heightened standards result from the severity of the infringement of constitutional property caused by an expropriation.

By contrast, Article 14(1) governs limitations of property. Limitations here are defined as any state-imposed restriction on the use, enjoyment, or disposal of property. Under German law, limitations are clearly distinguished from expropriation. Regardless of how severe the impact of a limitation is, it will never amount to an expropriation if the state does not acquire the property.³⁰ Within the category of limitations, a distinction needs to be made between direct and indirect limitations. A direct limitation is state action that would directly limit the environmental person's ownership, for example, through legislation or administrative decision. An example would be if the state permitted a third party to extract water from a lake in the Black Forest. An indirect

Democracy)', in I.B. Flores & K.E. Himma (eds), *Law, Liberty, and the Rule of Law* (Springer, 2013), pp. 77–101.

²⁶ For limitations on land ownership refer to Papier & Shirvani, n. 19 above, paras 491–600. On other jurisdictions: W.E. Nelson, 'The Growth of Distrust: The Emergence of Hostility toward Government Regulation of the Economy' (1996) 25(1) *Hofstra Law Review*, pp. 3–81.

²⁷ P. Degens, 'Towards Sustainable Property? Exploring the Entanglement of Ownership and Sustainability' (2021) 60(2) *Social Science Information*, pp. 209–29, at 221.

²⁸ There is no universally recognized term for state action that falls short of expropriation. Instead of limitations, 'control', 'regulation', or 'restrictions' are also used. Regulation (i.e., a limitation imposed directly on an owner through legislation or administrative decision) is mostly seen as a subset of limitations; see also Akkermans, n. 8 above; Van der Walt, n. 8 above, pp. 194–213.

²⁹ Bundesverfassungsgericht, 6 Dec. 2016, *NJW* 2017, p. 217, at 224.

³⁰ Bundesverfassungsgericht, 15 July 1981, *NJW* 1982, p. 745, at 748; Bundesverfassungsgericht, 2 Mar. 1999, *NJW* 1999, p. 2877, at 2877 et seq.

limitation is state action that would directly omit, remove, adjust, or impose a limitation on another person's property and thereby indirectly affect the environmental person's ownership. An example would be if the state lifted a ban on emitting harmful substances that – through the air, soil, or water – contaminate the Black Forest.

Article 14(1) refers to direct limitations as the definition of the content of, and the limits to, the obligations and rights of the property holder (*Inhalts- und Schrankenbestimmung*).³¹ The legislature lays down the rights and obligations, which can then be concretized through administrative decisions and regulations, case law, or doctrine. By contrast, Article 14(1) does not mention indirect limitations, even though the property clause still offers protection from them. The Federal Constitutional Court calls them impairments (*Beeinträchtigung*) as opposed to a definition of the content and limits.³² This distinction is not solely formalistic, but would have an impact on the protection of the Black Forest from excessive limitations, and the remedies that it would have at its disposal.

3. PROTECTION OF THE BLACK FOREST FROM EXCESSIVE LIMITATIONS OF PROPERTY

Under German law, the ownership vested in the environmental person 'Black Forest' arguably would enjoy constitutional property protection, but such protection would not be absolute. A very important principle in Germany, and around the world, is the state's power to limit property rights in the public interest and generally does not need to compensate owners for limitations of their property.³³ The Basic Law protects the owner only from *excessive* limitations.³⁴

Nevertheless, the starting point continues to be that the Black Forest is entitled to exclude human activity, and that limitations to this right require justification. The state would have to comply with certain conditions to avoid an excessive limitation of the ownership of the Black Forest. The environmental person's property, coupled with these fundamental principles of property law, would completely reverse the relationship between nature and human society. Without environmental property ownership, a human owner is allowed to do on the land what is not prohibited; for instance, they may extract and pollute drinking water unless prohibited by environmental regulation. With ownership vested in the environmental person, human entities would not be allowed to pollute rivers in the Black Forest unless environmental

³¹ Bundesverfassungsgericht, 14 July 1981, *BVerfGE* 58, p. 137, at 144; Bundesverfassungsgericht, 12 Mar. 1986, *NJW* 1986, p. 2188, at 2189.

³² Bundesverfassungsgericht, 26 May 1998, *NJW* 1998, p. 3264, at 3265.

³³ Akkermans, n. 8 above.

³⁴ Papier & Shirvani, n. 19 above, paras 467 et seq. For an analysis of excessive regulation under German law, refer to B. Hoops, 'Taking Possession of Vacant Buildings to House Refugees in Germany: Is the Constitutional Property Clause an Insurmountable Hurdle?' (2016) 5(1) *European Property Law Journal*, pp. 26–50. The international debate refers to 'regulatory takings' and 'indirect expropriations': J.E. Nowak & R.D. Rotunda, *Principles of Constitutional Law*, 4th edn (Reuters, 2010), pp. 276 et seq; A.K. Hoffmann, 'Indirect Expropriation', in A. Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press, 2008), pp. 151–70.

regulation permitted it. Rather than being the rule, pollution would become the exception.³⁵ This is the core of the additional protection offered to environmental persons by ownership. That said, as the following subsections show, this fundamental shift would apply primarily to harmful activities in the Black Forest itself but to a much lesser extent to activities on other properties that indirectly affect the Black Forest.

This section examines the additional protection offered by constitutional property law against excessive limitations of property. It compares this protection with the situation where only environmental NGOs represent and seek to protect the interests of the human-owned Black Forest and the environment more broadly (subsequently referred to as the ‘NGO-protection scenario’). This additional protection can be divided into three categories:

- institutional and judicial protection, in the form of additional decisions by the state needed to permit harmful activities to the Black Forest and enhanced access to justice for the environmental person (3.1);
- substantive protection under the property clause, distinguishing between direct (3.2) and indirect limitations (3.3), in terms of whether the Black Forest would be less exposed to extraction and pollution if it owned itself than would be the case in the NGO-protection scenario; and
- remedies against excessive limitations available to the environmental person (3.4).

3.1. *Additional Institutional and Judicial Protection*

This subsection demonstrates that direct extraction and pollution in the Black Forest would require additional legislative authorization, while no such requirement would apply to pollution caused by activities on a different property. Also, unlike an NGO, the environmental person would have access to the Federal Constitutional Court and could rely upon the Basic Law and all legislation.

Institutional protection

As the Black Forest is owned by private or state human entities, the owners are, in principle, allowed to extract and pollute as much as they please. Environmental NGOs have no say in their decisions. To limit extraction and pollution, the legislature has to impose additional obligations on the owners in an Act of Parliament and/or create a legislative basis for authorities to regulate property.³⁶ Examples of such direct limitations would be in environmental protection legislation, such as the Federal

³⁵ Accordingly, the character of environmental regulation would be inverted. Instead of outlawing pollution, it would legitimize pollution by limiting the property of the environmental person: Borràs, n. 2 above, pp. 114, 128 et seq; L.P. Breckenridge, ‘Can Fish Own Water? Envisioning Nonhuman Property in Ecosystems’ (2005) 20(2) *Journal of Land Use and Environmental Law*, pp. 293–335, at 318.

³⁶ Bundesverfassungsgericht, 14 July 1981, n. 31 above, p. 144; Bundesverfassungsgericht, 12 Mar. 1986, n. 31 above, p. 2189; R. Wendt, ‘Art. 14 GG’, in M. Sachs (ed.), *Grundgesetz*, 7th edn (C.H. Beck, 2014), para. 58.

Environmental Protection Act (Bundesnaturschutzgesetz), the Federal Water Act (Gesetz zur Ordnung des Wasserhaushalts), and the Federal Immission Control Act (Bundesimmissionsschutzgesetz). Article 14(1) GG only protects the property designed by these limitations.³⁷

If the Black Forest were owned by an environmental person, the forest could benefit from this point of departure. The natural subject would not have to tolerate any harmful activities on the property. In principle, no road or power line could be built and no gravel could be extracted without the environmental person's consent. To permit such activities, a direct limitation of the environmental person's property would be required. The legislature would have to regulate the ownership or authorize an authority to do so, unless such legislation already exists. This additional institutional requirement would shield the natural subject from harmful activities on the property to some extent.

However, many activities that are harmful to the Black Forest do not take place in the forest itself. For instance, rivers and winds may carry to the Black Forest contaminated air and water, polluted by human owners on a different property. Private law norms such as §906 of the German Civil Code (Bürgerliches Gesetzbuch (BGB)), which outlaws significant nuisance from other properties, and environmental regulation such as the Federal Immission Control Act may already preclude such harmful activities. However, what is essential from an institutional perspective is that the property clause would not require the legislature to take additional steps to permit such indirect limitations over the environmental person's property.³⁸ The natural subject's ownership would not extend so far beyond its physical boundaries to block them automatically. On the contrary, the starting point would be that the human owner of the other property could act freely, and the legislature would need to adopt or empower authorities to adopt direct limitations of that property. There could be a constitutional duty for the legislature to protect the environmental person's ownership,³⁹ but this protection would still not be automatic. When harmful activities occur on a different property, there would thus be no additional institutional protection.

Judicial protection

The Black Forest would enjoy enhanced access to the courts compared with that in the NGO-protection scenario. With the Black Forest currently owned by human entities, German law allows environmental NGOs only to bring an action against administrative decisions before the administrative courts and only to rely upon environmental protection legislation.⁴⁰ NGOs have no access to the Federal Constitutional Court and cannot rely on the Basic Law to argue the unconstitutionality of legislation. This

³⁷ Bundesverfassungsgericht, 28 Apr. 1999, *NJW* 1999, p. 2493, at 2495; Wendt, n. 36 above, para. 54.

³⁸ 'No additional steps' means no steps beyond the property law rules that allow owners to emit substances on their property.

³⁹ Papier & Shirvani, n. 19 above, paras 134 et seq.

⁴⁰ L. Schimmöller, 'Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador' (2020) 9(3) *Transnational Environmental Law*, pp. 569–92, at 587; Fischer-Lescano, n. 6 above, p. 206.

position would be different only if German constitutional law provided for rights of nature, such as those entrenched in Articles 71 to 73 of the Constitution of Ecuador.⁴¹

If the Black Forest were to hold constitutionally protected ownership, German law would, in principle, allow the environmental person to challenge before the administrative courts any administrative decision that affects its ownership, and rely on any legislation and Article 14 GG.⁴² Moreover, the environmental person could invoke Article 14 against legislation and, having exhausted all remedies before the administrative courts, against administrative decisions before the Federal Constitutional Court.⁴³

3.2. *Additional Substantive Protection from Direct Limitations*

The state would impose a direct limitation on the Black Forest's property by, for example, permitting third parties to extract water from forest lakes or discharge harmful substances into them.⁴⁴ This subsection shows that with the Black Forest owning itself, its interest in such cases would move to the centre of the legal inquiry. All state action affecting its ownership would have to be suitable, necessary, and proportionate in the narrow sense to achieve an objective in the public interest. All purely private activities and unnecessary harmful activities in the public interest in the Black Forest would be outlawed. Although this is a tremendous improvement compared with the NGO-protection scenario, the weight of the Black Forest's interest in the balancing of interests would be relatively low because of the existence of anthropocentric, particularly extractive, value judgments in the German legal system.

The position of the Black Forest's interest in the legal inquiry

To adopt a lawful limitation, the authority would have to ensure that it is proportionate (*verhältnismäßig*) to impose such a burden on the environmental person. The decision, and the legislation on which it is based, must be suitable (*geeignet*), necessary (*erforderlich*), and proportionate in the narrow sense (*verhältnismäßig im engeren Sinne*) to achieve a legitimate goal in the public interest.⁴⁵ Generally speaking, the German courts fully review the application of this proportionality test and can substitute their own value judgments for those of the authority.⁴⁶

⁴¹ Borràs, n. 2 above, pp. 134 et seq; Schimmöller, n. 40 above, pp. 577 et seq. Cf. C. Kauffman & P. Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail' (2017) 92(3) *World Development*, pp. 130–42.

⁴² K.-U. Riese, '§ 113 VwGO', in F. Schoch & J.P. Schneider (eds), *Verwaltungsgerichtsordnung: VwGO* (C.H. Beck, commentary last updated July 2021), paras 20 et seq; R. Wahl & P. Schütz, '§ 42(2) VwGO', in Schoch & Schneider, *ibid.*, paras 43 et seq. There are exceptions to this rule; for instance, where a building permit is granted to the owner of another property, construction law would limit the scope for the Black Forest to invoke Art. 14.

⁴³ § 90(1) and (2) Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz); cf. Fischer-Lescano, n. 6 above, p. 213.

⁴⁴ §§ 8(1), 9(1), read in conjunction with § 4(4) Federal Water Act.

⁴⁵ Bundesverfassungsgericht, 6 Dec. 2016, n. 29 above, p. 221; Bundesverfassungsgericht, 16 Feb. 2000, NJW 2000, p. 2573, at 2574; Wendt, n. 36 above, para. 70.

⁴⁶ The spatial choices in municipal zoning plans and other government plans, which may affect the environmental person's property, are often subject only to limited judicial review: Bundesverfassungsgericht,

This test would place the environmental person's ownership at the centre of the assessment. The harmful activity and the deterioration of nature would have to be justified in the public interest. This would be a major step forward compared with the NGO-protection scenario, where NGOs have to argue for a limitation of the human owner's freedom in the interests of environmental protection. In the latter situation, it is not the deterioration but the protection of nature that needs to be justified in the public interest. As nature has no rights of its own under German law, unlike the position under Ecuadorian law, its rights do not feature as a right that is limited.

Suitability and necessity of the harmful activity

The different steps of the test (suitability, necessity, and proportionality in the narrow sense) would improve the protection of the environmental person in varying degrees. Suitability requires that the permitted activity be capable of contributing to a legitimate goal in the public interest.⁴⁷ Unlike the activities of human owners on their own property, human activity in the Black Forest would need to be justified by a public interest, such as cultural and recreational activities. Suitability would thus protect the natural subject from purely private activities, such as unloading waste in the forest for private gain.

Necessity requires there to be no less invasive means available to achieve the legitimate objective.⁴⁸ For example, with regard to a permit to discharge harmful substances into a lake, a permit subject to a condition to install a filter could be a milder means if most harmful components could be filtered out at insignificant cost. Suitability and necessity would thus protect the natural subject from all harmful activities for a private interest and unnecessarily harmful activities in the public interest.

Framework for the balancing of interests

Proportionality in the narrow sense requires legislation to reflect an equitable balance between the public interest and the freedom of the environmental person.⁴⁹ Administrative authorities need to scrutinize whether the public interest in the harmful activity outweighs the environmental person's interest and other public and private interests adversely affected by the harmful activity.⁵⁰ To meet these standards, the legislature and administrative authorities need to take some investigative steps. Firstly, they make an inventory of all affected interests, public and private, that are legally

20 Feb. 2008, *NVwZ* 2008, p. 780, at 783; Bundesverfassungsgericht, 8 July 2009, *NVwZ* 2009, p. 1283, at 1285 et seq.

⁴⁷ See, e.g., M.Ch. Jakobs, 'Der Grundsatz der Verhältnismäßigkeit' (1985) *Deutsches Verwaltungsblatt*, pp. 97–102, at 99.

⁴⁸ B. Grzeszick, 'Art. 20 GG, VII', in Herdegen & Klein, n. 19 above, paras 113 et seq. In the context of spatial planning, a less strict test of whether the project makes a substantial contribution to the achievement of the goal will be applied: B. Stüer, *Bau- und Fachplanungsrecht*, 5th edn (C.H. Beck, 2015), No. 4923.

⁴⁹ Bundesverfassungsgericht, 15 Sept. 2011, *NVwZ* 2012, p. 429, at 430; Bundesverfassungsgericht, 2 Mar. 1999, n. 30 above, p. 2879.

⁵⁰ Grzeszick, n. 48 above, paras 117 et seq.

relevant.⁵¹ Public interests are an open category of interests largely defined by the legislature,⁵² and broadly concern at least a significant part of the population. If interests are not public, they are private. Secondly, the authorities accord weight to these interests based on the Basic Law and, where an administrative decision is concerned, legislation.⁵³ Thirdly, they balance the interests that benefit from a decision against the weight of the interests adversely affected by that decision.

The relevant private and public interests that are at stake depend on the circumstances of each legislative or administrative decision. With regard to protecting the Black Forest, environmental protection routinely features as a relevant public interest in the balancing exercise.⁵⁴ Also, a number of scholars argue that property protection is a relevant public interest;⁵⁵ this seems plausible given that Article 14 entrenches property protection in the Basic Law. The ownership interest is also taken into account as a private interest.⁵⁶ If the Black Forest owned itself, the protection of its ownership would thus be considered a private and public interest, while the property rights of a human owner would not feature in the balancing. The reverse is true if the forest is owned by human entities and has to rely solely upon an environmental NGO to advocate its preservation.

The weight of the Black Forest's interest

Determining the weight of the Black Forest's interest would be a two-step exercise. Firstly, the competent body would ascertain the physical impact of the decision on the forest.⁵⁷ The weight of the environmental person's interest in preventing the decision is proportional to the potential pollution or other adverse impact. Secondly, the competent body would accord normative weight to the environmental person's interest on the basis of the Basic Law and, in the case of administrative decisions, legislation. This step would largely determine the additional protection offered to the forest by the balancing.

Here, the environmental person's property again would present a puzzle. On the one hand, Article 14 GG provides that ownership has a legal value of its own. It seems certain that the weight of the environmental person's ownership would be greater than the weight of the public interest in environmental protection in the NGO-protection scenario. On the other hand, it seems likely that the normative value of ownership held by an environmental person would be significantly lower than that of ownership held by

⁵¹ On planning decisions see A. Schink, '§ 74 VwVfG', in H.G. Henneke (ed.), *Knack/Henneke, Verwaltungsverfahrensgesetz (VwVfG)*, 10th edn (Carl Heymanns, 2014), paras 130, 137.

⁵² R. Viotto, *Das öffentliche Interesse* (Nomos, 2009), pp. 26 et seq., 47.

⁵³ B. Stürer & D. Hönig, 'Das Eigentum als Grundlage von Abwägung und Rechtsschutz' (2002) *Verwaltungsarchiv*, pp. 350–67, at 360; K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band III/2, Allgemeine Lehren der Grundrechte* (C.H. Beck, 1994), pp. 785, 820, 828.

⁵⁴ See, e.g., Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, pp. 219, 221.

⁵⁵ See, e.g., P. Häberle, *Öffentliches Interesse als juristisches Problem* (Athenäum-Verlag, 1970), p. 34.

⁵⁶ W. Neumann & C. Külpmann, '§ 74 VwVfG', in P. Stelkens, H.J. Bonk & M. Sachs (eds), *VwVfG: Verwaltungsverfahrensgesetz*, 9th edn (C.H. Beck, 2018), paras 71 et seq.

⁵⁷ Stürer & Hönig, n. 53 above, p. 359; Stern, n. 53 above, pp. 784, 819, 831.

human entities who not only conserve the Black Forest but also use it for extractive purposes. This is as a result of a contextual approach to weighing property rights that is tailor-made for human owners and their extractive activities. The objective of property under German law is to guarantee the economic freedom of property holders and to enable them to shape their lives independently and responsibly.⁵⁸ The weight of the property will generally depend on the extent to which state action affects the individual freedom of the owner.⁵⁹ The greatest weight is attached to homes, which are vital for the exercise of fundamental rights and freedoms.⁶⁰ This doctrine is not only human-centred, but also extraction-centred because economic freedom and independent lives more often than not go hand-in-hand with the extraction and pollution of nature. Because of this extractive orientation, the weight of the interest of a human owner exclusively conserving the Black Forest in all probability would be lower than if they also used it for extractive purposes. The weight of the property held by conservation-minded owners would not be significantly greater than, or equal to, the weight of the environmental person's ownership.

The root problem in constitutional property doctrine is thus two-fold. Firstly, nature does not hold fundamental rights under German law.⁶¹ What, if anything, freedom means to a natural subject is unknown. Secondly, there seem to be no established criteria for weighing ownership used for conservation only; there is thus no template for weighing the ownership of the Black Forest. If they are to depart from human- and extraction-centred doctrine, then legislatures, authorities, and courts need to develop new and different standards for determining the normative value of an environmental person's property.

The basis for developing these standards would be the Basic Law and the German legal order as it is, which tends to reinforce the threat to the protection of the environmental person's property. The obvious source of inspiration would be Article 20a GG. This provision states that '[m]indful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order'.

The German state is thus obliged to protect the environment in the interests of human society.⁶² It is clear from the reference to future generations that the state's obligation is not aimed at protecting nature for its own sake, but only as far as nature serves human interests.⁶³ This is corroborated by the history of Article 20a GG, which was introduced in 1994. During the drafting process, advocates of protecting nature 'for

⁵⁸ Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, p. 214; Bundesverfassungsgericht, 15 Sept. 2011, n. 49 above, p. 430.

⁵⁹ Bundesverfassungsgericht, 15 Sept. 2011, *ibid.*, p. 430; H.D. Jarass, 'Die enteignungsrechtliche Vorwirkung bei Planfeststellungen' (2006) *Deutsches Verwaltungsblatt*, pp. 1329–35, at 1333.

⁶⁰ Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, p. 214.

⁶¹ R. Scholz, 'Art. 20a GG', in Herdegen & Klein, n. 19 above, paras 32 et seq.

⁶² For developments around the world in this respect, see Borràs, n. 2 above, pp. 115–28; and O'Donnell & Talbot-Jones, n. 16 above, p. 2.

⁶³ Scholz, n. 61 above, para. 39.

its own sake' clashed with those who wished to protect nature only in the interests of human society.⁶⁴ Eventually, protection of nature 'for its own sake', which could have challenged human-centred doctrine, did not find its way into the Basic Law (GG).

The second paragraph of Article 14 GG could further reduce the weight of the environmental person's property. It says that property entails obligations. While Article 14(2) does not impose obligations directly on the owner, it extends the legislature's freedom to limit property where the (use of) property affects the public interest.⁶⁵ So, if the environmental person's property were vital for, for instance, economic development, more extraction and pollution of the Black Forest would be permissible. However, the fact that the public interest is increasingly entangled with environmental protection could dampen this effect.⁶⁶ The final result is difficult to predict, but in the light of Article 20a, Article 14(2) would never protect nature 'for its own sake'.

All this reflects an anthropocentric approach to nature and its property rights, with extraction at its core.⁶⁷ An anthropocentric approach would grant protection to the environmental person's property only in so far as it would be conducive to human society, without considering any intrinsic value of nature and animal life in nature.⁶⁸ This intrinsic value can be defined as the legal status that nature and animals would assign to themselves if they had a legal system, just as human societies assign a legal status to their members.⁶⁹ This definition, of course, draws on two anthropocentric assumptions. It assumes that nature and animals do not have a legal system, not even a simple one, and that nature and animals would choose to create a legal system based on fundamental rights for individuals to protect them.

Excessive limitations of the Black Forest's property

Provided that the other requirements such as suitability and necessity are met, such an anthropocentric approach could mean that far-reaching limitations of the environmental person's property, such as permitting substantial pollution for economic development, would not be considered excessive under constitutional property law. It would seem that the same would apply if the Black Forest were owned by human entities for the sole purpose of conserving it. Even in an interdependent ecosystem, the human interest in (exploiting) nature is likely to continue to dominate under an anthropocentric view, because of the needs of humans and given that the legal system is administered by humans.⁷⁰

⁶⁴ Bericht der Gemeinsamen Verfassungskommission, Bundestags-Drucksache 12/6000, pp. 66, 150; Schröter & Bosselmann, n. 9 above, p. 202.

⁶⁵ Papier & Shirvani, n. 19 above, para. 416.

⁶⁶ Degens, n. 27 above, pp. 220 et seq.

⁶⁷ Cf. J. Kersten, 'Das Anthropozän-Konzept' (2014) *RW Rechtswissenschaft*, pp. 378–414, at 379 et seq.

⁶⁸ Cf. Borràs, n. 2 above, p. 128 (from whom I borrow the term 'intrinsic value').

⁶⁹ Breckenridge, n. 35 above, p. 307; cf. T.W. Frazier, 'The Green Alternative to Classical Liberal Property Theory' (1995) 20(2) *Vermont Law Review* 1995, pp. 299–371, at 309 (on the difficulties of determining the preferences of non-human life).

⁷⁰ Bétaille, n. 3 above, p. 55.

That said, it is impossible to predict where exactly the courts would draw the line. The available case law and scholarship only concern limitations imposed on human owners, creating an anthropocentric frame of reference that is not easy to adjust to the property of environmental persons. Our current vocabulary and thinking about excessive limitations is similarly rooted in the human economy. The devaluation of investments by limitations of property may be a sensible boundary for excessive limitations with regard to human owners,⁷¹ but would not make any sense if a natural subject owned itself. The only firm boundary would be Article 19(2) GG. This provision prohibits regulating the essence of property, which is the right to use property for private purposes and the power to dispose of property.⁷² The Black Forest, however, does not wish to use itself or to engage in trade. Again, our vocabulary and thinking leave us poorly equipped to apply constitutional property law to environmental persons. In an anthropocentric, thus still human-centred approach to Article 19(2) and the property of environmental persons, the near depletion of nature's agricultural or recreational value, to name but two examples, would probably be better guidelines for the excessiveness of limitations.

3.3. *Additional Substantive Protection from Indirect Limitations*

Should the legislature or administrative authorities permit, or fail to prevent, activities on other properties that would harm the Black Forest, the environmental person's prospects of success would generally look bleaker than in the case of harmful activities in the Black Forest itself. However, the forest would still be substantially better protected than it would in the NGO-protection scenario.

Imagine that an administrative authority decided to permit the human owner of a property a few kilometres away from the Black Forest to set up a factory emitting vast amounts of nitrogen oxides and ammonia. The wind would blow these substances to the Black Forest, and they would harm animals, plants and soil in the forest. To permit such activities, the authority would still have to balance the relevant interests as set out in the previous subsection with the environmental person's interest at the centre of the inquiry. However, if the other property is privately owned, the Basic Law would also protect the private owner's interest in the harmful activity. It would therefore be more difficult for the environmental person's property interest to trump the interest in extraction and pollution. However, as its property enjoys constitutional protection, its prospects would still be better than would be the case in the NGO-protection scenario. The assessment would be the same as the assessment of direct limitations if the state owned the other property because public bodies cannot rely upon Article 14 GG.⁷³

If an administrative authority took the initiative to prohibit, on another privately owned property, activities that are harmful to the environmental person's property,

⁷¹ Bundesverfassungsgericht, 6 Dec. 2016, n. 10 above, pp. 231 et seq.

⁷² Bundesverfassungsgericht, 15 Sept. 2011, n. 49 above, p. 430; Bundesverfassungsgericht, 28 Apr. 1999, n. 37 above, p. 2495.

⁷³ Bundesverfassungsgericht, 1 Sept. 2000, *NVwZ-RR* 2001, p. 93.

the inquiry would substantially change and the natural subject's protection would be substantially reduced. The interest of the other property owner would take centre stage because the authority would regulate that owner's property. The interest of the Black Forest could only feature as the interest justifying the limitation with the weight discussed in the previous subsection. However, its weight would still be higher than the weight of environmental protection as a public interest in the NGO-protection scenario. If the state owned the other property, the prohibition could not be challenged before the Constitutional Court based on Article 14 GG.

Administrative authorities and private actors must observe rules on emissions, such as those adopted under the Federal Immission Control Act. If these rules are broken, the environmental person, as well as environmental NGOs, could demand enforcement. If the emissions standards themselves are excessively lenient, enforcement is clearly not a solution. However, unlike an NGO, the Black Forest could bring an action before the Federal Constitutional Court for violation of its property rights, arguing that the state failed to protect its property sufficiently from harmful activities.

However, the action before the Federal Constitutional Court would be unlikely to succeed. When it comes to the obligation of the state to protect property from harmful emissions, the Federal Constitutional Court affords considerable discretion to the legislature.⁷⁴ According to the Court, the balancing of myriad interests is in the realm of the legislature and generally is not open to judicial scrutiny. An obligation to protect the environmental person's property would be more likely to apply where the connection between the harmful activity and the damage was clear, where the impact was severe, and where there was no alternative other than to restrict the property of human owners to protect the Black Forest.⁷⁵ Even with regard to climate change, the Court recently refused to impose an obligation to protect property rights held by human entities through the reduction of greenhouse gas emissions. The Court would intervene only where no measures against climate change were taken to protect property rights, or these measures were blatantly inadequate or insufficient to achieve the goal of protecting property.⁷⁶ As emissions standards are in place in many areas, the Black Forest's action would be very unlikely to succeed if the forest were owned by an environmental person, whose property would, as discussed in the previous subsection, seem to carry less weight than the property rights of a human owner also using it for extractive purposes.

3.4. Remedies

For the protection of its property to be effective, the Black Forest would need to be able to obtain the right remedies in order to stop extractive activities. This subsection demonstrates that the invalidating of state action or adequate measures to prevent damage to the natural subject would be the most desirable remedies. The German property

⁷⁴ Papier & Shirvani, n. 19 above, para. 135.

⁷⁵ Bundesverfassungsgericht, 26 May 1998, n. 32 above, p. 3265.

⁷⁶ Bundesverfassungsgericht, 24 Mar. 2021, *NJW* 2021, p. 1723, at 1735 et seq.

clause would provide adequate relief primarily in the form of invalidating the limitation, or preventive measures such as pollution filters. Compensation in money would only be a subsidiary remedy in most cases.

Possible remedies and their desirability

There would be three types of remedy that the Black Forest could obtain in court if state limitations violated the environmental person's property and contravened the property clause. Firstly, the limitation would be invalid, meaning that the harmful activity could not be lawfully conducted, and no damage would be inflicted on the Black Forest (assuming there is compliance with the law). Secondly, the limitation would remain valid and the harmful activity could be lawfully conducted, but measures would be taken to mitigate the damage. If a factory were permitted to discharge contaminated water into a lake of the forest, a filter for harmful substances would be such a preventive measure. Thirdly, the limitation would remain valid and the harmful activity could be lawfully conducted, but the environmental person would be entitled to require the state to repair the damage or be awarded monetary compensation.

Environmental NGOs are unable to obtain any of these remedies under the property clause because they cannot invoke Article 14. From the perspective of the environmental person, which could obtain remedies under the property clause, there would be a clear ranking of remedies in terms of desirability. Although environmental personhood means that there is technically a separate legal person holding the property right, the Black Forest remains both the subject and the object of the property right.⁷⁷ Most legal persons only hold assets that, if damaged, can be easily repaired or replaced through money. For environmental persons, however, human activities can cause physical and potentially irreparable harm. There would thus be a clear preference for the invalidity of the limitation or, at least, measures to prevent the damage. Only to the extent that the ecosystem could be restored would reparation or monetary compensation be adequate remedies.

Remedies under the property clause

At first glance, German law appears fully disposed to accommodate the environmental person's hypothetical preferences. An important principle in German constitutional property law is that holders of property rights that are affected by unlawful limitations of their property must generally challenge the unlawful limitation and ask the administrative court to declare the limitation invalid,⁷⁸ rather than claim compensation. This is in line with the primary purpose of the property clause, which is to protect the property itself (so-called *Bestandsgarantie*) and not only the value that the property

⁷⁷ A. De Vries-Stotijn, I. Van Ham & K. Bastmeijer, 'Protection through Property: From Private to River-held Rights' (2019) 44(1) *Water International*, pp. 736–51, at 738, 745; Borràs, n. 2 above, pp. 114 et seq; Clark et al., n. 4 above, p. 831; Breckenridge, n. 35 above, p. 293.

⁷⁸ Bundesverfassungsgericht, 2 Mar. 1999, n. 30 above, p. 2879; Bundesverfassungsgericht, 15 July 1981, n. 30 above, p. 747.

represents. However, there are exceptions. Again, the distinction between direct and indirect limitations is relevant to the available remedies.

Remedies for excessive direct limitations

If the state were to directly limit the environmental person's property by permitting harmful activities in the Black Forest and the uncompensated permit imposed a disproportionate burden on the environmental person, the invalidity of the permit on the basis of the property clause would not be the most likely outcome in court. The decision to issue the permit is likely to be based on legislation that is applicable to an indefinite number of cases. If that is the case, the disproportionate permit will generally not be invalid but turn into 'a definition of the content and limits requiring equalization' (*ausgleichspflichtige Inhalts- und Schrankenbestimmung*).⁷⁹ The legislation must compel the competent authority to take measures to prevent the damage in such a case,⁸⁰ which is the most likely outcome. If preventive measures proved infeasible or disproportionately burdensome, the authority would pay compensation in money, provided that the legislative basis mandated this remedy. Only if the legislation authorizing the limitation did not foresee preventive measures or compensation would both the legislation and the permit be unconstitutional and invalid.⁸¹

Remedies for excessive indirect limitations

If an administrative authority were to disproportionately impair the environmental person's property by permitting harmful activity on another property, the standard remedy would be invalidity of the permit.⁸² However, the environmental person would have to challenge the permit in court in a timely manner,⁸³ failing which it would probably be left without judicial recourse to the courts.⁸⁴

If authorities fail to enforce emissions standards, the environmental person, unlike an NGO, could probably obtain compensation.⁸⁵ When it comes to legislative omissions to introduce stricter emissions standards, it has already been pointed out in the

⁷⁹ Bundesverfassungsgericht, 15 Sept. 2011, n. 49 above, p. 430; Bundesverfassungsgericht, 2 Mar. 1999, n. 30 above, p. 2879.

⁸⁰ Bundesverfassungsgericht, 2 Mar. 1999, *ibid.*, p. 2879.

⁸¹ *Ibid.*

⁸² § 113(1) Administrative Court Procedure Code (*Verwaltungsgerichtsordnung*) (VwGO).

⁸³ Under § 74(1) VwGO, *ibid.*, the environmental person is required to lodge an appeal within one month.

⁸⁴ As the environmental person failed to challenge the lawfulness of the permit, the courts would be unlikely to award compensation under the doctrine of 'expropriation-like infringement' (*enteignungsgleicher Eingriff*): U. Battis, '§ 18 BauGB', in U. Battis, M. Krautzberger & R.P. Löhr (eds), *BauGB: Baugesetzbuch [Federal Building Code]*, 14th edn (C.H. Beck, 2019), para. 3. If the harm caused to the environmental person was unforeseeable or the environmental person could not rely upon Art. 14, which may be the case under construction law, the Black Forest might still obtain compensation under the doctrine of 'expropriatory infringement' (*enteignender Eingriff*).

⁸⁵ This claim can be based upon either an expropriation-like infringement or the Police Act of one of the federated states (*Länder*), e.g., § 39(1)lit.b Ordnungsbehördengesetz of North-Rhine Westphalia. However, the action will be successful only if the authority was under an obligation to act and there was no discretion not to act: H.J. Papier & F. Shirvani, '§ 839 BGB', in M. Habersack (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 7*, 8th edn (C.H. Beck, 2020), para. 54.

analysis of indirect limitations (3.3) that the environmental person would be unlikely to succeed in compelling the legislature to protect the environmental person's property. It is no surprise that an action for repair or compensation in money would also not be successful. Even if there had been an obligation for the legislature to act, the protection of the state's financial interests is cited to justify that the legislature would not be liable to pay compensation.⁸⁶

4. PROTECTION OF THE BLACK FOREST FROM EXPROPRIATION

Expropriation entails the state taking away legal title to the property to use it in the public interest, for example, for the construction of a road. Vesting ownership in the environmental person would offer clear advantages for the protection of the Black Forest in the context of expropriation. As things stand, the Black Forest's private human owners can sell the forest to the state, without the state having to go through an expropriation procedure. Environmental NGOs could only argue for the protection of the forest within the procedure in which the project is planned.⁸⁷ If the human owners refused to sell to the state or if an environmental person owned the Black Forest, the state would have to observe the constitutional and legislative requirements for expropriation and go through an expropriation procedure to acquire ownership. Also, because of the impact of the expropriation, which is inherently excessive,⁸⁸ the human owner or the environmental person would receive compensation. This is stipulated by Article 14(3) GG and is one of the fundamental principles of expropriation law in almost all jurisdictions.⁸⁹ An environmental NGO, on the other hand, would not receive compensation under the property clause. This section examines the additional institutional and substantive protection enjoyed by the environmental person (4.1) as well as the remedies at the environmental person's disposal (4.2).

4.1. *Additional Institutional and Substantive Protection*

This subsection demonstrates that ownership would make additional legislation necessary in order to transfer ownership of the Black Forest to developers of economic development projects. Moreover, ownership would create additional substantive protection through the proportionality test. However, the weight of the Black Forest's interest in the balancing of interests would be lower than if the state expropriated human owners of the forest who also use it for extractive purposes, because of the continued anthropocentric prioritization of human interests over those of nature.

⁸⁶ Bundesgerichtshof, 10 Feb. 2005, *NJW* 2005, p. 1363, at 1364; A. von Arnould, 'Enteignender und enteignungsgleicher Eingriff heute' (2002) 93 *Verwaltungsarchiv*, pp. 394–417, at 404 et seq.

⁸⁷ § 73(4) Administrative Procedure Code (Verwaltungsverfahrensgesetz) (VwVfG); W. Neumann & C. Külpmann, '§ 73 VwVfG', in Stelkens, Bonk & Sachs, n. 56 above, para. 103.

⁸⁸ Papier & Shirvani, n. 19 above, para. 700.

⁸⁹ See, e.g., N.K. Tagliarino, *National-Level Adoption of International Standards on Expropriation, Compensation and Resettlement* (Eleven, 2019); J.A.M.A. Sluysmans, S. Verbist & E.J.L. Waring (eds), *Expropriation Law in Europe* (Kluwer, 2015).

Additional institutional protection

Article 14(3) GG requires that the expropriation is authorized by an Act of Parliament.⁹⁰ Ownership of the Black Forest by the environmental person would offer additional institutional protection compared with the situation in which a human owner decided to sell it to the state. The expropriation statute not only has to authorize the expropriation, but also to specify the purposes and the projects for which property may be expropriated.⁹¹ As there are several statutes that authorize expropriation for many types of project and purpose,⁹² this requirement would offer little additional protection in practice. It would only provide additional protection from expropriation for economic development projects, such as a new factory or mall which has the potential to generate jobs and growth. The Federal Constitutional Court has imposed such strict rules on the specificity of expropriation statutes for such projects⁹³ that, in practice, a specific statute needs to be promulgated for each project.⁹⁴ This would very likely hamper economic development projects in the Black Forest, which would have to be expropriated to implement the project.

Additional substantive protection

The second explicit requirement under Article 14(3) GG is that the expropriation serve the public good. The ‘public good’ in turn has two sub-requirements. The expropriation has to serve a public goal of particular weight (*Gemeinwohlziel von besonderem Gewicht*). While the legislature has a margin of appreciation in defining such objectives, this category in any case excludes purely private purposes.⁹⁵ The state thus cannot take away ownership of the Black Forest, for instance, for a private dumping ground. The second sub-requirement is that the project is a proportionate means to achieve the public goal of particular weight. Proportionality consists of three steps: suitability, necessity, and proportionality in the narrow sense. The project will be suitable and necessary if it makes a substantial contribution to the public goal of particular weight.⁹⁶ Proportionality in the narrow sense requires that the public and private interests adversely affected by the project do not outweigh the project’s contribution to the public goal of particular weight.⁹⁷ In addition to the explicit public good requirement, the expropriation itself must be the least invasive suitable means to acquire the land for the project without imposing an excessive burden on the property holder.⁹⁸

⁹⁰ Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, p. 214.

⁹¹ Bundesverfassungsgericht, 24 Mar. 1987, NJW 1987, p. 1251, at 1253.

⁹² See, e.g., § 85(1) Federal Building Code (Baugesetzbuch (BauGB)), which authorizes expropriation for myriad infrastructure projects on the basis of a municipal zoning plan.

⁹³ Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, p. 218; Bundesverfassungsgericht, 24 Mar. 1987, n. 91 above, p. 1253.

⁹⁴ B. Hoops, *The Legitimate Justification of Expropriation* (Juta, 2017), para. 3.2.3.1.

⁹⁵ Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, p. 214.

⁹⁶ *Ibid.*, pp. 215 et seq.

⁹⁷ *Ibid.*, p. 216.

⁹⁸ *Ibid.*, pp. 215 et seq.

From the perspective of environmental protection, the fact that the project and the expropriation would have to be justified and measured against the environmental person's property interest would be a significant advantage over the situation where the Black Forest is owned by human entities and an environmental NGO has to argue against a public project.

What makes the German approach particularly valuable to the environmental person is that the German courts generally do not defer to the value judgments of the expropriating authority in the proportionality test, but may substitute it with their own assessment.⁹⁹ Also, the role of the compensation owed within that test could contribute to the environmental person's protection. Compensation is considered to be only a *consequence* of a lawful expropriation.¹⁰⁰ For this reason, the Federal Constitutional Court has decided that the competent authority must not take into account the compensation owed in the balancing of interests.¹⁰¹ The background to this rule is that, as set out above (3.4), the German Basic Law primarily protects the property right as such and only subsidiarily its value.¹⁰² This would prevent the monetary value of the Black Forest from tilting the scale towards expropriation.

That said, there is potential for even more additional protection. The requirements of the public goal of particular weight, suitability, and necessity would be applied in the same way regardless of whether the owner is a human or an environmental person. The weak spot in the protection of the environmental person would be the test of proportionality in the narrow sense. As discussed with regard to limitations (3.2 and 3.3), the property interest of the environmental person would be likely to create some additional weight for the interest in protecting the Black Forest compared with a situation where environmental protection would feature only as a public interest in the balancing of interests.¹⁰³ Also, expropriations lead not only to extraction or pollution, but to the loss of part of the ecosystem embodied by the environmental person. This magnitude of the damage should substantially increase the weight of the environmental person's interest.

However, the analysis of the limitations has already shown that the anthropocentric, extractive value judgments of the German legal system are very likely to underestimate significantly the value of the Black Forest to the ecosystem as a whole. As a result, the natural subject would receive relatively little additional substantive protection. This leads to the paradoxical insight that vesting ownership in an environmental person and excluding human activity as much as possible would, under certain circumstances, be counter-productive for protection from expropriation. If human entities own the Black Forest and not only conserve the forest, but also use it as a home or for sustainable food production, the property interest would probably receive more weight in the

⁹⁹ Ibid., pp. 221 et seq, in particular 223, 227 et seq, 231 et seq; Bundesverfassungsgericht, 31 May 2011, NVwZ 2011, p. 1062, at 1064.

¹⁰⁰ Bundesverfassungsgericht, 10 Mar. 1981, NJW 1981, p. 1257; Bundesverfassungsgericht, 18 Dec. 1968, NJW 1969, p. 309, at 311, 313.

¹⁰¹ Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, p. 216.

¹⁰² Cf. Hoops, n. 94 above, pp. 133, 548 et seq.

¹⁰³ See, e.g., Bundesverfassungsgericht, 17 Dec. 2013, n. 10 above, pp. 219, 221.

balancing of interests because those human activities receive particular protection under the property clause.

Overall, it seems very likely that it would still be possible to expropriate the property interest in the Black Forest either way. In fact, the scarcity of case law on disproportionate expropriations suggests that German authorities generally expropriate property of human owners within constitutional boundaries.¹⁰⁴

4.2. *Compensation as a Remedy*

If the expropriation did not meet all legislative and constitutional requirements, the environmental person could lodge an appeal before the administrative courts and have it set aside. This would meet the needs of the Black Forest. If the expropriation were lawful, the remedy would be compensation, pursuant to Article 14(3) GG, in money or other form.¹⁰⁵ Being awarded compensation following an expropriation would be a major advantage compared with the situation where the Black Forest is owned by human entities.

However, as this subsection argues, this standard remedy would not meet the needs of the environmental person, and expropriations of the environmental person's property should generally be prohibited. The primary function of compensation is to replace the expropriated property in the estate of the expropriatee. It thereby heals and equalizes the excessive burden borne by the expropriatee in the public interest.¹⁰⁶ It is fair that all taxpayers share the burden for the public good by paying compensation to the expropriatee. The anthropocentric assumption behind this function is that compensation, most often in money, can adequately replace the property in the estate of the expropriatee.

Theoretically, compensation in money or in the form of land to replace the taken land could assist the environmental person in repairing the damage caused by the expropriation and the project implemented in the Black Forest. However, if an environmental person's property were expropriated, the forest would literally become smaller. To the forest, the property would not merely be a tool or an asset that helps a person to realize their potential; the property is part of the person. As each part of the forest is a unique and irreplaceable component of an ecosystem, compensation would be little more than a plaster on the stump of a limb after an amputation.

Even if compensation could be an adequate remedy for the Black Forest, it would be unlikely to reflect the value of the expropriated property. The assumption in most

¹⁰⁴ For an exception see Bundesgerichtshof, 27 Jan. 1977, *NJW* 1977, p. 955, at 956; and for an analysis see Hoops, n. 94 above, para. 3.3.5.1.

¹⁰⁵ Papier & Shirvani, n. 19 above, para. 699.

¹⁰⁶ H. Dagan, 'Expropriatory Compensation, Distributive Justice, and the Rule of Law', in B. Hoops et al. (eds), *Rethinking Expropriation Law I: Public Interest in Expropriation* (Eleven, 2015), pp. 349–67, at 351. For the other functions of compensation, see T.J. Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (Cambridge University Press, 2011), p. 71; F.I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law' (1967) 80(6) *Harvard Law Review*, pp. 1165–258, at 1214–18.

jurisdictions seems to be that payment of the property's fair market value is generally an equitable form of compensation. By contrast, a subjective value that only the owner attaches to the property is legally irrelevant in most jurisdictions.¹⁰⁷ The same applies under German legislation, and the Basic Law permits this choice.¹⁰⁸ The choice is problematic because fair market value reflects only the value of the Black Forest to the human economy. The value does not take into account contributions of the natural subject to society that cannot be expressed in money, let alone its intrinsic value.¹⁰⁹ The compensation awarded would thus always prove to be too low in any case to equalize the burden borne by the natural subject.

5. A WAY FORWARD

Ownership and other property rights have not only greatly contributed to economic development and growth, but also to environmental degradation.¹¹⁰ As ownership and its characteristics have proven quite resilient over time, it is unsurprising that some advocates of environmental protection are trying to use ownership for their own advantage.¹¹¹ Ownership of natural entities, if vested in environmental persons, can be a powerful means for the environment to protect itself because, in western-style legal thinking, any limitation of ownership will be valid only if it is justified by other rights or the public interest. In the absence of limitations, environmental persons could theoretically exclude all human activity on the new natural subject. Environmental persons could therefore better manage themselves, insulated from human decision making, compared with the situation where nature has to rely on human democracy to regulate the harmful acts of human owners.

Through the example of the Black Forest, this article has demonstrated that ownership and constitutional property law in Germany would provide considerable additional protection from extraction and pollution. That is not to say that ownership would miraculously resolve all threats to nature. The state would still have the power to limit and expropriate the environmental person's property. However, compared with a situation where human entities own the natural entity, the natural subject would receive additional institutional protection through the requirement of a legislative basis for expropriations and all limitations concerning activities on its land. Also, the environmental person would have standing all the way up to the Constitutional Court with regard to any state or private action affecting it, and could rely on all legislation and the Basic Law.

¹⁰⁷ Sluysmans, Verbist & Waring, n. 89 above, Ch. 1, Section 6.3; G.S. Alexander & E.M. Peñalver, *Introduction to Property Theory* (Cambridge University Press, 2012), pp. 157 et seq.

¹⁰⁸ See, e.g., § 95 BauGB; Papier & Shirvani, n. 19 above, para. 703.

¹⁰⁹ See, e.g., M. Sagoff, *Price, Principle, and the Environment* (Cambridge University Press, 2004).

¹¹⁰ F. Capra & U. Mattei, *The Ecology of Law* (Berrett-Koehler, 2015).

¹¹¹ K. Sanders, "Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2018) 30(2) *Journal of Environmental Law*, pp. 207–34, at 217 et seq; J. Waldron, 'The Normative Resilience of Property', in J. McLean (ed.), *Property and the Constitution* (Hart, 1999), pp. 170–96. Other advocates of Rights of Nature must find this move unsettling, as they wish to move away from a system that categorizes natural entities as private property.

The substantive protection of the natural entity from pollution and extraction would be stronger than if it is owned by human entities. Suitability and necessity as parts of the proportionality test would prevent all private and all unnecessary public activities on the natural subject itself. However, in the final balancing of interests, it is very likely that the environmental person's property would be accorded considerably less weight than a human owner's property used for purposes other than (or in addition to) nature conservation. The protection from activities on another property that are harmful to the natural subject would generally be weaker because of the weight of the interest of the owner of that property. Moreover, the constitutional duty for the legislature to protect property would be unlikely to help environmental persons to compel the legislature to introduce stricter emissions standards. This little weight would not, or only to a very limited extent, result from the fact that the owner of the natural entity would be an environmental person. Rather, anthropocentric value judgments deeply entrenched in the German legal order favour extractive human activities and would be likely to reduce significantly the weight of the interests of the natural subject and any conservation-minded human owner. The flaw thus lies in anthropocentric property doctrine.

As regards the remedies for excessive limitations, invalidation of the administrative decision or preventive measures would seem to be satisfactory remedies for the protection of the natural subject. However, there is a risk that excessively damaging activities on the environmental person's land would only attract compensation in money. The remedy for lawful expropriation is compensation, most often in money. Receiving monetary compensation would be better than what an environmental NGO can hope for and could fund environmental protection efforts. However, the remedy of compensation would still not be satisfactory because it would fail to take into account that the environmental person embodies a part of nature. The assumption that parts of the natural subject could be replaced through compensation, drawing on the separation of subject and object of property rights, is false in respect of environmental persons.

Vesting ownership in a natural subject is a powerful, albeit imperfect, means of protecting nature. If the anthropocentric flaws in property law and doctrine were addressed, it would be more powerful still. To enhance the weight of the environmental person's property in any balancing of interests, German law should follow an 'ecocentric approach' to weighing property rights.¹¹² With this approach the weight of the environmental person's property must include the intrinsic value of the natural subject. It would require human institutions to acknowledge the role of the natural subject in the whole ecological system and not just human society, and recognize their own kind of contribution and productivity.¹¹³ An ecocentric approach still recognizes and takes into account human needs as part of the ecosystem, though.¹¹⁴ This recognition of intrinsic value would greatly enhance the weight of property held by environmental

¹¹² Gordon, n. 3 above, p. 74; Borràs, n. 2 above, p. 128; Schröter & Bosselmann, n. 9 above, p. 204.

¹¹³ Breckenridge, n. 35 above, p. 307.

¹¹⁴ See M. Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9(3) *Transnational Environmental Law*, pp. 429–53 (for a stricter interpretation of 'ecocentric').

persons in the balancing of interests because the property would serve to protect this intrinsic value and the natural subject's life and physical integrity. In a balancing of interests, it would also decentre human needs and alleviate their dominance.¹¹⁵ In addition, a more 'ecocentric approach' to remedies would establish the invalidity of the limitation as the standard remedy for excessive limitations; it would either prohibit expropriation of natural subjects or prescribe compensation in the form of land that could adequately replace the expropriated piece of the natural entity as the standard remedy for expropriation (and a requirement for a lawful expropriation). Future research must critically examine how this ecocentric approach could be implemented.

As German law, unlike many other jurisdictions, generally subjects both expropriation and limitations to a full judicial review, it may be relatively better equipped to implement these changes through the judicial development of the law.¹¹⁶ However, according weight to the interests of environmental persons would be an extraordinary intellectual challenge. Legislatures, authorities, and courts are used to making value judgments about an interest based upon its importance to human society.¹¹⁷ In an ecocentric rather than an anthropocentric legal framework, natural entities not only have a value to society as parts of the environment that sustain human life, but also an intrinsic value.¹¹⁸ Moreover, not only will this intrinsic value have to be determined, but also its relative weight in respect of human interests, such as the commercial or agricultural use of the forest land.

Undoubtedly, constitutional property law would have to undergo a long transition before public bodies could safely accord an appropriate weight to the environmental person's interest and provide satisfactory remedies. It is for legal researchers to explore ecocentric approaches to property further, and assist state bodies in developing methods and criteria for valuing the property rights of environmental persons in an ecocentric framework.

¹¹⁵ Gordon, n. 3 above, p. 72; Clark et al., n. 4 above, pp. 836 et seq; O'Donnell & Talbot-Jones, n. 16 above, pp. 3 et seq.

¹¹⁶ It should be noted that expanding the role of the judiciary and limiting the scope for manoeuvring of the legislature and/or the executive branch may conflict with entrenched cultural views on the proper role of the judiciary, and would therefore be no easy endeavour; cf. Hoops, n. 94 above, pp. 541 et seq.

¹¹⁷ S. 36(1) Constitution of the Republic of South Africa 1996, for instance, refers to 'an open and democratic society based on human dignity, equality and freedom' as the framework in which value judgments are made.

¹¹⁸ O'Donnell & Talbot-Jones, n. 16 above; Breckenridge, n. 35 above, pp. 300, 314.