

LAND LAW AND HUMAN RIGHTS

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A. Introduction

Land law and human rights have never seemed particularly natural bedfellows. Perhaps it is because the popular notions of property and humanity appear somehow antithetical, a jarring juxtaposition of the self-regarding impulse towards personal appropriation and an other-regarding vision of the intrinsic merits of strangers. Again, land law and human rights law may have tended to look like polar extremes of jurisprudential concern precisely because, across the distance of the supposed public-private divide, the rather different resonances of their unshared terminology -- the intellectual tenor of divergent legal traditions -- intensified the impression that these areas were culturally and substantively quite distinct. Their lack of congruence may have appeared all the more understandable in those jurisdictions where the allocation of the primary goods of life was already largely settled and where disputes over land seldom raised fundamental issues of raw human entitlement. On this view human rights considerations were apt to penetrate the sphere of the land lawyer only in the context of aboriginal land claims or systematic ethnic displacement or gross colonial exploitation in far-flung parts of the globe. In England, by contrast, the interface between human rights discourse and the law of real property came to seem somewhat limited amidst the relative affluence of a post-war welfare state in which the oppressed and the dispossessed -- Frantz Fanon's 'wretched of the earth' -- were conspicuous mainly by their absence.

For these, and many other, reasons the intricate machinery of the Law of Property Act 1925 and its satellite legislation contains little which could be confused with the positive protection or reinforcement of basic concepts of human freedom, dignity and equality. The rights upheld by the 1925 legislation (and by its associated regimes of registration) are, in general, derivative or transaction-based rights rather than rights of an original character arising in spontaneous vindication of free-standing perceptions of human worth. Still less did the formative property jurisprudence propounded by an earlier generation of Victorian judges overtly endorse any intrinsic link between property and human values. For instance, the overseers of England's industrial revolution cared little for that most modern of concerns -- the human right to respect for privacy.¹ The sole sense in which notions of human freedom impinged on the 19th century world of real property was evidenced by the landowner's more or less unconstrained power to exploit his land as he saw fit without

¹ See Gray, *Property in Thin Air*, [1991] CLJ 252 at 259-63.

regard either to the needs of others² or to any higher conception of the irreducible rights of his fellow human beings.³ Most famously, in *Bradford Corp'n v Pickles*,⁴ the House of Lords allowed a landowner, even though acting maliciously, to cut off a supply of clean water which would otherwise have served the rapidly developing domestic, sanitary and industrial requirements of the city of Bradford. As Lord Macnaghten indicated,⁵ the landowner might prefer 'his own interests to the public good' and might indeed be 'churlish, selfish, and grasping.' But, although his conduct might seem 'shocking to a moral philosopher', the House of Lords refused to intervene.

Yet the assumed dissociation of land law and human rights has always been one of the larger (but no less insidious) myths of the law. The law of property silently betrays a range of value judgments about the 'proper' entitlements of human and other actors.⁶ These value judgments reflect a complex picture of social relationships and rankings, each casting a shadow on some extra-legal index of freedom, dignity and equality. For instance, the law of matrimonial property long bore the imprint of a dogma of marital symbiosis which ensured that, deep into the 20th century, a substantial portion of the population lived most of their adult life in a state of legal and factual dispossession. The medieval notion of spousal unity -- of husband and wife as 'one flesh' -- had the effect of suspending the legal personality of the married woman and rendering her incompetent to acquire property or even to earn wages in her own name.⁷ As Lord Denning MR acidly observed some time later, 'the law regarded husband and wife as one: and the husband as that one.'⁸

The invidious discrimination practised against the married woman was reversed only slowly by the long-term effects of the Married Women's Property Acts of 1870 and 1882, but the historical process provides yet another reminder of the way in which, as Professor C.B. Macpherson pointed out,⁹ the idea of property is being gradually broadened to include a 'right to a kind of society or set of power relations which will enable the individual to live a fully human life.' Indeed, in an older and more enlightened property philosophy which lies deeply embedded in Anglo-American political thought, the concept of 'property' was *always* accounted as

² See *Tapling v Jones* (1865) 11 HLC 290 at 311, 11 ER 1344 at 1353 per Lord Cranworth (every man has 'a right to use his own land by building on it as he thinks most to his interest').

³ See Lord Hoffmann's recent description of human rights as 'rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation' (*R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1411D-E).

⁴ [1895] AC 587.

⁵ [1895] AC 587 at 601.

⁶ See Gray and Gray, *Elements of Land Law* (3rd edn, Butterworths, London 2001), pp 95-6.

⁷ The married woman's persona at common law was 'incorporated and consolidated into that of the husband ... her *baron*, or lord' (Blackstone, *Commentaries*, Vol I, p 430). See Gray, 'Property in Common Law Systems', in G.E. van Maanen and A.J. van der Walt (ed), *Property Law on the Threshold of the 21st Century* (MAKLU, Antwerp, 1996), pp 238-40. It is remarkable that the full legal capacity of the married woman was finally recognised in England only in the Law Reform (Married Women and Tortfeasors) Act 1935.

⁸ *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 at 332C.

⁹ 'Capitalism and the Changing Concept of Property', in E. Kamenka and R.S. Neale (ed), *Feudalism, Capitalism and Beyond* (ANU Press, Canberra 1975), p 120.

inclusive of a person's 'life, liberty and estate'.¹⁰ This Lockean articulation of the coalescence of property and human right was to have energising -- even revolutionary -- consequences. For James Madison in 1792, just 'as a man is said to have a right to his property, he may be equally said to have a property in his rights'.¹¹ By that stage, of course, the American colonists, in active assertion of 'certain unalienable rights',¹² had just thrown off the yoke of British rule and, equally important, had altered the *Grundnorm* of a large part of a continent's land law.¹³

Nowadays, albeit in a rather different way, the ideology of human rights is beginning to lay an equally radical imprint on the law of land in England and Wales. Once again the process dispels any bland supposition that human rights law and land law never meet, overlap or converge. The Human Rights Act 1998 incorporates or patriates certain 'Convention rights' already enshrined for half a century in the European Convention on Human Rights.¹⁴ The 1998 Act requires that all primary and subordinate legislation must, so far as possible, be 'read and given effect in a way which is compatible with the Convention rights'.¹⁵ Every 'public authority' must, moreover, act conformably with the Convention rights¹⁶ and, given that a 'public authority' is specifically defined as inclusive of a 'court or tribunal',¹⁷ this requirement may well mean that the Convention guarantees are broadly applicable in all litigation (whether or not between private individuals). Even if the Human Rights Act does not directly command such 'horizontal' effect,¹⁸ it is by now inevitable that various forms of supra-national human rights protection will, in any event, infiltrate English law by more subtle or subliminal means.¹⁹

¹⁰ John Locke, *Two Treatises of Government* (2nd critical edn by P. Laslett, Cambridge 1967), *The Second Treatise*, s 123 (p 368).

¹¹ 'Property', in *The Papers of James Madison* (R.A. Rutland et al (ed), University of Virginia Press, Charlottesville Va, 1983), Vol 14, p 266 (*National Gazette*, 27 March 1792).

¹² 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness' (United States Declaration of Independence (1776)).

¹³ After the close of the Revolutionary War the land law system of the former colonies became 'allodial' (see *Stevens v City of Salisbury*, 214 A2d 775 at 778 (1965); *City of Annapolis v Waterman*, 745 A2d 1000 at 1006 (Md 2000)).

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (see Cmd 8969 (1953)). The 1998 Act does not derogate from any pre-existing 'right or freedom' conferred by or under any law effective in any part of the United Kingdom (Human Rights Act 1998, s 11(1)(a)).

¹⁵ Human Rights Act 1998, s 3(1).

¹⁶ Human Rights Act 1998, s 6(1).

¹⁷ Human Rights Act 1998, s 6(3)(a).

¹⁸ See J. Howell, *Land and Human Rights*, [1999] Conv 287; 'The Human Rights Act 1998: the "Horizontal Effect" on Land Law', in E. Cooke (ed), *Modern Studies in Property Law (Vol 1): Property 2000* (Hart Publishing, Oxford 2001), p 149.

¹⁹ As Lord Cooke of Thorndon observed in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 714A, international human rights standards 'may be taken into account in shaping the common law.' See also *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2001] 3 All ER 393 at 404j-405a ('Our task is ... to draw out the broad principles which animate the Convention').

Amongst the Convention rights which will most distinctively affect English land law are the principle of respect for private and family life and for the integrity of the home,²⁰ the freedoms of peaceful assembly and association,²¹ and the right to independent and impartial adjudication of one's civil rights and obligations by an appropriate tribunal.²² Already these protective provisions threaten to render obsolete some of the time-honoured, but invasive, mechanisms of English land law which have permitted landlords, mortgagees and those in possession of land to have recourse to self-help or other arbitrary remedies.²³ But the intended focus of the present essay is not upon these likely modifications of the English law of land. Instead our preoccupation is with the central, and potentially most controversial, property-related provision of the European Convention -- that which guarantees the entitlement of 'every natural or legal person ... to the peaceful enjoyment of his possessions.'²⁴ Our concern will be with the meaning to be attributed to this provision in the context of the modern regulatory state. The Convention's property guarantee highlights an important point of convergence between land law, environmental law and human rights law and, for these reasons, promises to acquire an unprecedented significance for English land lawyers in days to come. Unfamiliar though European human rights discourse may initially appear to be, we will be increasingly required to grapple with very different ways of addressing some of the critical issues facing the land lawyers of the 21st century. We must also draw upon the experience of other jurisdictions which have chosen to embed the protection of property rights in constitutional or statutory form.

B. Property guarantees

The pivotal property provision of the European Convention on Human Rights proclaims, in Protocol No 1, Article 1, that

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(1); Human Rights Act 1998, s 1(1), Sched I, Part I.

²¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11(1); Human Rights Act 1998, s 1(1), Sched I, Part I. Significantly the right to freedom of movement (Protocol No 4, Article 2) is not included amongst 'the Convention rights' to which the Human Rights Act refers (see Gray and Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, [1999] EHRLR 46 at 49).

²² European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1); Human Rights Act 1998, s 1(1), Sched I, Part I.

²³ See Gray and Gray, *Elements of Land Law* (3rd edn, Butterworths, London 2001), pp 286, 1263, 1295, 1404, 1417.

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No 1, Article 1; Human Rights Act 1998, s 1(1), Sched I, Part II.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Despite its slightly awkward reference to 'possessions', Article 1 has been broadly understood in human rights jurisprudence as 'in substance guaranteeing the right of property'.²⁵ Although the protection of the Convention applies only to a person's *existing* possessions,²⁶ Article 1 provides important safeguards against arbitrary expropriation, distinguishing in the process between the *deprivation* of property and the mere *control of use* of property. The first, and most general, rule enunciated in Article 1 comprises the principle of 'peaceful enjoyment' of possessions.²⁷ The second rule (contained in the second sentence of the first paragraph) places significant restraints upon deprivations of property, whilst the third rule (contained in the second paragraph) recognises the ultimate entitlement of the state to control the use of property 'in accordance with the general interest.' It is, however, a constant refrain of European Court jurisprudence that the overarching principle of 'peaceful enjoyment' of possessions qualifies, and permeates the interpretation of, the second and third rules of the Article.²⁸

The safeguards provided by the Convention are, in their way, mirrored across the expanse of European history during the past millennium.²⁹ The human right to protection from arbitrary dispossession by the state is born of a deep impulse which views lawless seizure of property as a particularly violating kind of molestation -- a form of proprietary rape.³⁰ An instinct against arbitrary disseisin of freehold is at least as old as Magna Carta³¹ and went on to animate the great 18th century declarations of social and civil liberties. For Blackstone, writing in 1765, it was inconceivable that 'sacred and inviolable rights of private property' should be postponed to 'public necessity' without 'a full indemnification and equivalent for the injury thereby

²⁵ *Marckx v Belgium*, Series A No 31, para 63 (1979). See also *Sporrong and Lönnroth v Sweden*, Series A No 52, para 57 (1982); *James v United Kingdom*, Series A No 98, para 37 (1986); *Banér v Sweden* (1989) 60 DR 128 at 138.

²⁶ Article 1 'does not guarantee the right to acquire possessions' (*Marckx v Belgium*, Series A No 31, para 50 (1979)).

²⁷ See *Sporrong and Lönnroth v Sweden*, Series A No 52, para 61 (1982).

²⁸ *James v United Kingdom*, Series A No 98, para 37 (1986); *Tre Traktörer Aktiebolag v Sweden*, Series A No 159, para 54 (1989); *Allan Jacobsson v Sweden*, Series A No 163, para 53 (1989); *Mellacher v Austria*, Series A No 169, para 42 (1989); *Fredin v Sweden*, Series A No 192, para 41 (1991); *Former King of Greece v Greece* (2001) 33 EHRR 516 at 543 (para 50).

²⁹ It has even been argued that the ideal of democratic government developed specifically in Northwestern Europe over the last 1,000 years has its roots in Anglo-Saxon and Norse concepts of 'seisin' which upheld the territorial inviolability of those in possession (see A.E.-S. Tay, 'Law, the citizen and the state', in E. Kamenka, R. Brown and A.E.-S. Tay (ed), *Law and Society: The Crisis in Legal Ideals* (Edward Arnold, London 1978), p 10).

³⁰ Compare the etymological links between 'rape' and 'rapine' (*Shorter Oxford English Dictionary* (Clarendon Press, Oxford 1993), Vol 2, p 2477).

³¹ Magna Carta 1215, Arts 39, 52 (see J.C. Holt, *Magna Carta* (2nd edn, Cambridge UP 1992), pp 461, 465-6). See also *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 226 per Deane J.

sustained.³² As Blackstone explained, in strikingly modern parlance, the state cannot act 'even for the general good of the whole community ... by simply stripping the subject of his property in an arbitrary manner.' Blackstone's premise was adopted, quickly and in virtually identical terms, in the French Declaration of the Rights of Man and of the Citizen³³ and has since inspired a vast range of national and international prohibitions on the taking of property by the state except for justifiable public purposes and on payment of fair value.³⁴ This principled approach to the institution of property accords strongly with the modern view that '[r]espect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires.'³⁵

In the common law tradition this bias against uncompensated expropriation came to have the status of a strong presumptive principle in the definition of both legislative³⁶ and prerogative³⁷ powers. The sentiment against capricious taking was to find perhaps its most famous expression in the guarantee of the Fifth Amendment of the United States Constitution (authored, incidentally, by James Madison) that '[n]o person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.'³⁸ Such protection of property has, of course, no precise parallel under the unwritten constitution of the United Kingdom. But it would be wrong to suppose that, prior to the commencement of the Human Rights Act 1998, the United Kingdom never had experience of an entrenched prohibition on uncompensated appropriation. For decades the Government of Ireland Act 1920 -- which ranked of course as a constitutional instrument -- forbade the enactment in Northern Ireland of any law which

³² Blackstone, *Commentaries*, Vol 1, p 135.

³³ 'Since property is a sacred and inviolable right, no one may be deprived thereof unless a legally established public necessity obviously requires it, and upon condition of a just and prior indemnity' (Declaration of the Rights of Man and of the Citizen (1789), Article 17).

³⁴ See eg United Nations Universal Declaration of Human Rights (1948), Article 17(2). '[T]he prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems' (*Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 659 per Kirby J). The rule against such deprivation is 'fundamental' (*Malika Holdings Pty Ltd v Stretton* (2001) 178 ALR 218 at 248 [121] per Kirby J).

³⁵ *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1411D per Lord Hoffmann.

³⁶ *Western Counties Railway Co v Windsor and Annapolis Railway Co* (1882) 7 App Cas 178 at 188 per Lord Watson; *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 542 per Lord Atkinson; *Belfast Corp v O.D. Cars Ltd* [1960] AC 490 at 517-8 per Viscount Simonds, 523 per Lord Radcliffe. See also *The Queen v Tener* (1985) 17 DLR (4th) 1 at 8 per Estey J (Supreme Court of Canada); *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 657-661 per Kirby J (High Court of Australia).

³⁷ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 112-3 per Lord Reid, 162-3 per Lord Pearce, 169-70 per Lord Upjohn.

³⁸ This 'Takings Clause' is acknowledged throughout the common law world as the genesis of many other similar restraints upon expropriation by government. See eg section 51(xxxi) of the Constitution of the Commonwealth of Australia, which operates as a 'constitutional guarantee ... against acquisition without just terms' (*Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 282 per Deane J). See also Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000), pp 36-82.

would 'either directly or indirectly ... take any property without compensation.'³⁹ In its time this provision generated what is now a largely forgotten cache of case law (emanating ultimately from the House of Lords). This case law has suddenly re-emerged to claim a contemporary relevance in the elaboration of the property provisions of the Human Rights Act 1998.

C. Takings and the modern regulatory state

It is universally acknowledged that the modern state retains a power of 'eminent domain' under which it may requisition land from private citizens in the interest of the public good.⁴⁰ Without such a power of compulsory acquisition the organisation of the essential infrastructure of contemporary life would prove largely impossible. Roads and railways could not be built; existing transport services could not be improved; inner city areas could not be regenerated; water resources could not be conserved and channelled; the communications industry could not function; the list would proceed almost endlessly. But in return for the compulsory transfer of titles in land the state must pay compensation. Compulsory purchase orders lead ultimately to an award of compensation in respect of the landowner's actual loss as assessed under the Land Compensation Act 1961. The shadow of Magna Carta still falls heavily some eight centuries later.

Yet this is far from the end of the story. The pertinent difficulty is that much modern governmental activity involves, not the outright acquisition of a freehold or leasehold estate in land, but rather the imposition of substantial community-oriented restrictions upon the *free enjoyment* of estate ownership. In such cases the landowner suffers not expropriation, but a form of 'injurious affection'.⁴¹ We live in an age of unprecedented regulation -- a feature intensified by our membership of the European Union -- with the consequence that the landowner's user rights are potentially cut back by a plethora of regulatory controls which, without any divesting of his formal proprietary title, severely limit the landowner's ability to exploit his land in precisely the way he may wish. Such constraints range from urban planning legislation to nature conservation measures; from negative controls which restrict the scope of future development⁴² to positive impositions which require that the landowner cede various rights of user over his land⁴³ or even reinstate the land to prescribed

³⁹ Government of Ireland Act 1920, s 5(1).

⁴⁰ Eminent domain has been described as 'the proprietary aspect of sovereignty' (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 284 per Rich J). See also *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193 at 205 per Murphy J ('a necessary feature of government').

⁴¹ See eg *Belfast Corpn v O.D. Cars Ltd* [1960] AC 490 at 524-5 per Lord Radcliffe.

⁴² See, for instance, the regime of planning control now exercised pursuant to the Town and Country Planning Act 1990 (as amended).

⁴³ Coercive powers are available, for instance, to initiate a 'public path creation order' over private land (see Highways Act 1980, s 26; Countryside and Rights of Way Act 2000, s 58(1)). An electricity undertaker may apply for the compulsory grant of a wayleave to install an electricity line in or over land (see Electricity Act 1989, Sched 4, para 6(1)-(3)). Likewise a telecommunications operator may seek mandatory powers over the land of strangers in order to facilitate its operations (Telecommunications Act 1984, Sched 2, para 5).

environmental standards.⁴⁴ It is particularly significant, in this context, that increasing emphasis is nowadays placed on the importance of enhanced public access to recreational land and leisure opportunities as a necessary precondition of improved community health and the promotion of 'social equity'.⁴⁵

All such interferences with land use inevitably have an impact on the landowner. The potential use or development value of land may be dramatically limited by its inclusion in a conservation area,⁴⁶ by a change of zoning classification to exclude commercial use,⁴⁷ by its listing as a site of 'special architectural or historic interest'⁴⁸ or as a site of 'special scientific interest'⁴⁹ or by its involuntary dedication to an army of climbers and ramblers. At a stroke, the intervention of the state may curtail the possibility of profitable or convenient construction on the land, affect the intensity of permissible farming methods, or simply entail considerable personal expense for the landowner.⁵⁰ The sharp edge of regulatory control falls just as keenly on the homeowner who finds that he is not allowed to build a much needed garage over the site of his listed outside lavatory as on the farmer who is forbidden to plough over the habitat of some protected species of animal, bird or butterfly. Moreover, such governmental interference with land use can supervene at any time -- perhaps long after the date of acquisition by the current landowner -- thus skewing his investment-backed expectations in respect of exploitation of the land. In the regulatory era the state and its authorised agencies have truly extensive power to intervene, on behalf of a perceived public interest, in the preservation or promotion of environmental amenity (a phrase which is wide enough to cover not merely features of urban planning and design, but also far-reaching aspects of the natural and cultural heritage).

In the present context the critical question is not about the statutory competence of relevant forms of regulation. By and large we all agree, at least at the level of abstract principle, that important features of environmental value require protection. The central question relates instead to the allocation of the cost of the environmental protection which we all profess to desire; and this cost may be measured in terms of forgone

⁴⁴ See eg Town and Country Planning Act 1990, ss 215-219; Environmental Protection Act 1990, ss 80-81, 81A.

⁴⁵ See eg the explicit intendment of the 'right to roam' provisions of the Countryside and Rights of Way Act 2000, as articulated in *Access to the Open Countryside in England and Wales: A Consultation Paper* (DETR, February 1998), paras 1.8, 3.50, 3.66-7) and the *Explanatory Notes* accompanying the Countryside and Rights of Way Bill (Session 1999-2000), para 5. Compare the legislative extension in Sweden in 1985 of free fishing rights in private waters as part of a 'public recreation policy' designed to assist in the 'important task for society ... to make a wide range of leisure activities available to all' (see *Banér v Sweden* (1989) 60 DR 128 at 132-3, 141).

⁴⁶ Planning (Listed Buildings and Conservation Areas) Act 1990, s 69(1), 74; Town and Country Planning Act 1990, s 211.

⁴⁷ See Town and Country Planning Act 1990, s 55(2)(f); Town and Country Planning (Use Classes) Order 1987 (SI 1987/764).

⁴⁸ Planning (Listed Buildings and Conservation Areas) Act 1990, ss 1, 7-8.

⁴⁹ Wildlife and Countryside Act 1981, s 28 (as substituted by Countryside and Rights of Way Act 2000, s 75(1), Sched 9).

⁵⁰ See eg *Morland v Secretary of State for the Environment, Transport and the Regions* (Unreported, Court of Appeal, 10 December 1998) (costs of clean-up of disused quarry).

development value or lost amenity or sheer cash outlay. It remains a contingent fact of life that the promotion of environmental welfare comes at a price which must be paid either by the general community or by some subset of it. Should the individual landowner be left to bear the cost of a regulatory intervention which enures to the wider benefit of the whole community? True it is that the landowner has not been stripped of any freehold or leasehold estate in the land. Such estate ownership remains, in at least formal terms, undisturbed in his hands. But the impact of all forms of regulatory control is to delimit the scope of his user rights -- of vital aspects of his proprietary sovereignty -- with the result that any easy distinction between mere regulation and outright confiscation appears, in many cases, rather less than convincing.⁵¹ And if confiscation of an estate in land for public purposes generates an unquestioned entitlement to compensation from public funds, it seems at least feasible that the impact of regulatory control should similarly constitute a compensable event.⁵² The homeowner whose hopes of building a garage have been frustrated, the landowner whose garden is disfigured by an overhead power line, the farmer whose field is sterilised by the imperative of wildlife conservation -- all arguably deserve some reimbursement from public funds for their uncovenanted contribution to the larger public weal. As the Court of Appeal of Nova Scotia recently observed, what is at stake is the 'policy issue of how minutely government may control land without buying it.'⁵³

At this point the picture becomes pretty confused. In modern times English law has tended severely to truncate the availability of public compensation for the disadvantageous impact of land use regulation,⁵⁴ but the denial of such compensation is far from uniform. Thus, while no compensation is offered to the owner who is refused planning permission or whose house suddenly becomes a listed building or whose land is subjected to access rights under the Countryside and Rights of Way Act 2000, reimbursement from public funds is provided, haphazardly, to others. Compensation is payable, for example, in respect of the grant of power line wayleaves to electricity undertakers⁵⁵ and cable ducting facilities to communications companies.⁵⁶ Likewise landowners can claim compensation for the compulsory creation of a public footpath or bridleway over their land.⁵⁷ Increasingly nowadays the regulatory quid pro quo merges with, and is intensified by, various semi-consensual regimes aimed at ecologically sympathetic administration of land resources. Some landowners

⁵¹ See *Commonwealth of Australia v Western Australia* (1999) 196 CLR 392 at 487-8, where Callinan J indicated that the 'real point' about regulation is that governments 'can effectively achieve the benefit of many aspects of proprietorship without actually becoming proprietors.' See also *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 34 F Supp 2d 1226 at 1238 (1999).

⁵² See D. Anderson, *Compensation for Interference with Property*, [1999] EHRLR 543 at 554.

⁵³ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 699 per Cromwell JA.

⁵⁴ See Planning and Compensation Act 1991, s 31.

⁵⁵ Electricity Act 1989, Sched 4, para 7. See eg *R v Secretary of State for Trade and Industry and Northern Electric Plc, ex parte Wolf* (2000) 79 P & CR 299 at 302-304 (power lines over garden).

⁵⁶ Telecommunications Act 1984, Sched 2, paras 4, 7. See eg *Mercury Communications Ltd v London and India Dock Investments Ltd* (1994) 69 P & CR 135 at 163-9; *British Telecommunications plc v Humber Bridge Board* (Unreported, Chancery Division, 6 December 2000).

⁵⁷ Highways Act 1980, s 28(1). See, however, *Rotherwick's Executors v Oxfordshire CC* [2000] 28 EG 144 at 147, where the Lands Tribunal rejected, merely on the ground that it was out of time, an exorbitant compensation claim of £1.12 million in respect of a 2 kilometre footpath created in an Oxfordshire beauty spot.

can claim payments for taking part in 'countryside stewardship' schemes which conserve or enhance the 'natural beauty or amenity of the countryside (including its flora and fauna and geological and physiographical features) or of any features of archaeological interest there' or which promote the 'enjoyment of the countryside by the public'.⁵⁸ Farmers can be compensated for their participation in similar eco-management schemes affecting designated areas.⁵⁹ Such 'environmentally sensitive area' management schemes normally specify permissible methods of agricultural production and practices 'compatible with the environment'⁶⁰ and may also contain 'requirements as to public access'.⁶¹

D. Key questions

It is unlikely that the inconsistency surrounding compensable state intervention can survive close scrutiny under the European-derived property guarantee now incorporated in the Human Rights Act 1998. English law will, in this respect, be catapulted into the same kinds of controversy which have assailed the environmental protection laws of other major jurisdictions in Europe, North America and the Pacific Rim. In the elaboration of the English approach to compensable takings under the First Protocol of the European Convention, it will be important to have regard to the collective guidance provided by the experience of other jurisdictions, just as it is important to observe points of continuing divergence. The remainder of this paper is therefore concerned to pinpoint some of the key questions which bear upon the grant or denial of public compensation for the landowning citizen's involuntary contributions towards general environmental welfare.

(1) *Absolutism or relativism?*

In most areas of property law there exists a tension between two philosophical starting points, which may perhaps be characterised as the perspectives of the *property absolutist* and the *property relativist*. Most lay persons tend, by natural disposition, to be property absolutists -- in that they believe passionately and instinctively that ownership of an estate in land confers inviolable and exclusive rights of enjoyment and exploitation.⁶² By contrast the property relativist pictures property in terms, not of absolute rights, but rather of qualified entitlements based on social accommodation, community-directed obligation and notions of

⁵⁸ See Environment Act 1995, s 98; Countryside Stewardship Regulations 2000 (SI 2000/3048), paras 2(1), 3-6 (effective 5 December 2000).

⁵⁹ See Agriculture Act 1986, s 18(1)-(4A) (as amended by Agriculture Act 1986 (Amendment) Regulations 1997 (SI 1997/1457) and Development Commission (Transfer of Functions and Miscellaneous Provisions) Order 1999 (SI 1999/416), Sched 1). See further Environmentally Sensitive Areas (Stages I-IV) Designation Orders 2000 (SI 2000/3049-3052) (effective 5 December 2000); England Rural Development Programme (Enforcement) Regulations 2000 (SI 2000/3044) (effective 5 December 2000).

⁶⁰ Agriculture Act 1986, s 18(4)(a), (4A).

⁶¹ Agriculture Act 1986, s 18(4)(aa).

⁶² See *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* (1987) 38 BLR 82 at 96, where Scott J referred to this outlook as 'a robust Victorian approach.'

reasonable user.⁶³ The dominant modern juristic perception of property is, without much doubt, that of the relativist,⁶⁴ partly because the pressures of crowded urban coexistence have forced a fresh recognition of the heavily interdependent nature of our social and economic arrangements.⁶⁵ There remain today few true property absolutists, although those who tend towards this view maintain that all regulatory interference with land use necessarily constitutes a compensable 'taking' of property.⁶⁶ In its most unqualified form, the absolutist approach castigates uncompensated regulation as environmental fascism and insists that if the community wants environmental welfare, it must purchase it fairly rather than simply dump the unalleviated cost on isolated owners of real estate.

(a) *Inevitability of some uncompensated intrusions*

There are certainly signs that the America of President George W. Bush is drifting back towards a more absolutist view of property relationships, but relativists everywhere can still point to one pragmatic, and highly persuasive, rejoinder to the most extreme form of the absolutist argument. It simply cannot be the case that *all* regulatory subtractions from a landholder's user rights necessarily constitute compensable deprivations of 'property'. As Justice Holmes once indicated in the Supreme Court of the United States,⁶⁷ 'Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law.'⁶⁸ The progress of civilised society would effectively grind to a halt if every minor regulatory act of the state provoked an immediate entitlement to a carefully calculated cash indemnity for the affected landowner. Some property values, said Holmes, are 'enjoyed under an implied limitation, and

⁶³ As one leading American commentator has said, the notion of '[a]utonomous secure rights of property' may already have given way to 'entitlements that are interconnected and relative'. Property law may come to be based 'as much on responsibilities as on rights, on human connectedness rather than on personal autonomy' (Eric Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan L Rev 1529 at 1530-1531 (1988-89)). Much recent legislation in England exemplifies this approach (see eg Access to Neighbouring Land Act 1992; Party Wall etc Act 1996; Countryside and Rights of Way Act 2000).

⁶⁴ This perception bulked large through most of the 20th century. See the statement of Justice Roberts in the United States Supreme Court that 'neither property rights nor contract rights are absolute ... Equally fundamental with the private right is that of the public to regulate it in the common interest' (*Nebbia v New York*, 291 US 502 at 523, 78 L Ed 940 at 948-949 (1934)).

⁶⁵ See eg *Xpress Print Pte Ltd v Monocrafts Pte Ltd* [2000] 3 SLR 545 at 561H, where in the Singaporean Court of Appeal Yong Pung How CJ recently emphasised that, consistently with the realities of the modern urban context, the law 'must ... take root in the terra firma of the principles of reciprocity and mutual respect for each other's property.' For a similar view in the United States, see *Green Party of New Jersey v Hartz Mountain Industries, Inc*, 752 A2d 315 at 322 (2000) per O'Hern J ('At one time private property owners exercised virtually unfettered control over property. As social standards changed, the law changed to recognise the primacy of certain public interests over the rights of private property owners').

⁶⁶ Perhaps the foremost exponent of this view is Richard A. Epstein (see Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985)).

⁶⁷ *Pennsylvania Coal Co v Mahon*, 260 US 393 at 413, 67 L Ed 322 at 325 (1922).

⁶⁸ See likewise *Belfast Corpn v O.D. Cars Ltd* [1960] AC 490 at 518 per Viscount Simonds.

must yield to the police power' (the latter phrase connoting, in the American context, a power of regulatory control exercised on behalf of the public interest).

This approach is strongly echoed in modern European human rights jurisprudence⁶⁹ and received eloquent affirmation many years ago when an urban planning control measure in Northern Ireland was challenged as an illicit 'taking' of property. Presiding over the Northern Ireland Court of Appeal, Lord MacDermott LCJ observed in *O.D. Cars Ltd v Belfast Corporation*⁷⁰ that '[i]n a community ordered by law some regulation of private rights for the public benefit is inevitable, and constitutional restrictions of a general kind have to be read with this in mind.'⁷¹ When the *O.D. Cars* case reached the House of Lords, Viscount Simonds added, rather sniffily, that legislative attenuation of an owner's user rights 'can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed.'⁷² Yet the danger remains that, absent a certain level of judicial vigilance, the long reach of regulatory control may violate the cogent rule of political ethics which discountenances 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'⁷³ The critical question is always whether an individual's land is being improperly 'pressed into some form of public service.'⁷⁴

(b) *A practical example*

The nature of the problem is well illustrated in *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*,⁷⁵ a case whose facts exhibit (for those familiar with the television drama) a certain

⁶⁹ Environmental planning and conservation measures unquestionably fall within the ambit of the 'general interest' presumptively protected by Protocol No 1, Article 1 (see *Allan Jacobsson v Sweden*, Series A No 163, para 57 (1989); *Denev v Sweden* (1989) 59 DR 127 at 130; *Fredin v Sweden*, Series A No 192, para 48 (1991); *Pine Valley Developments Ltd v Ireland*, Series A No 222, para 57 (1991)). See also *Banér v Sweden* (1989) 60 DR 128 at 140, where the European Human Rights Commission implicitly endorsed the argument that '[e]veryone must be prepared to accept a certain interference in the public interest without compensation.'

⁷⁰ [1959] NI 62 at 87-8. See also *Slattery v Naylor* (1888) 13 App Cas 446 at 449-50 per Lord Hobhouse.

⁷¹ As Lord Hoffmann recently expressed the point, '[t]he give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest' (*Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C). See also *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1 at 10A-B per Lord Hoffmann.

⁷² *Belfast Corp'n v O.D. Cars Ltd* [1960] AC 490 at 519. Viscount Simonds merely echoed Lord MacDermott's view ([1959] NI 62 at 87) that, on any other analysis, the power to legislate for peace, order and good government 'would be abridged to an unthinkable degree.'

⁷³ *Armstrong v United States*, 364 US 40 at 49, 4 L Ed 2d 1554 at 1561 (1960) per Justice Black. See also *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 per Justice Brennan (1978); *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 639 per Kirby J; *Eastern Enterprises v Apfel*, 524 US 498, 141 L Ed 2d 451 at 470 (1998) per Justice O'Connor; *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C-D per Lord Hoffmann.

⁷⁴ *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1018, 120 L Ed 2d 798 at 814 (1992) per Scalia J.

⁷⁵ [1985] IRLM 364, on appeal from [1983] IRLM 391.

'Ballykissangel' quality or flavour. Here, under powers conferred by heritage conservation legislation, a preservation order had been made by the Irish Commissioners of Public Works in respect of land situated in the vicinity of a promontory fort of early neolithic origin. The order was precipitated by the fact that the landowner, although aware that the site comprised a listed national monument, had engaged in ploughing activities which disturbed items of archaeological interest.⁷⁶ The preservation order prohibited, without compensation, all further interference with the soil surrounding the site of the monument. The landowner later alleged that the preservation order, by preventing cultivation of his land, had sterilised the land in a manner invalidated by the property guarantees of the Irish Constitution (which are, in relevant respects, the equivalent of those contained in the European Convention on Human Rights⁷⁷). *O'Callaghan's* case thus raised quite acutely the question whether the individual landowner should be left to bear alone the economic cost of protecting, for the public benefit, an important feature of the national cultural heritage. The Irish High Court and, on appeal, the Supreme Court nevertheless held that the facts did not disclose, in constitutional terms, any 'unjust attack' on the landowner's property rights. We shall attempt later to discern the rationale for this decision, but it becomes immediately clear how closely run are the arguments for and against mandatory public compensation for the impact of regulatory interventions. In the very words attributed by Lord Macnaghten to the grudging landowner in *Bradford Corp'n v Pickles*,⁷⁸ the farmer in *O'Callaghan's* case may well have taken the view that 'he ha[d] something which he [could] prevent other people enjoying unless he [was] paid for it.'⁷⁹

(2) A viable distinction between mere regulation of use and outright expropriation of title?

It is, of course, tempting to resolve the question of compensation for state intervention by adopting a straightforward, if somewhat mechanical, rule that a mere restriction on the exercise of user rights over land, as distinct from a direct governmental acquisition of estate ownership, *never* generates any claim to compensation from public funds.⁸⁰ A bright-line rule of this sort possesses a certain pedigree. In *France*

⁷⁶ Sadly, depredation at the hands of local farmers and builders has all too often been the fate of Irish antiquities (see A. Weir, *Early Ireland: A Field Guide* (Blackstaff Press, Belfast, 1980), pp 99, 121, 125, 131-2, 155, 207, 219).

⁷⁷ See *An Blascaod Mór Teoranta v Commissioners of Public Works in Ireland* (High Court, 27 February 1998), per Budd J, confirmed without comment on appeal (*An Blascaod Mór Teoranta v Minister for Arts* [2000] 1 ILRM 401 at 409).

⁷⁸ [1895] AC 587 at 600-01 (see text accompanying footnotes 5-6, *supra*).

⁷⁹ 'Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity' valued by the external community? ([1895] AC 587 at 600 per Lord Macnaghten).

⁸⁰ This rule is most perfectly exemplified by the denial that restrictions on development imposed through planning control or zoning mechanisms give rise to any claim to publicly funded compensation (*Village of Euclid v Ambler Realty Co*, 272 US 365 at 395-7, 71 L Ed 303 at 314 (1926) per Justice Sutherland (United States Supreme Court); *Westminster Bank Ltd v Beverley BC* [1971] AC 508 at 529D-F per Lord Reid, 535C per Viscount Dilhorne; *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283 per Deane J; *The Queen v Tener* (1985) 17 DLR (4th) 1 at 7 per Estey J, 23 per Wilson J (Supreme Court of Canada); *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583B-C per Lord Hoffmann (Privy Council appeal from Bermuda)).

Fenwick & Co Ltd v The King,⁸¹ one of the classic cases on requisition by the state, Wright J (later Lord Wright) held that a 'mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not ... , merely because it is obeyed, carry with it at common law any right to compensation.'⁸²

The same broad approach is indeed attempted in Article 1 of Protocol No 1 of the European Convention, which on its face proscribes any *deprivation* of a person's property, but specifically preserves the 'right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ... '

(a) *Eventual coalescence of regulation and expropriation*

The difficulty with the purported distinction between regulation and expropriation is quite simply that it does not *work*. Every jurisdiction which has grappled with the problem of regulatory control has eventually been forced to the concession that *some* interferences with a landowner's user rights are so extreme that in substance, although not in form, they comprise a taking of land for public benefit and therefore call imperatively for compensation from public funds.⁸³ Excessive limitation of user rights inevitably shades into expropriation; a regulatory measure may well conceal a confiscatory act even though it leaves the formal title perfectly intact.⁸⁴ In the well known words of Justice Holmes, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking.'⁸⁵ The force of this proposition was explicitly acknowledged by the House of Lords in *Belfast Corpn v O.D. Cars Ltd*,⁸⁶ the highpoint of the Northern Ireland jurisprudence on 'takings', and is now widely confirmed throughout the common law world.⁸⁷

⁸¹ [1927] 1 KB 458 at 467.

⁸² See also *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 145-6 per Andrews CJ, 172-3 per Murphy LJ; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 116 per Lord MacDermott LCJ.

⁸³ See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415 per Stephen J (referring to the 'universality of the problem sooner or later encountered'). Nor is there much point in attempting to distinguish, for compensation purposes, between regulation which imposes merely *passive* restrictions and regulation which requires *active* performance or expenditure by the landowner. The latter form of regulation may well involve nothing more demanding than, say, the occasional lopping of trees surrounding a major electricity transmission line (see eg *Electricity Supply Board v Gormley* [1985] IR 129 at 151-2), whilst the former may result in the loss of untold millions in development potential (see eg *Lucas v South Carolina Coastal Council*, 505 US 1003, 120 L Ed 2d 798 (1992), text accompanying footnotes 124-9, *infra*).

⁸⁴ See *Belfast Corpn v O.D. Cars Ltd* [1960] AC 490 at 520 per Viscount Simonds. For reference in American case law to the 'almost imperceptible gradations' between regulation and taking, see *Stevens v City of Salisbury*, 214 A2d 775 at 779 (1965); *City of Annapolis v Waterman*, 745 A2d 1000 at 1015 (Md 2000). See also *Cohen v City of Hartford*, 710 A2d 746 at 754 (Conn 1998).

⁸⁵ *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 at 326 (1922). See similarly *United States v General Motors Corp*, 323 US 373 at 378, 89 L Ed 311 at 318 (1944) per Justice Roberts.

⁸⁶ [1960] AC 490 at 520 per Viscount Simonds, 525 per Lord Radcliffe. In the Northern Ireland Court of Appeal Lord MacDermott LCJ had been even more obviously prepared to regard the concept of compensable taking as inclusive of 'the imposition of some restriction or prohibition or other interference with proprietary rights.' For him, there could be a taking of property 'even though the proprietary rights which are taken away do not exhaust all the attributes of ownership' ([1959] NI 62 at 87).

The subtlety of the gradations between regulation and confiscation has also been amply recognised in European human rights law. In *Sporrong and Lönnroth v Sweden*⁸⁸ the European Court of Human Rights accepted that, in pursuance of its duty to 'look behind the appearances and investigate the realities of the situation', the Court must be sensitive to the possibility of 'de facto expropriation'. Thus a regulation of land use may constitute a 'de facto expropriation' if, without any formal deprivation of title, it 'affects the substance of the property' to such a degree that the measure 'can be assimilated to a deprivation of possessions'.⁸⁹ In practice there must have been some state intervention which takes away 'all meaningful use of the properties in question'.⁹⁰

The already indistinct borderline between regulation and expropriation is then further blurred by more recent developments in European jurisprudence. In terms of Protocol No 1, Article 1, mere interferences with land use rights fall to be considered, not as a species of 'deprivation' (which normally necessitates the payment of compensation to the landowner⁹¹), but as a presumptively legitimate measure of 'control' of land use (which carries no 'inherent' right to compensation⁹²). The European Court of Human Rights has now clarified, however, that even this form of regulation, which includes most schemes of town planning⁹³ and environmental protection,⁹⁴ calls for the provision of compensation if it otherwise fails to meet the overarching standard of 'peaceful enjoyment of ... possessions' guaranteed by the opening sentence of Article 1.⁹⁵ There

⁸⁷ See eg *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 144 per Mason J; *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 639 per Kirby J; *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 727 per Cromwell JA; *Alberta v Nilsson* (1999) 246 AR 201 at 221-3 per Marceau J.

⁸⁸ Series A No 52, para 63 (1982).

⁸⁹ *Banér v Sweden* (1989) 60 DR 128 at 139-140. See likewise *Fredin v Sweden*, Series A No 192, paras 42-3 (1991); *Pine Valley Developments Ltd v Ireland*, Series A No 222, paras 73-7. For an example of de facto expropriation, see *Papamichalopoulos v Greece*, Series A No 260-B, paras 41-5 (1993).

⁹⁰ *Fredin v Sweden*, Series A No 192, para 45 (1991). See, however, *Pine Valley Developments Ltd v Ireland*, Series A No 222, para 56 (1991), where the land in dispute was held not to have been left 'without any meaningful alternative use' since its owner (a property developer), although denied planning permission, could still farm or lease the land.

⁹¹ *James v United Kingdom*, Series A No 98, para 54 (1986); *Lithgow v United Kingdom*, Series A No 102, para 122 (1986); *Banér v Sweden* (1989) 60 DR 128 at 142; *Holy Monasteries v Greece*, Series A No 301, para 71 (1994); *Former King of Greece v Greece* (2001) 33 EHRR 516 at 555 (para 89).

⁹² See *Banér v Sweden* (1989) 60 DR 128 at 142.

⁹³ See *Sporrong and Lönnroth v Sweden*, Series A No 52, para 64 (1982); *Allan Jacobsson v Sweden*, Series A No 163, paras 54, 57 (1989).

⁹⁴ See *Banér v Sweden* (1989) 60 DR 128 at 140; *Fredin v Sweden*, Series A No 192, paras 47-8 (1991); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 600-1 (para 85).

⁹⁵ *Allan Jacobsson v Sweden*, Series A No 163, para 55 (1989); *Air Canada v United Kingdom*, Series A No 316-A, para 36 (1995); *Chassagnou v France* (2000) 29 EHRR 615 at 674-5 (para 75). The European Human Rights Commission likewise declined to rule out the possibility that a control of use may require compensation (see eg *Banér v Sweden* (1989) 60 DR 128 at 142; *Pine Valley Developments Ltd v Ireland*

are already indications of an increased willingness to hold that the 'peaceful enjoyment' clause of Article 1 is breached by certain kinds of land use control which, even though directed towards perfectly rational regulatory aims, fail to balance fairly the interests of the individual owner and the wider community, thus leaving the landowner uncompensated for his involuntary contribution to public welfare goals. In *Matos e Silva, LDA and others v Portugal*,⁹⁶ for example, the applicants' use of their land had been 'incontestably' restricted by a prolonged ban on both new construction and new farming activities. The ban had been imposed in connection with the creation of an aquacultural research station and national nature reserve for migrant birds to be sited on the applicants' portion of the Algarve coast. The Human Rights Court held that, although the intended environmental strategy 'did not lack a reasonable basis', the substantial (and uncompensated) interference with the landowners' rights had contravened the 'peaceful enjoyment' guarantee of Article 1.⁹⁷ A similar finding emerged in *Chassagnou v France*,⁹⁸ where the regulatory scheme under challenge was aimed at the improved organisation of hunting and the rational management of game stocks. Under new legislation landowners were obliged to surrender to approved municipal hunting associations their exclusive hunting rights over their own lands in return for reciprocal hunting rights over the lands of other association members. In so far as the scheme extinguished, for all practical purposes, the right to prohibit entry by huntsmen belonging to the new associations (and was, of course, both futile and offensive in relation to any landowners opposed to the principle of hunting), the Court held that there had been a clear derogation from the 'peaceful enjoyment of ... possessions' protected by Article 1.⁹⁹

(b) *The threshold of compensable 'regulatory taking'*

The point at which regulation becomes confiscation -- ie, the threshold of a compensable 'regulatory taking' -- is, of course, notoriously difficult to define.¹⁰⁰ The standard is certainly exacting. Some jurisdictions adopt the view that even an extensive diminution in the value of the affected land is not enough to establish that a 'regulatory taking' has occurred.¹⁰¹ By contrast, European case law maintains that 'severe economic

(1992) 14 EHRR 319 at 339 (para 84)). See also *S v France* (1990) 65 DR 250 at 262; *Former King of Greece v Greece* (2001) 33 EHRR 516 at 554-555 (para 89).

⁹⁶ (1997) 24 EHRR 573 at 599 (para 79).

⁹⁷ (1997) 24 EHRR 573 at 601-2 (paras 86-93).

⁹⁸ (2000) 29 EHRR 615.

⁹⁹ (2000) 29 EHRR 615 at 678-9 (paras 82-5).

¹⁰⁰ One commentator has described this aspect of takings jurisprudence as 'a top contender for the dubious title of "most incoherent area of American law"' (Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence*, 84 Geo LJ 1531 (1996)). See also *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 716 ('no magic formula'). For an excellent guide through the morass of American takings law, see David L. Callies (ed), *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas* (American Bar Association 1996).

¹⁰¹ See eg *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 700, 719-27 (although a decline in market value may be evidence of an elimination of 'virtually all the normal incidents of ownership').

consequences' flowing from a regulatory intervention (eg in the form of a 'concrete economic loss' of income or land value)¹⁰² may indicate that the 'peaceful enjoyment of ... possessions' has been fatally disturbed.¹⁰³ The United States Supreme Court has famously used as a benchmark the point where the landowner is 'called upon to sacrifice *all* economically beneficial uses' of his land.¹⁰⁴

Although approaches to the question vary, it is clear that the state must normally commandeer at least a substantial part of the utility of privately held land before confiscatory terminology begins to seem appropriate.¹⁰⁵ Courts across the common law world have variously expressed the threshold of compensable taking in terms of a removal of the 'substance' or 'reality' of proprietorship¹⁰⁶ or the elimination of 'virtually all of the aggregated incidents of ownership'.¹⁰⁷ Identification of the precise quantum of property which must be requisitioned by the state has proved problematical, not least in the context of environmental conservation. Has a compensable taking occurred when, for example, commercial excavation in land owned by a mining company is suddenly restricted by some regulatory initiative which incorporates the land within a national park? In *Newcrest Mining (WA) Ltd v Commonwealth of Australia*¹⁰⁸ McHugh J opposed the provision of publicly funded compensation for the mining company on the ground that its 'property interests ... in the land and minerals would continue as before.' The effect of the regulatory intervention was, in his view, 'merely to impinge on [the company's] rights to exploit those interests'. The majority of the High Court of Australia nevertheless believed that, in reality, there had been 'an effective sterilisation of the rights constituting the

¹⁰² See *Banér v Sweden* (1989) 60 DR 128 at 142-3. In *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 598 (para 76), it was alleged that the profitability of the affected land had fallen by 40 per cent during the period of the regulation.

¹⁰³ The initially awkward reference to 'peaceful enjoyment of ... possessions', which lies at the core of Protocol No 1, Article 1, may serve an important function by indicating that the threshold of compensable intervention is marked off by some sense of 'dispossession' of the landowner or of his enterprise or undertaking. It is significant that, in the old case law on the Government of Ireland Act 1920, the Northern Ireland courts moved slowly but surely towards reliance on the terminology of 'dispossession' (see *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157 per Babington LJ; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111, 116 per Lord MacDermott LCJ; *O.D. Cars Ltd v Belfast Corp'n* [1959] NI 62 at 82-4 per Lord MacDermott LCJ).

¹⁰⁴ *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1019, 120 L Ed 2d 798 at 815 (1992) per Scalia J (a 'categorical' taking).

¹⁰⁵ See eg *France Fenwick & Co Ltd v The King* [1927] 1 KB 458 at 467, where Wright J considered the rule against arbitrary taking of a subject's property to apply only to cases 'where property is actually taken possession of, or used by, the Government, or where, by order of a competent authority, it is placed at the disposal of the Government.'

¹⁰⁶ For resort to this criterion in Australia, see *Bank of New South Wales v Commonwealth of Australia* (1948) 76 CLR 1 at 349 per Dixon J; *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 633 per Gummow J. See also *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286 per Rich J ('everything that made [the property] worth having').

¹⁰⁷ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 717. See also *Alberta v Nilsson* (1999) 246 AR 201 at 221 (restriction 'of sufficient severity to remove virtually all of the rights associated with the property holder's interest').

¹⁰⁸ (1997) 190 CLR 513 at 573 (Kakadu National Park).

property in question',¹⁰⁹ thereby activating the constitutional requirement of just compensation. Kirby J thought it improper to expand a national park for public benefit 'at an economic cost to the owners of valuable property interests in sections of the park whose rights are effectively confiscated to achieve that end.'¹¹⁰ When, some years earlier, a similar issue had arisen before the Supreme Court of Canada,¹¹¹ Estey J likewise adopted the criterion that, in the interests of enhancing public amenity in the relevant park lands, the landowner's assets had been so regulated as to become 'virtually useless.'¹¹² Other similarly directed locutions emanating from Canadian courts speak of governmental interferences with land use which are so far-reaching that they operate a 'confiscation of all reasonable private uses' of the land.¹¹³

(c) *A residue of reasonable user rights for the landowner*

Each in its slightly different way, the formulae recited above articulate the message that the denial, for regulatory purposes, of a strategically significant quantum of user rights is tantamount to a confiscation and therefore requires the provision of compensation from public funds. But to the extent that regulatory intervention has left a residue of reasonable user rights vested in the landowner, *no* compensable event can be claimed to have occurred. Thus, for example, in *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*¹¹⁴ both the High Court and the Supreme Court declined to find that any compensable expropriation had been effected by a preservation order which prevented further ploughing of the land in question, but did not preclude its use for grazing.¹¹⁵ The claim of 'sterilisation' fell somewhat flat where the sterilisation complained of related merely to the unavailability of the land 'for other more profitable purposes.'¹¹⁶ Likewise in *Allan Jacobsson v Sweden*¹¹⁷ the European Court of Human Rights pointed out that

¹⁰⁹ (1997) 190 CLR 513 at 635 per Gummow J.

¹¹⁰ (1997) 190 CLR 513 at 639.

¹¹¹ See *The Queen v Tener* (1985) 17 DLR (4th) 1 at 12.

¹¹² Canadian courts have made frequent use of this standard (see eg *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR (3d) 462 at 473). See also *Casamiro Resource Corp v British Columbia* (1991) 80 DLR (4th) 1 at 10 (private rights rendered 'meaningless').

¹¹³ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 735-6 per Hallett JA.

¹¹⁴ [1983] IRLM 391 at 397 per McWilliam J; [1985] ILRM 364 at 367 per O'Higgins CJ (see text accompanying footnotes 76-7, *supra*).

¹¹⁵ 'I do not accept that all the bundle of rights constituting the plaintiff's ownership of the fort has been abolished ... the plaintiff has not been deprived of all normal use of the land' ([1983] IRLM 391 at 398-9 per McWilliam J).

¹¹⁶ [1983] IRLM 391 at 397 per McWilliam J. See, to like effect, *State ex rel BSW Development Group v City of Dayton*, 699 NE2d 1271 at 1276 (Ohio 1998).

¹¹⁷ Series A No 163, paras 61, 137 (1989).

the refusal of the applicant's request for planning permission for a second dwelling on the site of his existing home in no way prevented him from enjoying residence in the house which he already occupied.¹¹⁸

The one context in which a non-exhaustive abstraction of user rights tends to be regarded as automatically compensable occurs where the relevant regulatory activity takes the form of a continuous physical invasion, or 'permanent physical occupation', of the land concerned.¹¹⁹ Thus, notwithstanding the minimal impact or socially beneficial character of the intrusion, it has always been widely agreed that electricity transmission lines or pylons cannot be installed without the proffering of compensation.¹²⁰ Similarly, as evidenced by one of the classic decisions in American 'takings' law,¹²¹ the compulsory placement of facilities for cable television reception -- even though conducive to public benefit and extremely limited in scale -- constitutes a physically invasive interference with land use which must be compensated.¹²² By contrast, however, it is unlikely that a casual and intermittent physical presence -- such as that, say, of walkers or ramblers traversing open countryside -- could properly be identified as a sufficiently direct taking of land to justify a presumptive rule of publicly funded compensation for affected landowners.

In some circumstances it may not be altogether easy to determine whether regulatory intervention has extinguished all or most reasonable private uses of land. In perhaps the most controversial of the American 'takings' cases, *Lucas v South Carolina Coastal Council*,¹²³ state legislation intervened to frustrate the claimant's intention of building luxury beachfront homes on a notoriously unstable coastal area which he had earlier purchased for almost \$1 million. A majority of the United States Supreme Court pointed to the likelihood that the claimant was entitled to compensation for this regulatory imposition on the ground that, although not stripped of title, he had been deprived of all 'economically beneficial uses' of his land.¹²⁴ However, in spearheading the minority's opposition to publicly funded compensation, Justice Blackmun

¹¹⁸ See similarly *State of Ohio, ex rel RTG Inc v State of Ohio*, 753 NE2d 869 (Ohio Court of Appeals, 2001), where a takings claim by a mining company was rejected to the extent that, even following an environmentally motivated restriction of its subterranean mining rights, the company, as owner of the surface land, was able to put that land to other residential, agricultural and pastoral uses. (The company's takings claim succeeded in respect of other parcels of land in which it held not surface, but merely mining, rights.)

¹¹⁹ See *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1015, 120 L Ed 2d 798 at 812 (1992) per Justice Scalia.

¹²⁰ *West Midlands Joint Electricity Authority v Pitt* [1932] 2 KB 1 at 54 per Romer LJ (see also Macnaghten J at 30). See similarly *Robb v Electricity Board for Northern Ireland* [1937] NI 103 at 117 per Megaw J, 123-6 per Andrews LJ; *Electricity Supply Board v Gormley* [1985] IR 129 at 149-51 per Finlay CJ. In England and Wales compensation is now available under statute (see Electricity Act 1989, Sched 4, para 7).

¹²¹ *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 at 441, 73 L Ed 2d 868 at 886 (1982).

¹²² '[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character' (458 US 419 at 426, 73 L Ed 2d 868 at 876 per Justice Marshall). See also *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978); *Ehrlich v City of Culver City*, 911 P2d 429 at 443 (Cal 1996).

¹²³ 505 US 1003, 120 L Ed 2d 798 (1992).

¹²⁴ 505 US 1003 at 1044 at 1019, 120 L Ed 2d 798 at 815. See also *Lucas v South Carolina Coastal Council*, 424 SE2d 484 at 486 (1992).

attached significance to the fact that the landowner, whilst enjoined from building developments, could still enjoy 'other attributes of property' such as the right to exclude strangers and alienate the land to third parties,¹²⁵ together with the right to 'picnic, swim, camp in a tent, or live on the property in a movable trailer.'¹²⁶ Much depends on whether the private uses of which the landowner must be deprived are restrictively construed as comprising only economically valuable (or 'developmental') uses or are instead more broadly related to non-commodity values inherent in the land.¹²⁷ As the majority judgment in *Lucas* demonstrates, the current American tendency is, all too predictably, to confine the 'takings' question to monetisable aspects of land use as distinct from less tangible (and somewhat more subtle) features of human enjoyment of the resource concerned.¹²⁸

(3) *A component of social obligation inherent in rights of ownership?*

The European focus on the borderline between regulation and confiscation has tended to fasten not so much on the *property* abstracted from the aggrieved landowner as on the *propriety* of the abstraction.¹²⁹ European human rights case law accordingly demonstrates the inescapability of some kind of value judgment as to the competing interests involved in the regulatory context. In deciding whether a particular regulatory intervention has violated the 'peaceful enjoyment' guarantee of Article 1 of Protocol No 1, the court must determine whether a 'fair balance' has been struck between 'the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'¹³⁰ Ultimately, in common with the approach adopted in other jurisdictions, the European Court of Human Rights has identified the crucial issue

¹²⁵ For European parallels, see *Tre Traktörer Aktiebolag v Sweden*, Series A No 159, para 55 (1989); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 592 (para 103).

¹²⁶ 505 US 1003 at 1044, 120 L Ed 2d 798 at 831. See likewise *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 706, 728-9 ('traditional recreational uses' still available); *Steer Holdings Ltd v Manitoba* [1993] 2 WWR 146 at 153; *Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1041 (NY 1997); *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 34 F Supp 2d 1226 at 1241, 1243 (1999).

¹²⁷ See eg *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1065, 120 L Ed 2d 798 at 844 per Justice Stevens (who proffered the example of a 'regulation arbitrarily prohibiting an owner from continuing to use her property for bird-watching or sunbathing').

¹²⁸ See P. Manus, *The Blackbird Whistling -- The Silence Just After: Evaluating the Environmental Legacy of Justice Blackmun*, 85 Iowa L Rev 429 (2000).

¹²⁹ On this distinction, see *Loveladies Harbor, Inc v United States*, 28 F3d 1171 at 1179 (Fed Cir 1994).

¹³⁰ *Sporrong and Lönnroth v Sweden*, Series A No 52, para 69 (1982); *James v United Kingdom*, Series A No 98, para 50 (1986); *Fredin v Sweden*, Series A No 192, para 51 (1991); *Holy Monasteries v Greece*, Series A No 301, para 70 (1994); *Air Canada v United Kingdom*, Series A No 316-A, para 36 (1995); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 592 (para 106). See also *Former King of Greece v Greece* (2001) 33 EHRR 516 at 554 (para 89). To this extent the European approach mirrors the 'weighing of private and public interests' practised by courts in the United States (see *Agins v City of Tiburon*, 447 US 255 at 261, 65 L Ed 2d 106 at 112 (1980)).

as whether the landowner has been singled out to bear an 'individual and excessive burden' in relation to some community-directed obligation which should have been shared more widely.¹³¹

(a) *The test of legality*

It is of the essence of justice that laws should function at a certain level of generality.¹³² Accordingly, it is a major premise of Article 1 of Protocol No 1 that state intervention be 'lawful',¹³³ a precept which excludes any provision that operates erratically, over-selectively or in a wholly arbitrary manner. Such randomness of application goes fundamentally to the 'legality' of the provision concerned,¹³⁴ since an excessively 'individualised' targeting of otherwise socially desirable measures tends to smack unattractively of a 'bill of attainder'.¹³⁵ Regulatory intervention which operates *ad hominem* or whose scope is unduly narrowly restricted is therefore prone to fail not only the test of 'legality', but that of 'proportionality', and, by denying equal protection under the law, is also likely to breach the anti-discrimination provision contained in Article 14 of the European Convention.¹³⁶

Some sense of the possible response of English courts to highly specific or idiosyncratic impositions of environmental liability may now be gained from *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank*.¹³⁷ Here the Court of Appeal struck down, as inconsistent with both Article 14 and Protocol No 1, Article 1, the liability of certain landowners to contribute towards the cost of chancel repairs in their local church.¹³⁸ This liability (of ancient canon law origin) supposedly attached to these landowners as current proprietors of former rectorial glebe land adjacent to the church in question. The Court of Appeal, although agreeing that chancel repair liability was directed towards the 'legitimate [aim] of maintaining historic buildings in the public interest', emphasised that the obligation under challenge in the *Wallbank* case had improperly 'singled out' the landowners concerned for an archaic, arbitrary and unjustifiably discriminatory form of local

¹³¹ *Sporrong and Lönnroth v Sweden*, Series A No 52, para 73 (1982); *James v United Kingdom*, Series A No 98, para 50 (1986); *Håkansson and Sturesson v Sweden*, Series A No 121, para 51 (1990).

¹³² See Blackstone, *Commentaries*, Vol I, p 44; *Buckley & Others (Sinn Féin) v Attorney General* [1950] IR 67 at 70 per Gavan Duffy P; *Liyanage v The Queen* [1967] 1 AC 259 at 291 per Lord Pearce.

¹³³ See *Banér v Sweden* (1989) 60 DR 128 at 141.

¹³⁴ See *Hentrich v France*, Series A No 296-A, para 42 (1994); *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2001] 3 All ER 393 at 405d.

¹³⁵ *An Blascaod Mór Teoranta v Commissioners of Public Works in Ireland* (High Court, 27 February 1998), per Budd J (affd *An Blascaod Mór Teoranta v Minister for Arts* [2000] 1 ILRM 401 at 409).

¹³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14; Human Rights Act 1998, s 1(1), Sched I, Part I.

¹³⁷ [2001] 3 All ER 393 (Morritt V-C, Robert Walker and Sedley LJ).

¹³⁸ See Gray and Gray, *Elements of Land Law* (3rd edn, Butterworths, London 2001), p 974. The liability in the *Wallbank* case (amounting to over £95,000) was imposed on an elderly couple who had inherited their land some 30 years earlier.

taxation.¹³⁹ It may well be questioned whether the nexus between the landowners in the *Wallbank* case and the object of public conservationist concern (ie the local church) was any more remote than that between the farmer in *O'Callaghan's* case¹⁴⁰ and the national monument which the latter was required to preserve. True it is that the neolithic fort in *O'Callaghan's* case happened to be situated on the farmer's own land,¹⁴¹ but it is precisely this element of fortuitousness which accentuates, rather than relieves, the concern that the concentration of environmental liability upon a restricted class of one may now contravene the European Convention on Human Rights.

(b) *The test of proportionality*

It is broadly accepted that municipal authorities enjoy 'a wide margin of appreciation' in determining both the substantive goals and the procedural mechanics of appropriate policy initiatives in the regulatory area.¹⁴² It is therefore a cornerstone of human rights jurisprudence that Article 1 adjudications relating to 'peaceful enjoyment' inevitably entail an investigation of whether there exists 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.¹⁴³ Any interference with land rights which fails this test of 'proportionality' in relation to its declared regulatory aim cannot be 'deemed necessary' in terms of Article 1 of Protocol No 1 or said to subserve the 'general interest'.¹⁴⁴ But amongst the factors which tend to confirm the required proportionality of ends and means are the availability of monetary compensation for the affected landowner,¹⁴⁵ the avoidance of any excessive delay in clarifying the extent of

¹³⁹ [2001] 3 All ER 393 at 407a-g. The Court pointed out that chancel repair liability had 'long since lost its factual and legal basis' in that it was levied 'exclusively on the owners of land which has for centuries been divorced from the system of rights and responsibilities with which ecclesiastical law clothed the rectories of which the land once formed part' ([2001] 3 All ER 393 at 405h, 407a-b).

¹⁴⁰ *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General* [1985] ILRM 364, [1983] IRLM 391 (see text accompanying footnotes 76-7, 115-7, supra).

¹⁴¹ It is also true that the liability of the landowners in the *Wallbank* case derived from common law (and was only later confirmed in the Chancel Repairs Act 1932) and, again unlike that imposed in *O'Callaghan's* case, involved a positive obligation of money payment as distinct from a negative restriction of user. But it is less than clear, on reflection, that either of these factors should render the burden of environmental guardianship less acceptable in one case than in the other.

¹⁴² See eg *Sporrong and Lönnroth v Sweden*, Series A No 52, para 69 (1982); *AGOSI v United Kingdom*, Series A No 108, para 52 (1986); *Mellacher v Austria*, Series A No 169, para 45 (1989); *Fredin v Sweden*, Series A No 192, para 51 (1991).

¹⁴³ *James v United Kingdom*, Series A No 98, para 50 (1986); *Allan Jacobsson v Sweden*, Series A No 163, para 55 (1989). See also *Banér v Sweden* (1989) 60 DR 128 at 141-2; *Mellacher v Austria*, Series A No 169, paras 48, 57 (1989); *Fredin v Sweden*, Series A No 192, para 51 (1991). The United States Supreme Court has likewise confirmed that 'in a general sense concerns for proportionality animate the Takings Clause' (*City of Monterey v Del Monte Dunes*, 526 US 687, 143 L Ed 2d 882 at 900 (1999)).

¹⁴⁴ *Banér v Sweden* (1989) 60 DR 128 at 141.

¹⁴⁵ *Banér v Sweden* (1989) 60 DR 128 at 142; *S v France* (1990) 65 DR 250 at 262. See *Holy Monasteries v Greece*, Series A No 301, paras 71 (1994); *Matos e Silva LDA and others v Portugal* (1997) 24 EHRR 573 at 593 (para 111); *Former King of Greece v Greece* (2001) 33 EHRR 516 at 555 (para 89).

the regulatory imposition,¹⁴⁶ and the presence of any inherent risk¹⁴⁷ (or of foreknowledge on the landowner's part¹⁴⁸) that expectations of profitable development or exploitation might ultimately be falsified.¹⁴⁹ Correspondingly, any undue inflexibility¹⁵⁰ or over-selectiveness¹⁵¹ in the operation of a regulatory imposition tends to point towards a fatal element of *disproportionality* in the measure concerned.

(c) *Compensation inherent in the diffusion of regulatory benefits*

In so far as factors of compensation are relevant to proportionality, it must be borne in mind that environmental regulation sometimes involves no net loss at all for the affected landholder. Where, for instance, the diffused local or public benefit of the regulation secures an 'average reciprocity of advantage' for everyone concerned,¹⁵² a dimension of compensation can be said to be already inherent in the mechanism of regulation. The general distribution of the regulatory dividend -- as evidenced, say, by an enhanced quality of life for all in the neighbourhood or by an increase in local land values or by the more effective preservation of the cultural heritage¹⁵³ -- rather takes the edge off complaints of proprietary derogation.¹⁵⁴ Individual

¹⁴⁶ See eg *Allan Jacobsson v Sweden*, Series A No 163, para 60 (1989); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 602 (para 92).

¹⁴⁷ See eg *Fredin v Sweden*, Series A No 192, paras 50, 54 (1991); *Pine Valley Developments Ltd v Ireland*, Series A No 222, para 59 (1991).

¹⁴⁸ See eg *Allan Jacobsson v Sweden*, Series A No 163, paras 61, 136-7 (1989); *Fredin v Sweden*, Series A No 192, para 54 (1991). In *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General* [1985] IRLM 364 at 372, [1983] IRLM 391 at 396, 401, much significance was attached to the fact that the aggrieved landowner had been informed, prior to his purchase, of the fact that the land contained a listed national monument. See similarly *Loveladies Harbor, Inc v United States*, 28 F3d 1171 at 1177 (Fed Cir 1994); *Alegria v Keeney*, 687 A2d 1249 at 1253-4 (RI 1997); *Brunelle v Town of South Kingston*, 700 A2d 1075 at 1083 (RI 1997).

¹⁴⁹ Contrast the view recently adopted by the United States Supreme Court that a claimant cannot be barred from compensation merely because he acquired title with knowledge of a pre-existing regulatory limitation on his rights (see *Palazzolo v Rhode Island*, 121 S Ct 2448, 150 L Ed 2d 592 (2001)).

¹⁵⁰ *Sporrong and Lönnroth v Sweden*, Series A No 52, para 70 (1982).

¹⁵¹ *Hentrich v France*, Series A No 296-A, paras 47-9 (1994). See also *An Blascaod Mór Teoranta v Commissioners of Public Works in Ireland* (High Court, 27 February 1998), per Budd J; *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2001] 3 All ER 393 at 405d-h.

¹⁵² The root of this idea (classically demonstrated by zoning law) lies in the judgment delivered by Justice Holmes in *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 at 326 (1922). See also *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 362 per Bankes LJ, 370 per Scrutton LJ; *Agins v City of Tiburon*, 447 US 255 at 262, 65 L Ed 2d 106 at 113 (1980) per Justice Powell; *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283 per Deane J; *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 at 491, 94 L Ed 2d 472 at 492 (1987) per Justice Stevens; *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1017-8, 120 L Ed 2d 798 at 814 (1992) per Justice Scalia; *Kavanau v Santa Monica Rent Control Board*, 941 P2d 851 at 865 (Cal 1997).

¹⁵³ See eg *Penn Central Transportation Co v New York City*, 438 US 104 at 134-5, 57 L Ed 2d 631 at 655 (1978) per Justice Brennan.

¹⁵⁴ The affected landowner 'has in a sense been compensated by the public program "adjusting the benefits and burdens of economic life to promote the common good"' (see *Florida Rock Industries, Inc v*

proprietary rights can be seen as having been exchanged for improved civic rights to environmental welfare. This permutation of the law of general average helps to bridge the divergent emphases of European and common law approaches to the regulatory problem. To the extent that they can be said to promote the 'general interest' (and, thereby, indirectly the interests of the landowner himself), particular interferences with user rights more readily establish the proportionality of the provision in question.¹⁵⁵ Thus European tribunals have become increasingly insistent that landowners must be taken to be aware of, and implicated in, the 'general interest' which nowadays requires the regulation of land use for purposes of efficient town planning and of nature or heritage conservation.¹⁵⁶ Moreover, the 'margin of appreciation' principle, by focusing on the parameters of the democratic policy-making process, intensifies the sense that the individual citizen has already participated in the determination of collective environmental priorities.¹⁵⁷ The implicit assumption of much European case law is that, amidst the complex interdependencies of modern life, the landowner is obligated by a social duty to share the burdens of the 'general interest' from which he draws correlative benefits. The landowner's duty may not be absolute, but the crude principle of 'mutual benefit and burden' (with which property lawyers are indeed familiar¹⁵⁸) goes some distance toward cutting back the scope of those takings which call for mandatory compensation from public funds.

(d) *The net content of takings*

The issue of proportionality is affected, at an even more fundamental level, by the precise impact which, in any given case, regulation has exerted upon the complement of rights claimed by the landowner.¹⁵⁹ It is in this

United States, 18 F3d 1560 at 1570 (Fed Cir 1994), quoting *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978)).

¹⁵⁵ See eg *Wiesinger v Austria* (1993) 16 EHRR 258 at 290 (para 74), where the Human Rights Court rejected an Article 1 challenge to a land consolidation scheme, observing that it 'serves the interest of both the landowners concerned and the community as a whole by increasing the rentability of holdings and rationalising cultivation.'

¹⁵⁶ See eg *Fredin v Sweden*, Series A No 192, para 48 (1991); *Pine Valley Developments Ltd v Ireland*, Series A No 222, para 57 (1991); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 601 (para 88). In much the same way, American courts have held that 'legitimate state interests' are advanced by regulation directed towards providing protection from the 'ill effects of urbanization' (*Agins v City of Tiburon*, 447 US 255 at 261, 65 L Ed 2d 106 at 112 (1980)) or towards enhancing the 'quality of life by preserving the character and desirable aesthetic features of a city' (*Penn Central Transportation Co v New York City*, 438 US 104 at 129, 57 L Ed 2d 631 at 651 (1978)). See also, more recently, *Mayhew v Town of Sunnyvale*, 964 SW2d 922 at 934-5 (Tex 1998).

¹⁵⁷ See, in particular, the approach adopted by the Human Rights Commission in *Banér v Sweden* (1989) 60 DR 128 at 141-3. See (likewise in the context of Article 1 of Protocol No 1) the importance recently attached by the English Court of Appeal to statutory impositions 'voted upon by a representative legislature familiar with contemporary social conditions' (*Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2001] 3 All ER 393 at 405g-h).

¹⁵⁸ Gray and Gray, *Elements of Land Law* (3rd edn, Butterworths, London 2001), pp 1157-9.

¹⁵⁹ It has often been said that a court 'cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes' (see *MacDonald, Sommer & Frates v Yolo County*, 477 US 340 at 348, 91 L Ed 2d 285 at 294 (1986); *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1041, 120 L Ed 2d 798

context that, in its turn, European law may have something valuable to learn from the more highly analytical property tradition practised in the common law-based jurisdictions. Consideration of the impact of regulation requires some assessment of the degree to which the idea of 'property' comprises not merely notions of private right, but also elements of public duty. Of critical importance here is the exact scope of the community-directed obligations which define or delimit any landowner's 'bundle of rights'.¹⁶⁰ Uncompensated regulation of land use cannot be said to interfere with the 'peaceful enjoyment' of property if it brings about no actual *curtailment* of the landowner's existing user rights.¹⁶¹ Thus, for example, regulatory interventions which simply reinforce or 'duplicate'¹⁶² obligations already inherent in the landowner's title -- which render merely more explicit a limitation on user rights which was already present¹⁶³ -- do not operate any *taking* of property, let alone a *compensable* taking.¹⁶⁴ Where a regulatory imposition rules out some intrinsically illegitimate form of user, the rights of which the landowner may later claim to have been deprived were never, in truth, part of his 'bundle of rights' in the first place.¹⁶⁵ In such instances the regulatory control imposes no new burden; the public derives no new benefit; and there is neither need nor justification for compensation.

But to what extent does the landowner's 'bundle' consist not merely of *rights*, but also of *duties*? In the United States, for instance, the regulatory restriction of land use 'as one of the State's primary ways of preserving the public weal'¹⁶⁶ has long been 'treated as part of the burden of common citizenship'.¹⁶⁷ One of

at 829 (1992); *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 718, 729).

¹⁶⁰ See *Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1039 (NY 1997) ('the purchase of a "bundle of rights" necessarily includes the acquisition of a bundle of limitations').

¹⁶¹ This approach is reflected pre-eminently in the stance adopted by the United States Supreme Court that no compensation is payable 'if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with' (*Lucas v South Carolina Coastal Council*, 505 US 1003 at 1027, 120 L Ed 2d 798 at 820 (1992)). See also *Kim v City of New York*, 659 NYS2d 145 at 147 (Ct App 1997).

¹⁶² See *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1029, 120 L Ed 2d 798 at 821 (1992) per Justice Scalia.

¹⁶³ See *Kim v City of New York*, 659 NYS2d 145 at 148 (Ct App 1997).

¹⁶⁴ There is an extensive body of American case law, reaching back into the 19th century, which denies that any compensable 'taking' can be effected by land regulations which merely suppress 'noxious' or anti-social users which are 'injurious to the community' or threaten 'public health, safety, or morals' (see *Mugler v Kansas*, 123 US 623 at 665, 31 L Ed 205 at 211 (1887) per Justice Harlan; *Pennsylvania Coal Co v Mahon*, 260 US 393 at 417, 67 L Ed 322 at 327 (1922) per Justice Brandeis). As Justice Stevens remarked in *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 at 492, 94 L Ed 2d 472 at 492-3 (1987), only in this way can the law give effect to the obligation expressed in the common law maxim *sic utere tuo ut non alienum laedas* [use your own property in such manner as not to injure that of another] (see also *Munn v People of Illinois*, 94 US 113, 24 L Ed 77 at 84 (1877)). For a willingness to apply similar logic in Australia, see *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415 per Stephen J.

¹⁶⁵ See eg *Kim v City of New York*, 659 NYS2d 145 at 147, 151 (Ct App 1997) ('plaintiffs' title never encompassed the property interest they claim has been taken'); *Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1039-40 (NY 1997); *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 34 F Supp 2d 1226 at 1251 (1999).

¹⁶⁶ See *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 at 491, 94 L Ed 2d 472 at 492 (1987) per Justice Stevens.

today's vital questions concerns the extent to which this 'burden of common citizenship' imports a positive obligation to promote environmental welfare.¹⁶⁸ In an era of increasing environmental awareness it has become much more feasible to contend that land ownership is a form of social stewardship,¹⁶⁹ that right and responsibility are inseparably fused,¹⁷⁰ and that concern for environmental integrity is, at common law, an inescapable component of real entitlement. Such perceptions gain support both from the widespread affirmation throughout Europe that property rights must ultimately promote the public interest¹⁷¹ and from the insistence in European jurisprudence that 'in today's society the protection of the environment is an increasingly important consideration.'¹⁷² But to the extent that the landowner is *already* obligated to subserve the common good by safeguarding valuable or vulnerable features of environmental amenity, regulatory controls directed towards the same end cannot be said to derogate, compensably or otherwise, from the landowner's 'property'.¹⁷³ The community is already entitled -- has always been entitled -- to the benefit of a public-interest forbearance on the part of the estate owner.¹⁷⁴

¹⁶⁷ *Kimball Laundry Co v United States*, 338 US 1 at 5, 93 L Ed 1765 at 1772 (1949) per Justice Frankfurter.

¹⁶⁸ It is worth bearing in mind that 'the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder' (*Lucas v South Carolina Coastal Council*, 505 US 1003 at 1024-5, 120 L Ed 2d 798 at 818 (1992) per Justice Scalia).

¹⁶⁹ See W.N.R. Lucy and C. Mitchell, *Replacing Private Property: The Case for Stewardship*, [1996] CLJ 566; D.W. McKenzie Skene, J. Rowan-Robinson, R. Paisley and D.J. Cusine, *Stewardship: From Rhetoric to Reality*, (1999) 3 Edinburgh L Rev 151.

¹⁷⁰ See Gray, *Equitable Property*, (1994) 47(2) Current Legal Problems 157 at 188-214.

¹⁷¹ The archtypal provision is that enshrined in Article 14(2) of the German *Grundgesetz* ('Property imposes duties. Its use should also serve the welfare of the community'). Closer to home, Article 43.2.1^o-2^o of the Constitution of Ireland recognises that the exercise of property rights 'ought, in civil society, to be regulated by principles of social justice' and that, accordingly, the state may 'as occasion requires delimit by law the exercise of [such] rights with a view to reconciling their exercise with the exigencies of the common good.'

¹⁷² *Fredin v Sweden*, Series A No 192, para 48 (1991). See also *Guerra v Italy* (1998) 26 EHRR 357 at 371 (para 43) and, for a strong echo in England, *Miles v Secretary of State for the Environment and the Royal Borough of Kingston upon Thames* [2000] JPL 192 at 199-202.

¹⁷³ For a clear modern statement to this effect, see *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 737 per Hallett JA. See also *Kim v City of New York*, 659 NYS2d 145 at 152 (Ct App 1997), where a New York court denied compensation when a landowner was caused, at his own expense, to perform his common law obligation to provide lateral support for an adjacent highway. The court noted that this particular duty had been classically described as 'an obligation to the community' (see *Village of Haverstraw v Eckerson*, 84 NE 578 at 580 (1908) per Gray J) and as a 'normal incident to the ownership of real property within the City of New York (see *Laba v Carey*, 277 NE2d 641 at 647 (1971)).

¹⁷⁴ Hence, as one American court has pointed out, 'the question is simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?' (*Loveladies Harbor, Inc v United States*, 28 F3d 1171 at 1179 (Fed Cir 1994)).

(e) *The social limits of ownership*

The definition of the social limits of ownership is, of course, controversial.¹⁷⁵ At stake are rival views of the political balance to be maintained between individual and community interests. In some important sense the issue highlights crucial questions about the implicit content of *citizenship*. The sixty-four thousand dollar question for the environmental lawyer of the future becomes a human rights dilemma which perhaps only the land lawyer can resolve. To what degree may the private citizen's terms of landholding be prescribed, altered or confirmed -- without compensation -- by the socially motivated intrusion of governmental control over land use?

This highly sensitive question is far from new. Even in the 1920s English courts, in working out the implications of early town planning legislation, were well aware of the way in which concepts of community-oriented duty could delimit the scope of compensable taking. The conflicting motivations and philosophical starting-points were neatly exposed in *Re Ellis and Ruislip-Northwood UDC*,¹⁷⁶ where a claimant asserted a right to compensation on the ground that a local town planning scheme had prescribed a building line along a street frontage beyond which no further constructions could be erected. This prohibition deprived him of the lucrative opportunity to build a number of houses and shops on vacant land which he had purchased some time earlier. According to the Housing, Town Planning, &c, Act 1909 no compensation was payable for any injurious affection caused by town planning schemes which, 'with a view to securing the amenity of the area', prescribed the 'space about buildings' or limited the number or height or character of buildings.¹⁷⁷ Two members of the Court of Appeal were nevertheless determined that the claimant should receive compensation from public funds for the reversal of his fortunes as a property developer. Pleading in aid the presumption that a person should not be 'deprived either of his property or of any portion of the value of his property without compensation',¹⁷⁸ Bankes LJ led the majority in the Court to the improbable conclusion that a 'building line', as such, did not fall within the scope of the embargo on compensation. Eve J concurred and, as judges of the era so often did in relation to newfangled legislation of dubiously socialist origin, made disobliging remarks about the linguistic demerits of the legislation in hand.¹⁷⁹ However, in a typically robust dissent Scrutton LJ dismissed the compensation claim (together with the contrived arguments of his colleagues), observing that 'Parliament may have taken a view that a landowner in a community has duties as well as rights, and cannot claim compensation for refraining from using his land where they think that it is his duty so to refrain.'¹⁸⁰

¹⁷⁵ See Gray, *Property in Thin Air*, [1991] CLJ 252.

¹⁷⁶ [1920] 1 KB 343.

¹⁷⁷ See Housing, Town Planning, &c, Act 1909, s 59(2).

¹⁷⁸ [1920] 1 KB 343 at 361.

¹⁷⁹ [1920] 1 KB 343 at 372 (a 'novelty in Parliamentary nomenclature'). For evidence of similar judicial vituperation heaped on the early Rent Acts, see eg R.E. Megarry, *The Rent Acts* (11th edn, Stevens London 1988), Vol 1, pp xix-xx, 14-5.

¹⁸⁰ [1920] 1 KB 343 at 372. Bankes LJ had conceded that 'possibly ... a man ought not to be allowed compensation for doing in reference to his property what, apart from compensation, he ought to do voluntarily', but thought that the claimant's position 'cannot, however, be determined by considerations such as these' ([1920] 1 KB 343 at 362).

A similar concern with the delimiting effects of community-oriented perceptions of land ownership is even more readily apparent in *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*.¹⁸¹ Here, in the Irish Supreme Court, O'Higgins CJ indicated that 'the common good requires that national monuments which are the prized relics of the past should be preserved as part of the history of our people.'¹⁸² This being so, the preservation of the neolithic fort in dispute in *O'Callaghan's* case was 'a requirement of what should be regarded as the common duty of all citizens',¹⁸³ with the consequence that no compensation was required in respect of the restrictions imposed on the relevant landowner. Social assumptions relating to the ambit of civic responsibility thus exert a constant impact upon the definition of 'property' in land. Views will inevitably differ, however, as to the intensity of the individual citizen's obligation to contribute gratis towards the environmental welfare enjoyed by the wider community. Some may think, for example, that the uncompensated contribution to the cultural heritage which was forced upon the claimant in *O'Callaghan's* case went far beyond the call of duty.¹⁸⁴

The contrast between restrictive and expansive interpretations of the social responsibility underlying land ownership is aptly illustrated by two relatively recent North American decisions, both of which involved the regulation of ecologically vulnerable tracts of recreational beachfront land. In *Lucas v South Carolina Coastal Council*,¹⁸⁵ the courts of the United States signalled that, as a matter of inherent obligation, owners of environmentally sensitive areas bear only an extremely attenuated duty to protect the integrity or amenity of their land.¹⁸⁶ The United States Supreme Court ruled, by a majority, that the potential for profitable (albeit damaging) development of such areas was intrinsically limited merely by 'background principles' of property and nuisance. On this basis compensation for regulatory control could be denied to the landowner *only if* the control in question merely made explicit some restriction which 'inhere[s] in the title itself', with the result that the 'proscribed use interests' were therefore 'not part of [the owner's] title to begin with.' Beyond these parameters any regulatory legislation which wholly prohibited economically productive or beneficial land use

¹⁸¹ [1985] ILRM 364; [1983] IRLM 391 (see text accompanying footnotes 76-7, 115-7, *supra*).

¹⁸² [1985] ILRM 364 at 367. On the Irish theme of preservation of heritage for the common good, see also *Webb v Ireland* [1988] IR 353 at 383 per Finlay CJ, 390-1 per Walsh J.

¹⁸³ [1985] ILRM 364 at 368.

¹⁸⁴ See, for instance, the strong dissent entered by Justice Rehnquist in *Penn Central Transportation Co v New York City*, 438 US 104 at 140, 57 L Ed 2d 631 at 658 (1978), where a majority in the United States Supreme Court found that no compensable taking had been effected by the landmark preservation of New York's Grand Central Terminal.

¹⁸⁵ 505 US 1003, 120 L Ed 2d 798 (1992) (see text accompanying footnotes 124-9, *supra*).

¹⁸⁶ See Gray and Gray, 'The Idea of Property in Land', in S. Bright and J.K. Dewar (ed), *Land Law: Themes and Perspectives* (Oxford 1998), pp 49-51. David L. Callies has pointed to Justice Scalia's disparaging observation during argument in *Lucas* that 'I don't think wetlands regulation is something I would call one of the high concerns of public safety' (see Callies, *Preserving Paradise: Why Regulation Won't Work* (University of Hawaii Press, Honolulu 1994), p 81). The reference to 'public safety' is, of course, an evocation of the revered language of Justice Brandeis in the seminal case of *Pennsylvania Coal Co v Mahon*, 260 US 393 at 417, 67 L Ed 322 at 327 (1922).

automatically gave rise to a claim for public compensation.¹⁸⁷ The Supreme Court of South Carolina, to which the United States Supreme Court remitted the matter in *Lucas*, subsequently confirmed that there was no common law basis in either property or nuisance on which the *Lucas* claimant's proposed development could be inhibited.¹⁸⁸ The outcome in *Lucas* thus reflects little sense that community-directed obligations -- as, for example, in the form of an implicit duty to avoid ecological degradation or even to enhance environmental amenity -- may tacitly comprise a pre-existing and constant qualification on a landowner's title.¹⁸⁹ Significantly, the Supreme Court majority indicated that compensation could not be withheld simply on the basis that a landowner's proposed exploitation of his land was 'inconsistent with the public interest' or would 'violate a common-law maxim such as sic utere tuo ut non alienum laedas'.¹⁹⁰

In *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*,¹⁹¹ by contrast, the Court of Appeal of Nova Scotia rejected virtually identical claims for compensation even though the relevant beachfront regulation, by restricting construction on a fragile dune system, had deprived the claimants of 'virtually all economic value' in their land. Hallett JA indicated that the compensability of the regulatory intervention turned, in part, on the 'reasonableness of the development proposed for the land.' In the *Mariner Real Estate* case a government-commissioned environmental study had suggested that the claimants' proposed residential development would not be 'reasonable for the dune area', with the result (in the view of the Court of Appeal) that the Province's regulatory legislation could not, in truth, be described as preventing the claimants from exercising any 'reasonable private rights of ownership' of the lots in question.¹⁹² Absent the extinction of any 'reasonable' entitlement, the circumstances disclosed no de facto expropriation which was remotely eligible for compensation. As Hallett JA pointed out, the matter was ultimately measured in terms of correlative rights and duties: there was a need for the landowners and the Province of Nova Scotia to 'recognise the rights of each other and seek a just solution that would be fair and reasonable to both.'

¹⁸⁷ '[A] State, by ipse dixit, may not transform private property into public property without compensation' (505 US 1003 at 1031, 120 L Ed 2d 798 at 823).

¹⁸⁸ See *Lucas v South Carolina Coastal Council*, 424 SE2d 484 at 486 (1992).

¹⁸⁹ See eg *State of Ohio, ex rel RTG Inc v State of Ohio*, 753 NE2d 869 (Ohio Court of Appeals, 2001), where public compensation was successfully claimed by a mining company whose operations within a 2,000 foot radius of a well threatened to damage the aquifer which was the sole source of water for the village of Pleasant City, Ohio. In applying *Lucas*, the Court of Appeals held that the mining company had 'acted in all regards in a reasonable manner' and that the relevant regulatory restriction had imposed a restraint which was not already inherent in the company's title to the coal rights. Such outcomes demonstrate that, in the United States, the common law (as distinct from statutory or regulatory) obligations of landowners are still not far removed from the guiding spirit of *Bradford Corp v Pickles* [1895] AC 587 (see text accompanying footnotes 5-6, supra).

¹⁹⁰ 505 US 1003 at 1031, 120 L Ed 2d 798 at 822-823. See *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 34 F Supp 2d 1226 at 1253-4 (1999), where a United States District Court held that inherent nuisance-based limitations on landowners did not extend to the avoidance of developments which threatened the eutrophication of Lake Tahoe and the destruction of its fish.

¹⁹¹ (1999) 177 DLR (4th) 696.

¹⁹² (1999) 177 DLR (4th) 696 at 737.

E. Conclusion

The seemingly improbable has occurred: an essay in a book on land law becomes simultaneously an essay on human rights and civic duties. In large part it is, of course, the imperative of environmental conservation which has caused this coalescence of discourse in respect of human and proprietary entitlements. Modern environmental debate confers a wholly unexpected prominence upon the more esoteric corners of property theory; and the inner meaning of property in land turns out to be critically dependent on the communally defined parameters of citizenship. Realty and humanity are thus closely allied in a joint battle for survival, with the consequence that proprietary rights and proprietary duties are ultimately also social rights and social duties.

The allocation of the economic cost of environmental welfare was always bound to be problematical. This essay has attempted to illustrate some of the variables relevant to the question whether individual landowners should receive compensation for the performance of their role in furthering public environmental objectives. On such a question views will inevitably differ. Disputation in this area cuts sharply into the ideology of property, into personal perceptions of wealth, autonomy and civic responsibility. In the United States, for example, historic notions of citizenship seem to have crystallised into a deep collective distrust of all governmental regulatory activity, thereby prompting an increased insistence upon the compensation requirement of the Fifth Amendment. Decisions such as the Supreme Court's ruling in *Lucas* patently symbolise a strong judicial inclination to stem a tide of uncompensated taking from American citizens under the cover of a mere exercise of regulatory power. Yet, even in the United States, there is no unanimity of view. In an extremely powerful dissent in the Supreme Court's most recent contribution to the takings debate, Justice Stevens has pointed to the way in which the *Lucas* approach raises 'the spectre of a tremendous -- and tremendously capricious -- one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land' in environmentally sensitive locations.¹⁹³

In the European and Canadian contexts, by contrast, notions of citizenship have tended to generate a deeper sense of individual complicity with government in the business of sensible environmental regulation. As evidenced in European human rights jurisprudence, the emerging common law of Europe seems more socially oriented -- more receptive to the recognition of uncompensated community-directed restraints on property in land. A complex of historical reasons doubtless underlies the more intense perception of civic cohesion -- the socialised sense of duty -- which infuses so much of the case law on Article 1 of Protocol No 1 of the European Convention. But even here, as we have seen, the traffic is not all one-way and there are signs of an increasing sensitivity to the argument that the regulatory activity of government may nowadays call more pressingly for compensation to be paid to affected landowners. What is certain is that all modern jurisdictions are actively and inevitably engaged in defining (and redefining) the social boundaries of the institution of property. The overall goal is the formulation of a new 'land ethic', replicating in perhaps more contemporary terms Aldo Leopold's noble vision of the propriety of property.¹⁹⁴ And, in exploring in this

¹⁹³ *Palazzolo v Rhode Island*, 121 S Ct 2448, 150 L Ed 2d 592 at 624-5 (2001).

¹⁹⁴ See 'The Land Ethic', in A. Leopold, *A Sand County Almanac* (New York and Oxford 1987 (first published 1949)).

chapter the social ethics of land ownership, we too have been reaching out towards the elaboration of a new civic morality in the field of property relationships.¹⁹⁵

¹⁹⁵

See Gray and Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, [1999] EHRLR 46 at 102.