

ENVIRONMENTAL CONSIDERATIONS IN PROPERTY LAW

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Summary. The international principle of sustainable development requires the integration of ecological considerations into all levels of decision making. The decision making of private property owners concerning exercise of their powers over their objects or land is regulated by public environmental and planning laws. The efficiency of their operation can be greatly affected by assumptions made by a legal system at a jurisprudential level about the nature of the rights of private property. Do private land owners in fundamental principle have responsibilities for the integrity of ecosystems on their land? This paper reviews and challenges the widely held view that Common Law systems do not recognise responsibilities in this sense. It contrasts the German legal system which does recognise such responsibilities and goes on to explore the reception of German land law principles into the Torrens land title system which operates in many Common Law countries, concluding that this reception supplanted the original Common Law idea if in its original form it was contrary to environmental responsibility.

Keywords: real property, environmental protection, Natural Law, land title registration, deeds conveyancing, deeds registration, Common Law, German law.

INTRODUCTION

Protection of private property through the legal system is a very important issue in civil society.¹ This is especially so when the private sector is identified as the economic locomotive and it is necessary to attract private investment from domestic and international sources. The protection of private property against expropriation by the state is an unavoidable aspect of this issue. With the international success of conservative neo-liberal economic theory and practice there has been a trend to view private property in absolute terms,² particularly in

contrast to the common interests of the community. In other words, the private owner is seen increasingly as a sovereign of the physical object.

However, even at the international level, sovereigns must act appropriately within a community of nations. Equally, at the domestic level the democratic state and the communities that it represents have vital interests in efficient regulation of the use of private property. The community has a strong interest in how land is used. On the absolute view it would be claimed, in the liberal tradition, that my right to use my property as I wish ends at the point where I interfere with the legitimate rights of other citizens. It seems that in this version of liberal rights only the interests of humans are relevant in regulation of land use.

However, the community has a long term interest in maintaining the viability of private land beyond one human lifetime and it is now widely accepted that other

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¹ This paper is based on the text of a guest lecture presented by the author at Mykolas Romeris University, Vilnius, Lithuania, on the 8th December 2005. Many of the issues discussed in this paper are explored in more detail in the author's recently published book chapter 'Toward an Ecologically Sustainable Property Concept' in E Cooke (ed), *Modern Studies in Property Law – Volume III* (Oxford, Hart Publishing, 2005).

² The language in which these issues are discussed is potentially confusing. In German legal discussion property is described as an "absolute" right [*das absolute subjektive Recht*] because it is enforceable *in rem*; that is, against all the world even when others involved are to-

tal strangers, such as trespassers. In discussions of Common Law property theory the "absolute" proprietor of a right holds that right alone and need not be concerned about the views of others about use or disposition of the right. A further point on terminology is that the term "real property" in Common Law systems refers to estates and interests in *land*, in contrast to chattels, intellectual property and so forth.

life forms and their ecological communities have value in their own right, aside from the interests of human communities. [see 82; 43, p.455]. A system of regulation in which private property is regarded as absolute and its coexistence with other rights is to be negotiated with compensation is inherently anthropocentric, contrary to the emergent international principle of ecologically sustainable development. An ecologically sustainable property concept must be a relative concept. In this paper I will review conceptions of the freedoms that accompany private property beside the requirement that decision makers at all levels exercise the environmental responsibility implicit in the international concept of sustainable development.

At first glance, one might think that Article 23 of the *Constitution* of Lithuania [17] also contemplates an absolute concept of property –

- (1) Property shall be inviolable.
- (2) The rights of ownership shall be protected by law.
- (3) Property may only be seized for the needs of society according to the procedure established by law and must be adequately compensated for.

There is no reference to the existence of private property within a wider society as we find in Article 14(2) of the German *Constitution*, which, among other international sources, was no doubt contemplated by those who drafted Article 23. Nevertheless, other Articles in the Lithuanian *Constitution* make it clear that the document strives for a concept of property that is relative to the ecological constraints of the assets in question. Article 53(3) provides that “the State and each individual must protect the environment from harmful influences.” Article 54 goes on to provide –

- (1) The State shall concern itself with the protection of the natural environment, its fauna and flora, separate objects of nature and particularly valuable districts, and shall supervise the moderate utilization of natural resources as well as their restoration and augmentation.
- (2) The exhaustion of land and entrails of the earth, the pollution of waters and air, the production of radioactive impact, as well as the impoverishment of fauna and flora, shall be prohibited by law.

The practical application of these provisions in the Lithuanian courts will shed clearer light on this question. However, there will be interest in comparing the interpretation of principles expressed in Article 14 of the German *Constitution*, which I will explore shortly. Article 9 of the *Law on Land* creates express duties for land owners, including to (1) use the land according to its principal specific use, (3) use the land rationally, and (4) implement legal measures “for the protection of land, forest and waters from pollution ... in order to prevent the deterioration of the ecological situation.” [46, art. 9]]. Additionally, the civil law concept of property found in the new Lithuanian *Civil Code* [48] has evolved from the continental European tradition which

recognises responsibility attendant upon the social functions of private property.[61, p. 58-59]

Australia is a Common Law country. Like the legal systems of other countries that formerly were part of the British Empire, including the United States, the fundamental principles of our legal system have developed from judges’ rulings in earlier cases. It is probably no coincidence that ideas about property found in neo-liberal economic thinking are most warmly embraced in the Common Law countries, and particularly the United States, and at the same time in these legal systems, issues about the meaning of private property arise in cases concerning environmental regulation. In Australia legislation intended to introduce environmental and planning reforms is often interpreted by the courts to preserve so far as possible a complete freedom for the private proprietor, thus limiting the capacity of the new law to solve the environmental problems that have inspired the legal reforms. In the United States the situation is even more difficult. There even Planning Law is at risk of being struck down by the courts as unconstitutional for interfering with the constitutional right to enjoy private property unimpeded by the state.

This situation has given rise to a debate in Environmental Law that reaches back to the fundamental question of what we in the Common Law systems mean by “property”. I have argued that, correctly understood, the concept of property embodies responsible exercise of the proprietor’s powers, rather than a “despotic dominion”. [7, Chapter 1, 2.]. When this is recognised, legal environmental controls that require the recognition of ecological constraints of the property in question are not an intrusion on the proprietor’s powers. If the controls express scientifically verifiable ecological limitations of the property a responsible proprietor can be expected to respect them, having acquired the property subject to its inherent limitations. My argument has followed two courses –

1. when the Common Law is correctly understood it can be seen that it has always recognised a responsible form of property rather than the concept of absolute individualism advocated today; and
2. in any case, legislation that reformed our land title system was based on German law, which has for centuries recognised a responsible form of property, and this legislation has overturned the Common Law concerning ownership of land.

Before exploring these arguments, let us think for a moment about the meaning of ecological sustainable development in connection with the concept of property.

1. ECOLOGICALLY SUSTAINABLE DEVELOPMENT

The need to address global environmental issues was made very clear by the United Nations World Commission on Environment and Development in the *Brundtland Report*. [85] The Commission discussed the

need to integrate ecology into all forms of decision making –

The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making. They are, after all, integrated in the workings of the real world. This will require a change in attitudes and objectives and in institutional arrangements at every level.[85, 106p.]

And in a legal context –

Sustainability requires the enforcement of wider responsibilities for the impact of decisions. This requires changes in the legal and institutional frameworks that will enforce the common interest. Some necessary changes in the legal framework start from the proposition that an environment adequate for health and well-being is essential for all human beings - including future generations. Such a view places the right to use public and private resources in its proper social context and provides a goal for more specific measures. [85, 107 p.]

These concerns manifested as expressions of international will in the *Rio Declaration on Environment and Development* and *Agenda 21*. [80]

The integration of ecological considerations as a matter of domestic law into private and commercial decision-making is a challenge that remains largely unaddressed, although acceptance of the concept of sustainable development into basic principles of civil law is probably the key to the long term international success that it must achieve. Private or civil law understanding of private property rights is the natural starting point, and foremost in this respect are private property rights in land.

At the United Nations – *FIG Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development* [5, p.17-23] one of the conclusions reached by the international experts working together on this issue was that –

... property rights in land do not in principle carry with them a right to neglect or destroy the land. The concept of property (including ownership and other proprietary interests) embraces social and environmental responsibility as well as relevant rights to benefit from the property. The registration of property in land is thus simultaneously a record of who is presumed to bear this responsibility and who is presumed to enjoy the benefit of relevant rights. The extent of responsibility is to be assessed by understanding the social and environmental location of the land in the light of available information and is subject to express laws and practices of the appropriate jurisdiction.[5, p.6]

This appears to contradict the mainstream view of Common Law property jurisprudence. However, the juridical material referred to above supports optimism for a creative integration of a Common Law concept of *responsible proprietorship* with the international concept of sustainable development. What actually stands in the way of this evolution of the law? Is there an existing model that could show us how this could work in an economy based on private enterprise?

2. MODERN GERMAN PROPERTY LAW

The modern German systems of property law and environmental law are interesting in their own right. German law has also been influential around the world and especially in the Asia-Pacific region. The Civil Law of Japan, South Korea, Thailand, Taiwan and increasingly the mainland legal system of the People's Republic of China have all been strongly influenced by German law.

We rediscovered in the 1970s that Australian real property law system received a very substantial contribution from the Hanseatic-Hamburg legal system, which had been overlooked in legal circles from the latter 19th century.[67, p.55-60]. The reception of a law or system of laws often brings with it aspects that are not immediately obvious. The post-reception unfolding of the donor legal system is recognised as a valuable aid to interpretation when locating and assessing the potential of aspects of the received laws that might not yet have been recognised. [67, p.17 – 24].

The Hanseatic-Hamburg real property law system was highly influential in the emergence of modern German property law. The German juristic idea of property has exhibited a principle of *responsible proprietorship* for many centuries, which has been embedded in that country's private and public law jurisprudence. There has been a clear movement in German law over the past 160 years away from reliance on civil law responsibility *alone* and toward the enforcement of responsibility *also* through public law instruments. This movement has followed the amazing growth in the power of industrial society to impact adversely on natural and urban environments over the same period.

In German public law the broader social responsibility implicit in property was recognised in *The Kreuzberg Monument Decision*. [45, p. 219]. At that time there was no express constitutional text requiring it. Later, Article 153 of the *Weimar Constitution* of 1919 expressly recognised the social responsibility of property. This was recast into Article 14 of the present German Federal *Constitution*, [32, BGBl. S 1] which contains both a civil rights guarantee of property and a statement that property carries with it responsibilities –

- (1) Property and inheritance are guaranteed. Their meaning and limitations are defined in legislation.
- (2) Property carries responsibilities. Its use shall at the same time serve the common good.

The jurisprudence of Article 14 draws on a Natural Law tradition reaching back before the Enlightenment [52, p.270, 278] and a limitation within the liberal conception of property. The text of Article 14 is not regarded as the source of the responsibility of proprietorship but yet another expression of a deeper principle.

The responsibility expressed in Article 14(2) was first held to include an environmental obligation in the leading decision of the German High Court for Civil Cases in the *Cathedral of Beech Trees Case*. [9, p.669, 67, p. 171 -179] The court held that the content of the

environmental responsibility depended in turn upon the *environmental context* of the relevant property. The Court found that, even in the absence of legal regulation, a reasonable and economically oriented owner of the land with the common good in mind would recognise that the natural features and landscape of the land imposed a social responsibility on the owner to preserve a grove of trees. Therefore, a tree preservation order was not an expropriation of property that required compensation – it merely concreted responsibilities that the land owner already had.

The Bundesgerichtshof recalled that a sovereign interference in proprietary rights is to be characterised as an expropriation when it contravenes the constitutional guarantee of equality [32, Art 3], by requiring an unreasonable sacrifice in the interests of the commonality from an individual or a group. On the other hand, a limitation of property is acceptable when, without contravening the guarantee of equality, it expresses inherent and social limitations of the property which stem from the general nature of its existence. The natural features of property that make it worthy of preservation are an example of such inherent limitations. Legislation or administrative action requiring preservation does not interfere with proprietors' powers of disposition. Instead, they are a concrete expression of social responsibility associated with the property in view of its situation.

The German constitutional guarantee of property also protects the citizen's proprietary interests against undue environmental interference from governmental projects. In view of the social obligations implicit in property, which are to be determined in context, there is a level of interference generated by public initiatives that a private property owner must tolerate for the common good. However, when interference with usual use of the property reaches the *expropriation threshold* compensation must be paid. There is yet a further level of interference with the property at which the property cannot be used by its owners in a relevant sense and then it must be acquired by the State and compensation paid. The effective expropriation of property caused by aircraft noise in the vicinity of airports illustrates the application of these principles.[2 p.332; 67; p.179-181]

With respect to private law, it might be objected that the definition of ownership in § 903 of the *German Civil Code* [11] reveals no sense of responsibility on the part of the private proprietor, but rather an unrestrained freedom. Soon after the *German Civil Code* had taken effect, Otto Gierke wrote in his monumental work *Deutsches Privatrecht* –

When the concept of ownership is considered in isolation it cannot be viewed as an unlimited right of dominion. Only in comparison with the other rights of property can it be described as unlimited. [B]eside the illusion of absolute power, it carries limitations within its very concept ... It confers not arbitrary power but power bound by right. ... Here [is] the ... German legal

idea ... – ownership is pervaded by responsibilities. [33, p. 364-5]³

In light of these and other similar commentaries on the German civil law, I translate § 903 of the *German Civil Code* as –

§ 903 – Powers of the Owner

The owner of a thing can, so far as not contrary to law or the rights of third parties, deal with the thing at discretion and exclude others from every use or misuse of it. The owner of an animal has to observe the particular provisions for the protection of animals in the exercise of his powers.

The literature and judicial interpretation concerning § 903 supports translation of “nach Belieben” as “at discretion” rather than “at arbitrary pleasure”. [67; Chp 5.] Art 14 GG is regarded as just one historical manifestation of the Natural Law responsibility pervading property, demonstrating that the jurisprudential principle lies at a much deeper level than the positive law texts that clothe it. It is also much deeper than the present line between public and private law. When we investigate the work on private property by Natural Law jurists, from the Glossators through Grotius, Pufendorf and Wolff, to the drafting of the German Civil Code, we find responsibility stressed throughout. Indeed one long standing justification of Natural Law is that normative principles may be found in nature with the aid of reason alongside the physical laws of the universe and must be consistent with them. This supports constraint of the powers of the private proprietor to use the object of property responsibly with regard to the principles of ecology, which are also embedded in nature. [67; Chp 3] This observation, which is clearly borne out in interpretations of Art 14 GG, is not restricted to public law.

In German private law the principle of *responsible proprietorship* also manifests itself in these express proprietary responsibilities –

- compliance with a doctrine of “neighbourly consideration” in the use of one's property,
- maintenance of one's property and surrounding areas with a view to safety,
- registration of one's own proprietary interests in land at the risk of losing them in competition with someone who does discharge this responsibility.[44,⁴

After surveying civil law developments in Germany Jauernig wrote –

That social responsibility in owning land is extraordinarily strong remains without doubt. [44, p.607, 613]

³ This view is also reflected in the famous theoretical work of Ihering, *Der Zweck im Recht* (3rd edn, Leipzig, Breitkopf & Härtel, 1893) 519.

⁴ On recognition of this as a responsibility for the common good in the drafting debates for the BGB, see text below. The ‘duty of registration’ is maintained through three provisions – the presumption that the contents of the land title register are correct and complete (§891 BGB), the protection of good faith acquisition (§892 BGB) and the protection of transactions entered in faith on the register (§893).

This position in the private law system, consistent with German public law, promises adaptation to the challenges of the international concept of sustainability that is consistent across the existing legal system without call for further layers of public regulation.

It is interesting that further integration of ecological considerations into domestic legal decision-making led to amendment of the German *Constitution* [32] in 1994 to include Article 20a under the heading ‘Protection of the Natural Foundations of Life’⁵ –

The State protects the natural foundations of life, also with responsibility for future generations, through the Legislature within the constitutional order and through Executive and Judicial power according to law and right.⁶

It is significant that a conservative German CDU⁷ government took this step to embrace the concept of *sustainable development*⁸ only two years after the Earth Summit in Rio de Janeiro. [80] Article 20a is not merely a rhetorical policy directive, but a constitutional amendment inserting an objective of the national government into the text directly after the epoch-making declaration of the Federal Republic of Germany as a democratic and social federation. Its importance in the sophisticated hierarchy of German constitutional norms is not to be underrated. Its consistency with conservative thinking is best appreciated in an accurate historical understanding of the emergence of European liberalism and the Natural Law tradition that supports it.

3. COMMON LAW VIEW THAT PROPERTY IS UNRESTRAINED ARBITRARY POWER

There has been a mainstream view of the Common Law that rights of property are a civil law source of authority to do with the right whatever one arbitrarily wishes. With respect to ownership, this is generally seen as a right to do whatever one likes with the object of ownership, including destruction of it. One might make the simple point at this stage that the Common Law has maintained a very significant distinction between the right that one holds over the object and the object itself. It would be possible to advocate complete freedom with the right over the property, for example to sell it or to prevent others from using it, without allowing a free right to destroy the physical object for all time. However, with no reference to this distinction, the courts in Common Law jurisdictions have deliberately “read down” environmental protection legislation in order to protect private property freedoms; freedoms conceived in the civil law as unlimited and isolated from public law “interference” attempted by the legislature.

This has been a very powerful rhetorical position in Common Law systems.

This is exemplified by the case of *Protean (Holdings) Ltd v Environment Protection Authority*, [63, 51] in which anti-pollution legislation was deliberately interpreted in a way that minimised its impact on the holder of private proprietary rights. The court described usual powers for the control of pollution conferred on the Environment Protection Authority by the Environment Protection Act as “quite authoritarian, if not draconian in character” and so concluded that the Parliament must be understood to have intended that any powers conferred on the EPA that would “... enable them to invade or erode the existing rights and privileges of the individual, either of a personal or proprietary character, such provisions if at all ambiguous should be strictly construed in favour of the subject.” [63, p.55–6] It followed that the proprietor of an abattoir located in the inner-city area of a capital city could not be restrained with the public law regulatory instruments available from producing offensive odours and noises generally. Only pollution discharged from particular *point sources*, such as chimneys, required anti-pollution licences. This restriction of the regulator’s powers was no necessary interpretation of the text of the anti-pollution legislation. Interpretation of the legislation in light of a concept of *responsible proprietorship* should have led to a different conclusion.

The most influential source of this absolutist reading of the Common Law is the familiar passage of Sir William Blackstone dating from the 1760s –

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or *that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual* in the universe. [7, Chapter 1-2]

It is possible to detect a tone of humorous irony in this passage. However, just as Hale developed his environmental ethic with reference to divine Creation, [36, p. 370] Blackstone sought support for his influential view of *despotic dominion* in theology – the dominion over the earth and living things given by God to humans in *Genesis* 1, 28.[7, Book II, Chapter 1, 2-3.]

Yet Blackstone clearly acknowledged limitations the powers of the owner set by the Common Law rights of others to prevent pollution of their land. [7] It follows that Blackstone did not necessarily have in mind, as an incident of property, the possibility of anti-social use. At a time when common lands of English peasants were being enclosed by powerful individuals, [see 78] and memory of the English Revolution was not so distant, it is not surprising that he would have emphasised a “sole and despotic” power to exclude others from private property – especially the Crown. Blackstone’s pre-occupation with the proprietor’s power to exclude others is also clear in the passage quoted above containing his famous reference to “despotic dominion”. [7, Chapter 1-2]

⁵ Schutz der natürlichen Lebensgrundlagen.

⁶ Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen im Rahmen der verfassungsmäßigen Ordnung durch die Gesetzgebung und nach Maßgabe von Gesetz und Recht durch die vollziehende Gewalt und die Rechtsprechung.

⁷ Christian Democratic Union.

⁸ *die nachhaltige Entwicklung*.

The possibility that it might extend to *a right of unlimited use* is far less distinct.

4. HOW DO WE CHANGE COMMON LAW?

If it is true that the Common Law allows private landowners to do whatever they like with their land and we agree that a better approach would be to expect that landowners will act responsibly, as the German legal system does, how do we go about changing the Common Law?

First, the rules of Common Law are subject to legislation. It might be possible to persuade the political party with a majority in the Parliament to pass new legislation that makes a clear and unmistakable change. It must be clear and unmistakable because there is another Common Law principle invoked in the interpretation of legislation that Parliament does not intend to change the Common Law unless it uses clear and unmistakable language. There is a similar principle that Parliament will not reduce rights of private property except by a clear and unmistakable change, as we have seen above. [63] However, it seems unlikely that Parliament would be interested in law reform of this nature. Although the environment is an important issue, property owners vote. Sympathy for environmental issues can be expressed in less politically risky ways, like criticising oil slicks at sea from unidentified vessels.

Second, one could attempt to persuade the highest court (for us the High Court of Australia) in the hierarchy to break from the mainstream position of the Common Law and introduce a new rule. The High Court is unlikely to do this, particularly if it involves limiting rights of property, which it has traditionally protected. The High Court is more likely to say its role is to interpret the law and it is the role of Parliament to change it.

Third, one might seek to re-interpret the juristic material behind the present Common Law rule and argue that the position one identifies is the way the rule has always been, or should have been if it had not been for some unfortunate mistakes or misunderstandings. A court is much more likely to find new meaning in the Common Law if there is material to support it. This approach was adopted by the High Court of Australia when in 1992 it made a historical ruling that the Common Law recognises Aboriginal native title over the traditional lands of our indigenous population despite two centuries of unfortunate colonial and post-colonial administrative practice to the contrary. [50]⁹ In principle such reinterpretations of the Common Law may be advocated and accepted in any court or tribunal but risk reversal on appeal.

Finally, one might find existing legislation that has made a clear and unmistakable change to relevant aspects of the Common Law in the past and discover a

⁹ See A Howe, 'A Post-Structuralist Consideration of Property as Thin Air - Mabo, a Case Study' (1995) 2 *Murdoch University Electronic Journal of Law* (www.murdoch.edu.au/elaw/issues/v2n1/howe21.html).

new interpretation of it that extends to the troubling issue.

In finding support for a new attitude in the Common Law to the environmental responsibilities of private proprietors the last two approaches –

1. reinterpreting the Common Law, and
2. re-evaluating earlier legislative reforms of real property law,

appear to be the most productive and I shall explore them below.

5. REINTERPRETING THE COMMON LAW

Contrary to the view that the property owner is entitled to exercise *despotic dominion* over the physical object of property, there is significant material available in the Common Law to support the view that proprietary powers are to be exercised responsibly and not arbitrarily. The 17th century English Lord Chancellor and jurist Matthew Hale engaged with this question. Hale was probably the architect of modern Common Law judicial method.¹⁰

Blackstone acclaimed Hale's larger work, *The Analysis of the Law*, [35] as the most scientific and comprehensive analysis of Common Law made to that time and adopted it as the basis of the arrangement of his *Commentaries*.¹¹ On the responsibility of humans to care for land and to conserve biodiversity Hale wrote –

... the End of Man's Creation was, that he should be the Vice-Roy of the great God of Heaven and Earth in this inferior World; his Steward, Villicus, Bayliff or Farmer of this goodly Farm of the lower World ... his Usufructuary of this inferior World to husband and order it, and enjoy the Fruits thereof with sobriety, moderation and thankfulness.

And hereby Man was invested with power, authority, right, dominion, trust and care, to ... preserve the species of divers Vegetables, ... to preserve the face of the Earth in beauty, usefulness, and fruitfulness. [36, P.370]

Before Hale, we find that even the author of English liberalism, John Locke, qualified a power to destroy what one owns with considerations of need, the good of the governed, the distinction between fruits consumed and the earth itself, reason and the preservation of people, right and property. Locke also saw a limitation of the divine gift itself – "Nothing was made by God for man to spoil or destroy." [49, 31] These acknowledgements of human responsibility implicit in the human concept of private property, made by important founders of the Common Law family, mirror Natural Law theory advocated by contemporaries on the Continent and are more

¹⁰ See further M Raff, 'Matthew Hale's Other Contribution – Science as a Metaphor in the Development of Common Law Method' (1997) 13 *Australian Journal of Law and Society* 73.

¹¹ On Blackstone's admiration of Hale see W S Holdsworth, 'Sir Matthew Hale' (1923) 39 *Law Quarterly Review* 402, 421. See also S F C Milsom, 'The Nature of Blackstone's Achievement' (1981) 1 *Oxford Journal of Legal Studies* 1, 3.

consistent with concepts of ecologically sustainable development.

The theological orientation of these writings might surprise many readers who may have assumed, quite rightly, that the Common Law system is a modern secular legal system. However, in practice oaths are sworn on the basis of a sacred text [84, P.109] in support of evidence given from the witness stand or in affidavits in virtually all court cases. Denominational and ecumenical religious ceremonies celebrate the commencement of each new curial year. In the development of the Common Law theological considerations have provided significant inspiration for courts seeking a deeper ethical context for emerging legal principles. With respect to the rules of *natural justice* in Administrative Law, Byles J drew upon the hearing accorded by God to Adam before expulsion from Eden.¹² [20, P.180, 195] With respect to the concept of negligence in the Law of Tort, Lord Atkin formulated the *neighbour principle* in light of the New Testament direction to love one's neighbour. [24, 562, 580.]

Sacred texts clearly have great cultural significance. This is *not* to claim that in a legal system maintained by a multi-cultural and secular society religious ideas about the good and proper life should be directly carried over into law. Nevertheless, some basic norms in the Common Law system derive from theological sources. No doubt others have been more subtly inspired and any distinction between cultural and religious practice can never be entirely clear. We are entitled to ask in this situation, "What happens when a Jurist gets his or her theology wrong?" The world of the past cannot dictate that we must perpetuate its time-specific legal norms, so surely not spurious details of its religious beliefs.

What can we say about the perpetuation of Blackstone's view of a *despotic dominion* inherent in ownership, selectively devised on the basis of *Genesis*? Blackstone was raised in a devout Church of England family.

[83, P.20]. Blackstone's justification of property, formulated at the historical confluence of modern Natural Law, liberalism and early utilitarianism, was actually threefold –

1. a Natural Law right to subdue the earth sourced in *Genesis* 1, 28,
2. the application of labour to matter as a reason for the person responsible for the labour excluding others from use of the resulting product,¹³ and
3. that property was created by the state to maintain peace and order.[8, Chp IX.]

We may deduce that of these three only the Natural Law justification which Blackstone found in *Genesis* lends itself to support a power of *despotic dominion*, if we are indeed to take it as a serious characterisation of

private property. However, this justification is flawed. Blackstone's reference to *Genesis* 1, 28 omits the preceding part of the same biblical verse – the direction from God to "[b]e fruitful, and multiply, and replenish the earth ..." If Blackstone was advocating unlimited use rights, he has singled out God's direction to *subdue* to support a notion of *despotic dominion*, despite the other directions from God directed to fertility, nurturing and sustainability which Blackstone could have found in the very same verse. In other words, Blackstone made a very selective reading of *Genesis* 1, 28.

Today the Church of England does not share Blackstone's view of *Genesis* 1, 28. [30, P.17] It might not have in Blackstone's times. Today, so far as that denomination conceives human responsibilities regarding Creation in terms of property concepts, greater emphasis is accorded to a tenant status ordained in *Leviticus* 25, 1-35.¹⁴ [23] In other religious denominations also, there are, to say the very least, important theological conclusions that humans do not hold Creation in their hands for their *sole and despotic* enjoyment, and generally that humans have positive duties to the environment.¹⁵ From all of these theological viewpoints, our companions in Creation, the plants and animals which were also created by divine hand, also have a right to enjoy the Universe created for them, and are generally considered *divine*.

It is interesting to compare the theological conception of nature and the environment in other Abrahamic faiths. In the Islamic view, humans were granted intelligence and the ability to distinguish between virtue and sin, regarded as the essence of human dignity, precisely so we can play a role of vice-regency directly below God with obligations of stewardship toward all things, and particularly plants and animals.¹⁶[53, P.25,28] Environmental stewardship is thus an essential part of the Islamic way of life. [53, P.61] This conclusion must be drawn from consideration of many parts of the *Qur'an*.¹⁷[64] For example –

He has created man:

He has taught him speech (and intelligence).

The sun and the moon follow courses (exactly) computed;

And the herbs and the trees - both (alike) bow in adoration.

¹⁴ The former Archbishop of Canterbury, Dr M Ramsey, appointed this project of the Commission. See General Synod Board for Social Responsibility, 1986, 18-19.

¹⁵ See Australian Catholic Bishops' Conference, *Common Wealth For The Common Good* (Collins Dove Publications, 1992) 25-8; L de Silva, 'The Hills Wherein My Soul Delights' and HH the Dalai Lama, 'A Zone Of Peace' (Excerpts from Nobel Peace Prize Lecture) in M Batchelor and K Brown (ed), *Buddhism and Ecology* (London, Cassell, 1992); R Prime, *Hinduism and Ecology - Seeds of Truth* (London, Cassell, 1992) especially 8-21 and 36-52; and N Solomon, 'Judaism and the Environment' in A Rose (ed), *Judaism and Ecology* (London, Cassell, 1992).

¹⁶ See also İ Özdemir 'Toward an Understanding of Environmental Ethics from a Qur'anic Perspective' in RC Foltz, FM Denny and A Baharuddin (eds) *Islam and Ecology - A Bestowed Trust* (Cambridge, Harvard University Press, 2003).

¹⁷ I am using the *Yusufali* translation of the *Qur'an*; electronic edition distributed by The Islamic Computing Centre, London.

¹² The rules of natural justice are a significant aspect of Administrative Law, providing that if a person has important interests at stake, he or she must be given an opportunity to make submissions before a public decision is made that affects them.

¹³ Plainly adopting the *labour theory* attributed to Locke.

And the Firmament has He raised high, and He has set up the Balance (of Justice),

In order that ye may not transgress (due) balance. [64, Chapter 55, Verses 3-8.]

Later translation and commentary casts the *balance* referred to in Verse 7 as including ecological balance, and transgression in Verse 8 as including unsustainable practices, [1, P.62,8] which is quite consistent with *justice*, particularly when the principle of inter-generational equity is kept in mind.

The *Muslim* text, based on the *Qur'an* and the sayings of the Holy Prophet Muhammad contains the following lines –

The world is green and beautiful and God has appointed you as His stewards over it. He sees how you acquit yourselves. [1, P. 12.]

Mainstream theological traditions share the cosmological views of the human position in relation to resources, and private dominion over them, found in Islam, Christianity and Judaism share a substantial common wealth in spiritual traditions and sacred texts. In this connection, and with direct relevance to Blackstone's view, Rabbi Dr Norman Solomon asserts –

The context of Genesis 1, 28 is indeed that of humans being made in the image of God, the beneficent creator of good things; its meaning is therefore very precise, that humans, being in the image of God, are summoned to share in his creative work, and to do all in their power to sustain creation. [76, n. 15, 26-7.]

In conclusion on these points, Blackstone's emphasis on *subdual* in the 28th verse of *Genesis* shows that he read the text very selectively. The biblical foundation selected by Blackstone for a Natural Law human power of absolute and unrestrained use of property [31, N.38 AND 40] is today widely regarded as false by theologians. The essence of property might well lie in the proprietor's fullest powers to alienate his or her interest in the object and to exclude others from it, as well as *beneficial use and enjoyment* of the interest, but there is no sound jurisprudential basis to exercise that right in disregard of responsibilities to human society or to other species and their habitats.

A legal system that invokes religion at important points cannot dismiss as anachronistic or quaint a call for the correction of spurious juristic uses made of sacred texts in the past which perpetuate injustices into the future. The justification of a Natural Law right of unlimited dominion over an object of property is spurious in this sense. A greening of Natural Law was foreshadowed by the internationally renowned jurist His Excellency Judge Nagendra Singh, former President of the International Court of Justice, in his Forward to the *Report of the Expert Group on Environmental Law* of the World Commission on Environment and Development –

Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. There is at the present time an urgent need:

- to strengthen and extend the application of existing laws and international agreements in support of sustainable development;

- to recognize and respect the reciprocal rights and responsibilities of individuals and States regarding sustainable development, and to apply new norms for State and interstate behaviour to enable this to be achieved;

- to reinforce existing methods and develop new procedures for avoiding and resolving disputes on environmental and resource management issues. [27]

In his separate decision in the *ICJ Case Concerning the Gabčíkovo-Nagymaros Project*, [41, No 92] former Vice-President Weeramantry concluded that the contemporary concept of ecologically sustainable development equates cultural limitations on the exploitation of natural resources which have underpinned the wealth of many civilisations of far greater longevity than western industrial civilisation has so far enjoyed. The principle of ecologically sustainable development mediates or synthesises the otherwise dialectically opposed propositions of, on the one hand, the right to pursue economic development of that over which one has dominion, and on the other hand, the fact that all life depends on the existence of healthy eco-systems. As such, the principle of ecologically sustainable development is a long established principle of international customary law, which was again recognised by the international community at Rio de Janeiro – it did not emanate from the Earth Summit or the *Brundtland Report*.

It would be wrong to think that all domestic courts have found against an obligation of care implicit in property. In *Backhouse v Judd*, [4, 16] Napier J of the South Australian Supreme Court had to deal with cruelty to domestic animals, which are of course property. In discussing the source of a common law obligation to care for them his Honour said –

... it seems to me that the only satisfactory basis for the duty is that of ownership. There is nothing novel in the idea that property is a responsibility as well as a privilege. The law which confers and protects the right of property in any animal may well throw the burden of responsibility for its care upon the owner as a public duty incidental to the ownership [4, 21]

Common Law presumptions about the right to exploit that over which we have dominion should reflect emergent international law and interpretations that are consistent with international principles of sustainable development, rather than be grounded in the mistaken 18th century theology of William Blackstone. A principle of *responsible proprietorship* should be recognised as the jurisprudential position of the Common Law, not the mistaken idea of *despotic dominion*.

6. PAST REFORM OF COMMON LAW REAL PROPERTY

Common Law real property law no longer exists anywhere in pure form and today the modern law and practice of land title administration is barely influenced by the Common Law. It is only in Environmental and Planning Law that the antiquities discussed above continue to have impact. There have been two waves of leg-

islative reform of the Common Law in this respect; first, deeds registration was introduced. Then, secondly, really comprehensive reform was made in the 19th and 20th centuries when the Australian Torrens and English models of land title registration were introduced. It is my thesis that these reforms set out to change existing assumptions about proprietorship and social responsibility with respect to land as well as administrative mechanics for recording estates and interests in land.

Both the Australian Torrens and English models were devised through substantial receptions of legal principle from German models of land title registration systems. As we have seen above, [5] there is a juristic concept of *responsible proprietorship* implicit in fundamental aspects of German Property Law. I aim to demonstrate that it has been transplanted into the Torrens and the English registration systems. The proprietor's responsibilities under environmental protection and planning legislation should be interpreted in light of this fundamental concept and not the superseded Common Law position of *despotic dominion*, founded on a mistaken Natural Law premise.

7. EARLY REFORM OF COMMON LAW REAL PROPERTY – DEEDS REGISTRATION

Blackstone published his view of property as a *sole and despotic dominion* in an era when the English administration of real property was based exclusively on classical Common Law deeds conveyancing. Deeds conveyancing was first developed in the 16th and 17th centuries through judicial interpretations of the Statute of Uses [77, c.10] that achieved freedom from feudal constraints on the transfer of estates and interests in land. One of the freedoms achieved through deeds conveyancing was the possibility of confidential transactions with land. This upshot appears to have been unique among European juristic developments away from feudalism. Deeds conveyancing was supported by the basic Common Law principle of priority between competing claims to an estate or interest in land – *nemo dat quod non habet* [“one cannot give what one does not have”]. A doctrine of notice applied, but only as a limited exception to this principle. If a legal proprietor of land attempted two legal conveyances of the same estate or interest in the land, the second could not succeed because the estate or interest had already been conveyed away, and this applied even if the second conveyee had no notice of the first. Legal conveyance was achieved merely by execution, sealing and delivery of the deed. In this sense there was little sense of responsibility to others in wider society who might enter transactions with respect to the same land. [57, 482]

Deeds registration was developed across the 19th century to alleviate the problems that this absence of responsibility created. There was no mandatory direction to register deeds. Rather, conveyees who registered their written transactions gained priority over those who did not. The register was open to search by interested parties. In this way, a *principle of publicity* was re-

introduced to English real property law. In continental European legal systems in the French mould the fundamental question of *when* proprietors' interests are owed respect by other members of society, with whom they have no other legal relationship, hinges around legitimate acts of *publicity* through which they make the existence of their interests widely known. [6,7] In classical Roman Law possession was such an act, but in the French systems notarisation and registration became the required acts of publicity with respect to land. In other words, the proprietor became subject to reciprocal responsibilities to society that are recognised by the civil law. Society will enforce a private citizen's exclusive dominion if that person has undertaken actions that enable other citizens to protect their interests with certainty, thus serving the broader social good. The responsibility to make a legitimate act of *publicity* is thus a social responsibility implicit in the acquisition of property in land. That the private proprietor has a social function, and hence responsibility, became the mainstream jurisprudential position in the French systems through the work of Léon Duguit. [25]

It can be seen that with the adoption of deeds registration, reintroducing a principle of publicity, the social context of the institution of private property was recognised through legislative reform. It is true that deeds registration is distinguishable from notarisation and registration in the French style because the unregistered English deed remained a valid and effective instrument, however enforceability of the transaction through social institutions was made relative to the existence or non-existence of competing transactions that had been registered. In other words, those who had discharged their responsibilities for the wider benefit were preferred. Thus we may conclude that Blackstone's concept of property was implicitly reformed by legislation establishing the deeds registration system. Where deeds registration was adopted, it could no longer be said that the proprietorship of legal estates and interests in land was completely devoid of responsibility. It was subject at least to the responsibility to publicise the transactions through which they were acquired, at the risk of loss to those claiming competing interests and who had discharged this responsibility. The introduction of deeds registration thus signals the first adoption of a legal concept of *responsible proprietorship* in the private law of the Common Law world.

8. COMPREHENSIVE REFORM OF COMMON LAW REAL PROPERTY – LAND TITLE REGISTRATION

Development of the Australian Torrens System of land title registration in the 1850s in Adelaide, South Australia, was a far more comprehensive reform of real property law than the introduction of deeds registration. [29, 569] It was originally inspired in a very large measure by the system operating in the 1840s in Hamburg. This occurred through the work of Dr juris Ulrich Hübbe with the Torrens reform group. [71, chp.1, 67,

chp.1; 26, 193] The Hanseatic-Hamburg land title system later became the foundation of the modern German system. [10, 250,265]

One may identify some South Australian innovations where the Torrens system departed from the Hanseatic-Hamburg model; such as the system of caveats placed on titles to warn of unregistered transactions and the administrative rather than judicial registration of transactions. [67, chp.1; 26, 193] Remarkably for the 1850s, the Torrens system was intelligently formulated by an inter-disciplinary group drawing on international sources in the way of a modern law reform project, which is an impressive heritage. The Torrens system is named after Robert Torrens, who led this group and pressed the reform measure through the Legislative Assembly [popular chamber] of the South Australian Parliament. The reform was rapidly adopted throughout Australia, and then successively, throughout the former British Empire.

The English registration system was also developed with no small inspiration from a German model, through the influence of Fortescue-Brickdale –

The population affected by the system [in Germany and Austria-Hungary] amounts to 95 millions, whereas the population of Australasia ... is only 5½ millions. The general conditions also combine in many ways to render this Central European system the most useful and general model for study and imitation.’ [54, 129-130]

According to Ruoff, Brickdale was ‘the pioneer of effectual registration of title in [England]’. [72,6]

I contend that the adoption of German ideas of registered title introduced a particular concept of property. It is arguable, for example, that the idea of the conclusive land title register finally abolished the feudal concept of *seisin*, under which the *owner* was the person with the best right to possession, and substituted the modern liberal “bundle of rights” approach under which one of the rights of the owner is possession.¹⁸[79, s.41] Also, in the Torrens system, absent fraud, the registered legal proprietor holds free of all prior unregistered interests, whether aware of them or not [79, s.43] apart from the paramount or overriding interests, such as leases and rights of way. [79, s.42 (2)]

Most importantly, no estate or interest in land was to be created or to pass until registered in the land title register [79, s.40] The land title register is maintained for the wider social good – certainty in transactions concerning real estate and securities in it, and information symmetry in real estate markets. Implicit in these clear and comprehensive reforms is a legal concept of property subject to at least one wider responsibility, to register estates and interests in land at the risk of losing them completely, and one can imagine no greater disincentive to breach of a civil law responsibility.

The German idea of property has exhibited a principle of *responsible proprietorship* for many centuries and this has been embedded in that country’s private

and public law jurisprudence. The points are inseparable in logic; a land title register is maintained to achieve valuable social benefits and it operates on the basis of a responsibility to register one’s property in land, so this responsibility must be regarded as a social responsibility with respect to one’s property. The legal machinery of conclusive land title registers sets up incentives and disincentives that stimulate the self-interest of a citizen who acquires an estate or interest in land to register it for the achievement of greater social good.

In addition to the unavoidable logic of the situation, we may also review the evidence that as a matter of history the reformers who developed the Torrens system in Adelaide in the 1850s advocated a basic principle of responsibility and common good when advancing registered title. *Responsible proprietorship* was intended by the framers of the legislation as an aspect of a comprehensive reform that would displace the Common Law. Much contemporary writing in support of the reform measure demonstrates that a socially embedded concept of property was in the reforming mind. The jurist responsible for the German framework for the reform, Dr Hübbe, published an extensive pamphlet [monograph], titled *The Voice of Reason and the History brought to bear against the Absurd and Expensive Method of Encumbering Immoveable Property*, [40] while the original Bill was being debated before the Parliament and distributed a copy to each member. In this work Hübbe made an extensive comparative analysis of the principle of *publicity* in many real property systems around the world. He also sought to build on the shared historical traditions of the British and German communities of South Australia by reminding readers that both English and German Saxon real property law required the *publicity* of transactions with land through symbolic ceremonies with a turf or a twig from the land before local community. [40, 10-12; 26-7] This connection was broken by the English experience of Norman feudalism that commenced in 1066 and the English development of the trust¹⁹ and deeds conveyancing to avoid its most repressive aspects.

Most importantly, Hübbe’s book demonstrates that the legal-cultural values he brought to the analysis of land title registration were far from mechanistic and asocial. Throughout the work he referred to feudalism as an oppressive social system, drawing attention to the ability of Saxon women to own and transact with land, and to the absence of primogeniture. [15, p.13, 20-1] At many points Hübbe was concerned with the situations of those in any of the studied systems who were at disadvantage in relevant transactions; for example, when he described French marital real securities. [15, p.39. p.42] To illustrate the advantages and savings in interest and legal costs that would flow from land title registration he drew on a transaction involving a young couple of

¹⁸ To this end s 41 Transfer of Land Act 1958 (Victoria), for example, deems registered title to be equivalent to *seisin*.

¹⁹ The English concept of the trust involves division of title to property between legal title, held by a trustee on trust for the benefit of one or more beneficiaries, who hold equitable proprietary interests in the property (the beneficial title): see generally R Chambers, *Trusts: A Modern Analysis* (Oxford University Press, 2006).

limited means.[15, p.68-9] Ultimately, he considered that the “less propertied” gained greater protection through the principle of publicity which, in contrast to deeds conveyancing, requires transparent transactions recorded in public. [15,p. 59-60 and 94]

Hübbe also approved the relevance of *public interest* that he found in Saxon property law –

In such ... [national council meetings]... the Saxons had their first shares in their commonwealth adjusted, in point of property as well as of possession, of dignity, and of burden. The sturdy Saxons, though very far from holding communistic views were a people eminently given to meet together and devise anything and everything, under some point of view or other, as a matter of public interest. [40, p.88,10]

This democratic participation and social responsibility were for Hübbe the overarching custom, under which the distinguishing principle was –

... and always has been, wherever Saxons had it their own way, that transactions affecting lands must be public and notorious, and attested to at the people’s ordinary meeting, in order to be valid. [40, p.11]

This connection between the more technical operations of land title registration and the more philosophical ideal of a concept of property imbued with responsibility is repeated in some other jurisdictions. Movement to land title registration coincided with rapid urbanisation and the growth of middle class land ownership on the one hand and bureaucratisation on the other. The British parliamentary inquiries into land title illustrate this. In the first report to recommend land title registration, [34. Discussed in 67, p. 47-54] the Commission also pressed the need for social responsibility in land ownership as an argument for its adoption –

... the fee simple in land shall always be represented and be in the possession of persons capable of fulfilling those new *duties and offices which the ownership of land in the present state of society entails or involves*. [67,p.29]

Similarly, the second commission appointed to draft the *German Civil Code* considered the objectives which the ‘duty of registration’²⁰ would achieve. They included –

- prevention of doubts and disputes;
- protection of the interests of third persons;
- making the proprietary legal relationships of a land parcel transparent;
- legal certainty;
- raising national welfare;
- the approval of most governments in Germany and the representatives of agricultural interests;
- enhancement of secured credit
- agreement with the ideals of the people.[21, p.723-8, discussed 67, p.139 -158]

So, in Adelaide, London and Berlin it was considered that the introduction of land title registration at the pivotal juncture in rapidly changing settlement patterns in all three jurisdictions would secure social benefits at

a number of different levels. The responsibility to register one’s property in land has thus been regarded as a social responsibility in history as well.

Are there grounds for saying that the principle of *responsible proprietorship* received with the Hamburg model of land title registration extended to *environmentally responsible proprietorship*?

In the Hamburg model estates in land [*Erbe*] were classified according to land use in a fascinating application of civil law property concepts to the urban problem of *placing* inconsistent land uses in tolerable spatial relationship to each other. Examples include –

- *Brauerbe* - brewery estate
- *Backerbe* - bakery estate
- *Wohnerbe* - residential estate

While at first sight this might appear as a divergence between the systems, a similar capacity was actually retained for the Torrens system by instituting an exception to the security of registered title; a paramount [overriding] interest in favour of conditions and reservations in the original Crown grant of freehold tenure. [68, ss 37 and 38; 69,ss 69 and 161; 79, s 42] This capacity was actually utilised in the early years of the implementation of the Torrens system in Australia in order to restrict the uses to which land might be put when laying out the development of some early country towns. This was certainly done in South Australia in later periods with respect to land not under the planning authority of a local council.²¹ Reservations and conditions of the Crown Grant for mining and grazing purposes have been more common. In such ways, broader social intentions were integrated in the Crown Grant with the description of the tenure. Such “pre-planning” efforts in Hamburg and Australia to integrate the civil law object of ownership with its social and environmental context contrast strongly with their equivalents at the time under the English general law system.²²

Further, concern about the polluted environments of major English cities, and the need to plan Adelaide in advance to avoid such problems, was expressed in South Australia at the time when land title registration was being debated –

From the immense difficulty experienced by sanitary reformers in England in purifying their great towns and cities, the inhabitants of all rising towns and cities should learn never to allow theirs to become impure. We ought not, in South Australia, to neglect the painful experiences of the mother-country. Under careful sanitary and medical supervision Adelaide never need be-

²¹ Some examples are Crown Grant Vol 1746 Folio 20, which restricts the use of the land to business purposes, Crown Grant Vol 1750 Folio 153, which restricts use of the land to residential purposes, in addition to those granting land to public authorities for general and specified public purposes. I am indebted to Mr D Mackintosh, Deputy Registrar-General of South Australia, for correspondence on this point (letter of 29 January 1999 on file with author).

²² See for example, descriptions of Manchester in F Engels, *The Conditions of the Working Class in England* (2nd ed, trans & ed W O Henderson and W H Chaloner, London, Blackwell, 1971). See M Raff, ‘A History of Land Use Planning Legislation in Victoria’ (1996) 22 *Monash University Law Review* 90.

²⁰ *Die Eintragungspflicht*.

come unhealthy; without such attention it will gradually develop the same physical horrors observable in London and elsewhere ... To prevent this melancholy pressure every means should be devised by the authorities. No person should be allowed to build hovels in populous cities. *The limitation of liberty implied in proper regulations is no greater infringement upon personal rights than is demanded by the public welfare.* The law allows the pulling down of hovels, and it should equally prohibit their erection. [18]

The editors of the Adelaide newspapers were part of the inner sanctum of the Torrens reform group, as was Dr Hübbe. We may conclude that in 1857 Adelaide was ready for a concept of property implicitly subject to responsibility, social and environmental, and the Torrens system delivered it.

9. CONCLUSION – TOWARD AN ECOLOGICALLY SUSTAINABLE PROPERTY CONCEPT

Common Law presumptions about the world, about us and the parts of it we call “ours” must change. Rather than presuming that the 21st century private registered proprietor has a “sole and despotic dominion” in the style of Blackstone, [7] which we know to be ecologically unsustainable, we should presume that the 21st century private registered proprietor will act with responsibility regarding the ecological constraints of the land parcel in question. I have argued that the idea of property behind the presumption is based on mistaken theology. In any case, transformation has occurred through the reception of a land title system, the inextricable underlying principle of which is *responsible proprietorship*, reflecting fundamental Natural Law principles. The unfolding of these principles in practice may be observed in the modern German legal system.

This is a far preferable jurisprudential basis for a 21st real property system than the idea of “sole and despotic dominion” which was based on theological error and is inconsistent with the international concept of sustainable development. Today the Common Law idea of real property exists nowhere in pure form. Legislative reform of real property law throughout the Common Law legal family has introduced the essential abstract concept of *responsible proprietorship* which manifests itself in the text and mechanics of legislation that was introduced comprehensively to displace the Common Law real property principles of Blackstone’s era. Land title registration carries unavoidably within its structure at least one social responsibility of proprietorship enforced through civil law means. Historical evidence of reformers’ intentions confirms that this is one legal manifestation of a more abstract concept of *responsible proprietorship* implicit in their comprehensive reform measures. The history of the Hamburg-Hanseatic real property systems that inspired Torrens, as well as the later unfolding of the modern German legal system show that *responsible proprietorship* embraces environmental responsibility.

The principle of *publicity* implicit in deeds registration also demonstrates a socially embedded concept of property. Analogy drawn from systems influenced by French notarisational and registration of real property transactions suggests that the principle of *publicity* alone could well be sufficient to attract the ideas of social responsibility accepted in those systems through the jurisprudence of Duguit. [25]

Land title registration in the German style, deeds registration and French influenced models, and systems derived from them, account for very many of the world’s domestic real property law systems applying to urbanised land use in the world. The widespread adoption of land title registration systems around the world suggests that it has been the globalising trend in real property law. These systems will continue to spread. United Nations Capacity Building Guidelines simply assume that land title registration systems will be adopted. [82, p.15-18] The World Bank also prefers land title registration.²³ International Monetary Fund requirements that land law reforms be introduced as a facet of structural adjustment can lead to consideration of adopting land title registration systems even where this might lead to social tensions. [47, p.75] This paper should not be thought to argue for the adoption of land title registration where it would be culturally inappropriate. However, it is apparent that through momentum alone the adoption of land title registration systems will continue to be a globalising trend for many years.

With recognition on a wider plane of the juristic concept of *responsible proprietorship* that is implicit in land title registration systems, integration of the international concept of sustainable development into the many domestic legal systems where those systems have been adopted will be more achievable.

BIBLIOGRAPHY

1. Al-Hafiz, BA Masri. Islam and Ecology. In FM Khalid and J O’Brien, *Islam and Ecology* (London, Cassell, 1992).
2. *Appeal from Environmental Assessment of Munich Airport II* BVerwGE 87.
3. Australian Catholic Bishops’ Conference, *Common Wealth For The Common Good* (Collins Dove Publications, 1992).
4. *Backhouse v Judd*[1925] *South Australian State Reports* 16.
5. *Bathurst Declaration on Land Administration for Sustainable Development*, 6, available at <http://www.ddl.org/figtree/pub/figpub/pub21/figpub21.htm>
6. Beysen, E. Frankreich, C v Bar, *Sachenrecht in Europa* (Osnabrück, Universitätsverlag Rasch, 2000) Vol 4.
7. Blackstone, *Commentaries on the Laws of England* (15th edn, London, Cadell & Davies, 1809) Book II.

²³ See J Slater, ‘Thailand Sets an Example – Land-Titling Initiatives Lead to Cheaper and Longer-Term Loans’ in *Far Eastern Economic Review*, 9 May 2002, 40; F F K Byamugisha ‘The Effects of Land Registration on Financial Development and Economic Growth: A Theoretical and Conceptual Framework’ *World Bank Policy Research Working Paper* No 2240 (November 1999).

8. Boorstin, D. J. *The Mysterious Science of the Law - An Essay on Blackstone's Commentaries* (Gloucester, Peter Smith, 1973).
9. *Buchendomurteil* DVBl 1957, 861 or DÖV, 1957.
10. Buchholz, S. Die Quellen des deutschen Immobilienrechts im 19. Jahrhundert. (1978) 7 *Ius Commune*.
11. *Bürgerliche Gesetzbuch* [BGB].
12. Byamugisha, F. F. K. 'The Effects of Land Registration on Financial Development and Economic Growth: A Theoretical and Conceptual Framework' *World Bank Policy Research Working Paper* No 2240 (November 1999).
13. *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, International Court of Justice, 1997 no 92.
14. *Cathedral of Beech Trees Case. Buchendomurteil* DVBl 1957, 861 or DÖV, 1957.
15. Chambers, R. *Trusts: A Modern Analysis* (Oxford University Press, 2006).
16. Charlebois, L. 'Creating Land Registration Systems for Developing Countries' (1999) *Amicus Curiae* 8.
17. *Constitution of the Republic of Lithuania*, Adopted on the 25th October 1992.
18. Contaminations of Great Cities, *The South Australian Register* (Adelaide) 3 July 1857.
19. Cooke, E. (ed), *Modern Studies in Property Law – Volume III* (Oxford, Hart Publishing, 2005).
20. *Cooper v Wandsworth Board of Works* (1863) 14 *CB (NS)*.
21. Deutschland, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* (ed B Mugdan, Berlin, R von Decker, 1899) vol III [Sachenrecht] 3868–82 (1979 re-edition, Aalen, Scientia) vol 3.
22. Denny, F.M. and Baharuddin, A. (eds) *Islam and Ecology – A Bestowed Trust* (Cambridge, Harvard University Press, 2003).
23. Doctrine Commission, *Man and Nature*, (ed H W Monteiore, Collins, 1975).
24. *Donoghue v Stevenson* [1932] *AC* 562, 580.
25. Duguit, L. Les Transformations générales du droit privé depuis le Code Napoléon, published as 'Changes of Principle in the Field of Liberty, Contract, Liability and Property' in *The Progress of Continental Law in the Nineteenth Century* (Boston, Little, Brown & Co, 1918).
26. Esposito, A. K. A Comparison of the Australian ("Torrens") System of Land Registration of 1858 and the Law of Hamburg in the 1850s' (2003) 7 *Australian Journal of Legal History*.
27. Experts Group of WCED. *Environmental Protection and Sustainable Development - Legal Principles and Recommendations* (London, Graham & Trotman/ Martinus Nijhoff, 1987)
28. Foltz, Denny and Baharuddin (eds) *Islam and Ecology – A Bestowed Trust* (Cambridge, Harvard University Press, 2003).
29. *Frazer v Walker* [1967] 1 *AC* 569.
30. General Synod Board for Social Responsibility (Church of England), *Our Responsibility for the Environment* (London, Church House Publishing, 1986).
31. *Genesis* 1, 28.
32. German Federal Constitution *Grundgesetz für die Bundesrepublik Deutschland*, 23.5.1949 (BGBl. S 1).
33. Gierke, O. *Deutsches Privatrecht* (Leipzig, Duncker & Humblott, 1905) Vol II: Sachenrecht.
34. Great Britain. *Report of the Commissioners appointed to consider the subject of the Registration of Title with reference to the Sale and Transfer of Land*, 15 May 1857, British Sessional Papers, 1857, vol. XXI.
35. Hale Matthew. *The Analysis of the Law* (London, J Walthoe, 1713 - facsimile edition, D S Berkowitz & S E Thorne, London, Garland, 1978).
36. Hale, Matthew. *The Primitive Origination of Mankind* (London, William Shrowsbery, 1677).
37. Hargrove, E. C. *Foundations of Environmental Ethics* (New Jersey, Prentice Hall, 1989).
38. Holdsworth, W. S. Sir Matthew Hale 39 *Law Quarterly Review*, 1923.
39. Howe, A. A Post-Structuralist Consideration of Property as Thin Air - Mabo, a Case Study' 2 *Murdoch University Electronic Journal of Law*, 1995 <www.murdoch.edu.au/elaw/issues/v2n1/howe21.html>.
40. Hübbe, U. *The Voice of Reason and the History brought to bear against the Absurd and Expensive Method of Encumbering Immoveable Property* (Adelaide, David Gall, 1857).
41. *Hungary/Slovakia*, International Court of Justice, 1997 no 92.
42. Ihering, *Der Zweck im Recht* (3rd edn, Leipzig, Breitkopf & Härtel, 1893).
43. *International Legal Materials*, (1983).
44. Jauernig, O. Zivilrechtlicher Schutz des Grundeigentums in der neueren Rechtsentwicklung. JZ 41.
45. *Kreuzberg Monument Decision* ProVG 9 (1882), 353, reproduced in DVBl 1985.
46. *Law on Land* No. I-446 (26 April 1994) as amended to No. IX-1136 (15 October 2002).
47. Lea, D. *Melanesian Land Tenure in a Contemporary and Philosophical Context* (University Press of America, 1997).
48. *Lithuanian Civil Code*. Valstybės žinių. 1996. No. 108. Full English text of much Lithuanian legislation is available through – www3.lrs.lt
49. Locke, J. *Two Treatises Of Government* (ed P Laslett, London, Cambridge University Press, 1963) II.
50. *Mabo v State of Queensland* (1992) 175 CLR 1.
51. Manchester in F Engels, *The Conditions of the Working Class in England* (2nd ed, trans & ed W O Henderson and W H Chaloner, London, Blackwell, 1971).
52. *Maßnahmen des Wohnungsamts* BGHZ 6.
53. Mawil Y Izzi Dien. Islamic Ethics and the Environment. in FM Khalid and J O'Brien, *Islam and Ecology* (London, Cassell, 1992).
54. *Methods of Land Transfer – Eight Lectures* (London, Stevens & Sons, 1914).
55. Milsom, S. F. C. The Nature of Blackstone's Achievement (1981) 1 *Oxford Journal of Legal Studies* 1.
56. Mugdan, B. (ed) Deutschland, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* (Berlin, R von Decker, 1899) vol III [Sachenrecht] 3868–82 (1979 re-edition, Aalen, Scientia) vol 3.
57. *Northern Counties of England Fire Insurance Company v Whipp* (1884) 26 *Ch D* 482.
58. O'Brien, J. *Islam and Ecology* (London, Cassell, 1992).
59. Othman Abd-Ar-Rahman Llewellyn. The Basis for a Discipline of Islamic Environmental Law' in Foltz, Denny and Baharuddin (eds) *Islam and Ecology – A Bestowed Trust* (Cambridge, Harvard University Press, 2003).
60. Özdemir, İ. Toward an Understanding of Environmental Ethics from a Qur'anic Perspective' in RC Foltz.
61. Pakalniskis, V. The Doctrine of Property Law and the Civil Code of the Republic of Lithuania. (2004) 50(42) *Jurisprudence* 55.
62. Prime, R. *Hinduism and Ecology - Seeds of Truth* (London, Cassell, 1992).
63. *Protean (Holdings) Ltd v Environment Protection Authority*, [1977] VR 51.

64. *Qur'an, Yusufali* translation, electronic edition distributed by The Islamic Computing Centre, London.
65. Raff, M. 'A History of Land Use Planning Legislation in Victoria' (1996) 22 *Monash University Law Review* 90.
66. Raff, M. 'Matthew Hale's Other Contribution – Science as a Metaphor in the Development of Common Law Method' (1997) 13 *Australian Journal of Law and Society*.
67. Raff, M. *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law* (The Hague, Kluwer Law International, 2003).
68. Real Property Act 1858 (SA);
69. Real Property Act 1886 (SA);
70. Registration of Title in Prussia, (1888) 4 LQR 63.
71. Robinson, S. *Transfer of Land in Victoria* (Sydney, Law Book Co, 1979).
72. Ruoff, T. *An Englishman Looks At The Torrens System* (Sydney, Law Book Co, 1957).
73. *Scotching Frazer v Walker* (1970) 44 ALJ 248.
74. Silva, L de. 'The Hills Wherein My Soul Delights' and HH the Dalai Lama, 'A Zone Of Peace' (Excerpts from Nobel Peace Prize Lecture) in M Batchelor and K Brown (ed), *Buddhism and Ecology* (London, Cassell, 1992);
75. Slater, J. 'Thailand Sets an Example – Land-Titling Initiatives Lead to Cheaper and Longer-Term Loans' in *Far Eastern Economic Review*, 9 May 2002.
76. Solomon, N. 'Judaism and the Environment' in A Rose (ed), *Judaism and Ecology* (London, Cassell, 1992).
77. Statute of Uses, 27 Hen VIII c 10.
78. Thompson, E.P. *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, Penguin, 1975).
79. Transfer of Land Act 1958 (Victoria).
80. UNCED, *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, U.N. Doc. A/CONF.151/26/Rev.1.
81. United Nations – Economic Commission for Europe, *Land Administration Guidelines – With Special Reference to Countries in Transition*, New York & Geneva, 1996, ECE/HBP/96.
82. United Nations *World Charter for Nature* UN GA Res 37/7, 9 November 1982.
83. Warden, L C. *The Life of Blackstone* (Virginia, Michie, 1938).
84. Willen, R S. 'Rationalization of Anglo-legal culture: the testimonial oath' (1983) 34 *British Journal of Sociology*.
85. World Commission on Environment and Development, *Our Common Future* (Australia, Oxford University Press, 1987).

APLINKOSAUGOS REIKŠMĖ NUOSAVYBĖS TEISĖJE

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Santrauka

Tarptautinis darnaus vystymosi principas reikalauja ekologinių aspektų integracijos primant bet kokius sprendimus. Viešosios aplinkosaugos ir planavimo teisės aktai reguliuoja privatinės nuosavybės savininkų sprendimų, susijusių su jų teisių į jiems priklausančius objektus ar žemę įgyvendinimu, priėmimą. Įstatymų veikimo efektyvumui didelės įtakos gali turėti teisės sistemos jurisprudencija apie privatinės nuosavy-

bės teisių prigimtį. Ar privačios žemės savininkai iš esmės atsako už ekosistemos vientisumą jų žemėje? Šiame straipsnyje apžvelgiamas plačiai paplitęs požiūris, kad bendrosios teisės sistemos nepripažįsta tokios atsakomybės. Šis požiūris skiriasi nuo Vokietijos teisinės sistemos, kuri tokią atsakomybę pripažįsta ir siekia šios šalies žemės teisės principus perkelti į Torrens žemės nuosavybės sistemą, veikiančią daugelyje bendrosios teisės šalių, atsižvelgiant į tai, kad taip perkėlus pasikeičia pirminė bendrosios teisės idėja, nepaisant to, jog jos pirminė forma prieštaravo dėl aplinkosaugos srityje atsakomybės.

Šiuo metu bendrosios nekilnojamojo turto teisės idėja niekur neegzistuoja nesusieta. Nekilnojamojo turto įstatymų leidybos reforma bendrosios teisės šalių teisinėje sistemoje įvedė esminę bendrąją sąvoką – „*privačiosios nuosavybės savininko atsakomybė*“ (responsible proprietorship). Ši sąvoka yra įstatymų tekstuose bei įstatymų leidybos procedūrose. Ji buvo įvesta siekiant visapusiškai atskleisti Blekstouno (Blackstone) laikų bendrosios nekilnojamojo turto teisės principus. Žemės nuosavybės teisių registracija savo struktūroje neišvengiamai apima mažiausiai vieną socialinės savininko atsakomybės aspektą, įgyvendinamą civilinės teisės priemonėmis. Istoriniai reformatų ketinimų įrodymai patvirtina, kad tai yra viena daug abstraktesnės privačiosios nuosavybės savininko atsakomybės sąvokos apraiškų, pasireiškianti atitinkamose reformos priemonėse.

„*Viešumo*“ (publicity) sąvoka pasireiškia registruojant dokumentus, taip pat parodo socialiai įtvirtintą nuosavybės sąvoką. Viešumo sąvoka pati savaime galėtų būti pakankama pritraukti socialinės atsakomybės idėjas, kurios buvo priimtos minėtose sistemose Duguit jurisprudencijos dėka.

Žemės nuosavybės teisės registracija Vokietijoje, dokumentų registracija, registracijos modeliai, kuriems turėjo įtakos Prancūzija bei iš jų kilusios sistemos yra dalimi daugybės pasaulio nekilnojamojo turto teisės sistemų, pritaikomų pasaulyje urbanizuotai naudoti žemę. Visame pasaulyje priimtos žemės nuosavybės teisės registracijos sistemos leidžia daryti išvadą, kad tai buvo esminis postūmis nekilnojamojo turto teisėje. Šios sistemos ir toliau plis.

Šiuo straipsniu nesiekama prieštarauti žemės nuosavybės teisės registracijai ten, kur tai būtų nepriimtina atsižvelgiant į kultūrinius ypatumus. Tačiau akivaizdu, kad žemės nuosavybės teisės registracijos sistemų įvedimas ir toliau bus ypač svarbus procesas.

Pripažinus platesnę *privačiosios nuosavybės savininko atsakomybės* teisinės sąvokos reikšmę, kuri susijusi su žemės nuosavybės teisių registracijos sistemomis, tarptautinė darnaus vystymosi sąvoka greičiau integruosis į daugelį vietinių teisi- nių sistemų.

Pagrindinės sąvokos: nekilnojamasis turtas, aplinkosauga, prigimtinė teisė, žemės nuosavybės teisių registracija, nuosavybės teisių perdavimo dokumentas, dokumentų registracija, bendroji teisė, Vokietijos teisė.

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