PLANNING, LAW AND ECONOMICS

An investigation of the rules we make for using land

BARRIE NEEDHAM

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What rights should the state have over privately owned land? Why should planning favour some landowners over others? How can the practice of land-use planning be improved?

These are essential questions which affect the citizen in two ways. People can be protected in their activities by property rights: they value that protection. And property rights can have a financial value too. The law, which affects who has property rights, what those rights are, and how they may be used, can have very great financial consequences for people and very great economic consequences for society in general.

For those reasons, looking at land-use planning as it affects and is affected by property rights illuminates some core aspects of land-use planning, including effectiveness, efficiency, ethics and ideology. In this book, Needham examines those aspects from the clear perspective of law and economics.

Barrie Needham is professor of spatial planning at the University of Nijmegen, The Netherlands. He has written extensively, in English and in Dutch, about land-use planning, land policy, and real estate and he advises the Dutch government on these matters. He wrote the Dutch volume for the *Compendium of Spatial Planning Systems in Europe*, published in 1999 by the EC, and in 2004 Sdu-uitgevers in The Hague published his Dutch book on policy for land for industry and employment.

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PREFACE

I have become increasingly convinced of the importance for land-use planning of a good knowledge of law and of economics. With this book I want to show how that knowledge can be used to understand the practice better and also to improve it.

My knowledge of economics began with a university study and has been developing ever since. My knowledge of law is self-taught, much narrower and is not so systematic. I hope that lawyers reading this book will forgive the intrusion of an amateur into their field and the layman's way in which I use legal terms.

I had the good fortune to be taught economics by those who had been taught, at first and second hand, by Pigou. Pigou (1932: vii) wrote in the foreword to his classic *Economics of Welfare*:

> The complicated analyses which economists endeavour to carry through are not mere gymnastic. They are instruments for the bettering of human life. The misery and squalor that surround us, the injurious luxury of some wealthy families, the terrible uncertainty overshadowing many families of the poor – these are evils too plain to be ignored. By the knowledge that our science seeks it is possible that they may be restrained.

That is my aim with this book too. I hope it will not be thought presumptuous if I use Pigou's words, however old fashioned and outdatedly idealistic, to express this.

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Barrie Needham
Nijmegen
February 2006

CHAPTER 1

LAND-USE PLANNING AND PROPERTY RIGHTS: A FRAUGHT RELATIONSHIP

> The working of self-interest is generally beneficent, not because of some natural coincidence between the self-interest of each and the good of all, but because human institutions are arranged so as to compel self-interest to work in directions in which it will be beneficent.
>
> (Cannan 1913, quoted in Pigou 1932: 128–129)

Land-use planning affects property rights

A few years ago I saw on the television a planner/urban designer on the location where a large town expansion was to be built. She strode in big rubber boots across the fields, indicating with broad sweeps of the hand what would be built and where. The land was privately owned. But clearly such incidentals as existing rights in land must not be allowed to stand in the way of realizing her vision. I was reminded of the first planning project on which I worked, a plan for the expansion of Ipswich (1966). The development area was to be designated according to the procedures of the 1965 New Towns Act. We who knew where the new town was to be built (actually, it never was built) had on no account to give any indication of this until after certain legal procedures had been completed. That was necessary in order to be able to acquire the land at existing use value. Once again, realizing the planned development was not to be hindered by existing rights. When in 1947 the then minister of planning in Britain, Lewis Silkin, went to visit the site of the new town he wanted to have built at Stevenage, he alighted from the train to find that local opponents had replaced the station nameplates with 'Silkingrad'. They equated Silkin's land-use policy with the communism of the Soviet Union.

To those stories can be added countless others illustrating how land-use planning can harm private interests. We might smile condescendingly at the naivety behind the cry, 'It's my land and I can do what I like with it'; but we still feel aggrieved and improperly constrained if our application to extend our house is refused. Land-use planning is, quite properly, an emotional subject.

Those are particular episodes. At a very general level we have to take into account article 1 of the Protocol to the European Convention on Human Rights.

> 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.

Where does that leave land-use planning, which interferes in the 'peaceful enjoyment' of one's land possessions? That article continues:

> The proceeding provision 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.

Is that a 'let-out clause' giving carte blanche to land-use planning? If Europe follows America and puts more emphasis on individual property rights, the Protocol could have as much effect on land-use planning in Europe as the Fifth Amendment to the American Constitution has in the United States. We in Europe would be wise not to ignore the question.

The Fifth Amendment says: 'Nor shall individual property be taken for public use, without just compensation.' Its significance for land-use planning in the United States is that when a public body pursuing land-use planning restricts how someone may use her land or building, this is in some circumstances regarded as a 'taking' which must be compensated financially.

The proponents of as little possible restriction on individual property rights call themselves 'libertarians'. They stress 'freedom of the individual, the benefits of both market forces and entrepreneurship, the role of law, and the perils of bureaucratic control of the economy and society' (Sorensen and Day 1981). According to this libertarian perspective, there should be as little land-use planning as possible, for people should be free to decide how to use their property rights.

> Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are those rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?
>
> (Nozick 1974: ix)

Private ownership of property protects the individual against arbitrary or arrogant actions of politicians, state officials and other holders of power.[1] As a protection against too simple a view of property rights, an appendix on 'a theory of property' has been added to this chapter.

We can accept in principle – even if we are libertarians – that the state be allowed to restrict some of our actions. This is part of the price we pay for the

benefits of living in a society. We may not drive faster than 50 kilometres per hour on certain streets: we may not carry a gun: we may not defame others. We can accept that because those restrictions apply to everybody: everybody must 'pay the price'. Land-use planning has, however, the particular characteristic that it discriminates between people. If a state agency does that, it is supposed to discriminate only between classes of people specified beforehand, such as those younger than eighteen or those who have lived in the country for less than so many years. Land-use planning, however, discriminates between people in a seemingly arbitrary way. For it discriminates between locations, and if you happen to live (or have rights in land) in 'the wrong location' that is your bad luck. On location A office development is allowed, on location B not. That locational discrimination is exacerbated by the fact that the financial consequences are often huge. Land-use planning allows, arbitrarily it would sometimes seem, some people to become millionaires while others must remain poor farmers. The way that land-use planning affects property rights can be particularly sour.

Land-use planning affects economic efficiency

The effects of land-use planning on people's lives go further than clashing with the strong feelings which many people have about land and places and about their own rights in land. For the interests which people have in land and buildings are not just emotional but often financial too. Land-use planning can make a person poorer or richer, by affecting the value of the rights on her land. It can do this both directly by restricting what may be done with that person's land, and indirectly by influencing what others may do with their land, whereby their land has an effect on the value of the first person's land. Those financial consequences for individuals can add up to very great economic consequences for the society.

The study of how people use property rights can enable us to analyse the economic consequences of land-use planning. According to the 'libertarian' perspective, the aim of land-use planning should be to 'improve the efficiency and effectiveness of public regulation over economy and society' (Sorensen 2003). The best way of doing this is to let people themselves decide how to use their own land and property. For if individuals act in their self-interest and if they interact under certain conditions, the result will be a better use of scarce resources than if those individuals are restricted in their actions by land-use planning. The argument continues: that will, however, not realize the desired economic goal unless the market in property rights is appropriate. It is not that the public administration should do nothing, rather that it should limit itself to creating the conditions under which individuals, in unencumbered interaction, will produce economic results which are the best for society. So state actions should as much as possible be restricted to making the market in property rights appropriate.

We can see the strong points in this argument without going as far as the libertarians. For the argument puts the discussion of the relative merits of 'public planning versus the market' in a new light. Land-use planning affects the way that people use property rights and *therefore* affects the efficiency with which economic resources are used. This way of looking at things enables a sharper analysis of the economic effects of land-use planning.

Can land-use planning still be justified?

Those are very serious criticisms against land-use planning: it restricts the ways in which people may use their property rights, and it can result in those rights being used less efficiently. And yet: many countries have practised land-use planning for many years and – it would seem – want to continue doing so. Why? Why have not we, the members of the public who by our votes select the law makers and policy makers, chosen politicians who want to abolish land-use planning?

The answer is, presumably, because we consider that it can be a useful activity. We can be cynical about this: we want to retain land-use planning because it protects our property interests. This might be true in a selfish, pecuniary sense, as in the argument that the American system of zoning or of no-growth communities is used to protect the value of single family housing in the suburbs and to exclude poor families (Seidel 1978; Fischel 2001). The economic benefits can be less immediate but nevertheless valuable, as when land-use planning creates a framework for private investment.[2] However, we would do well not to be too cynical. Our interests in the way in which land and buildings are used can also be less self-seeking, sometimes even altruistic. We want land in location X to be used in such a way that we can enjoy the view of it. We want our town centres to be attractive and lively places. We want to be able to find work without having to travel too far to find it, without at the same time being so near to it that the noise and traffic disturb us. We want other members of the public to be housed decently. We want the interests of our children and our children's children to be safeguarded.

This topic is often discussed in terms of: land-use planning restricts private interests in favour of the public interest; there are procedures in place to protect those whose individual interests might be damaged; but if necessary the public interest must take precedence. Land-use planners sometimes act in accordance with this argument: they see individual rights as an obstacle to the realization of land-use planning schemes and they feel justified in being cavalier with people's rights: because the planning is in the public interest, isn't it? If a landowner refuses to cooperate in a publicly initiated scheme, some planners feel that their professional judgement and social commitment are being questioned, and the landowner is seen as an opponent to the public good, as represented by the planner. Planners acting in this way have been described by Davies (1972) as 'evangelistic bureaucrats'.

I find, however, the discussion 'private interests versus the public interest' to be an inadequate way of exploring this topic. For 'the public' is composed of you and me and all other persons. Our interests are individual. 'The public interest' is too quickly associated with the interest of the municipality, or the national government. The point at issue is then, that land-use planning affects individual interests in land, favouring some and harming others. Some of the people whose interests are involved have not yet been born. How can such conflicts between individual interests be resolved? Matters become even more complicated when we take into account that there can be a conflict between what one person wants for herself and what she wants for the collectivity. We might want to live in the middle of a beautiful landscape: but we do not want others to live there, because that would spoil the view for us.[3] We make a distinction between our interest as a private individual and our interest as members of a collectivity.

In the last thirty years or so, much has been written about property rights and some of those ideas are very relevant to land-use planning. Indeed, some of the writers, taking an explicitly ideological stance, have argued for little less than the scrapping of land-use planning, as the logical outcome of their ideas. Many of those writers are American, such as Siegan (1970 – when he justifies the absence of zoning in Houston) and Ellickson (1973 – alternatives to zoning). Yet their ideas have received little attention in Europe, let alone affecting the practice there. It is striking, for example, that the ideas of Coase (1988a), which first appeared in the United States in 1960 (the problem of social cost) and which helped to win him a Nobel Prize in 1991, were not applied to land-use planning in Europe until much later. In the 1980s, some of the ideas were propagated in Britain and, under the political benevolence of Thatcherism, were worked out in the form of arguments for much less public land-use planning. This movement is surveyed by Thornley (1991). It did not have much practical effect and its theoretical justification was weak, as was pointed out by Pearce (1981) and Grant (1988). More recently, the same ideas have once again been applied to make an argument for less public land-use planning: see Corkindale (1998) and Pennington (2002). But these also have not advanced the academic (as opposed to the political) argument, even though they could have used the solid theoretical work done by Lai (1997). Grant (1998) has again made this point critically. More recently, Webster and Lai (2003) have made a systematic argument from property rights for a particular approach to urban management.

Why this book has been written

In this book I investigate the relationship between land-use planning and property rights, for two reasons. The first is that I see the potential of land-use planning as a way by which a public administration can achieve various social goals. Yet I recognize also some of the criticisms made against it, from property rights and – derived from that – from economic theory. I want therefore to investigate how

land-use planning can be justified in spite of those criticisms, with strong, clear and testable arguments.

The second reason for writing this book is that my support for land-use planning is not uncritical. I see the potential of land-use planning for good: but only if it is practised in certain ways. Which ways? I this book I put forward suggestions for improving the practice, arising out of my critical investigation of the possible justifications for land-use planning.

A DIFFERENT LANGUAGE FOR A BETTER UNDERSTANDING AND JUSTIFICATION OF LAND-USE PLANNING

In the last thirty years or so, a branch of study has been developed called 'law and economics'. This offers us a language with which we can discuss these questions: how can land-use planning be justified? How should land-use planning take account of peoples' rights in land? How can the practice be improved? Moreover, because many of the criticisms of land-use planning just mentioned use this language, it is important that land-use planners too learn it so as to be able to engage in dialogue. Planners must not expect lawyers and economists to learn their language. Moreover, planners' language is often less precise than that of lawyers and economists. So it is the planners who must learn to use a new language.[4]

Let us start making acquaintance with the necessary terms and ideas by giving a working definition of the activity we call land-use planning. By *land use* I mean the man-made (woman-made) physical environment. This is both the physical form (roads, buildings, urban open spaces, agricultural land, the countryside insofar as it is preserved and tended) and the use to which those artefacts (the physical form) are put. The use refers to the activities which take place in or on the buildings and spaces, including who performs those activities (questions of geographical segregation, affordable housing, etc.). People have ambitions for the land use in a particular location. Examples are environmental sustainability, a pleasant environment, a distribution of uses which enables economic efficiency, good access to housing for all, maintaining our cultural heritage. The extent to which those ambitions are met we can call 'the quality' of that land use. Different people have different ideas about what is a good or a high-quality land use for a particular location. We consider here only those ambitions which, their adherents claim, are so important that they should be recognized and adopted by a public authority, which should then take the necessary actions, directly and indirectly, so that the ambitions can be realized.

This requires the activities of a state agency. This term refers to any body which is empowered to act on behalf of the state.[5] It includes national, regional and local governments, both the representative bodies (the legislative and/or policy making organs) and the administrative agencies which implement those

decisions. A state agency will not use its public powers to realize a particular quality of land use unless it has formally decided that realizing that land use is a goal of its public policy.

Land-use planning is no more than the actions taken by a state agency to realize the ambitions which it adopts for the land use in a particular location. The differences – if there are any – between land-use planning and related concepts such as spatial planning and town and country planning need not concern us here.

An introduction to the legal language

Land-use planning affects rights and interests in land

Land-use planners should be able to talk with lawyers using a language which is precise and which lawyers already understand.[6] That language is to be found in the discussion about property rights, or 'rights in a thing', more specifically 'rights in land'.[7]

Land-use planning affects rights in land. Society places a high value on people being able to use their property rights. So the rights in land held by people in the plan area must be legally protected. It is for that reason that certain formal procedures must be followed before a land-use plan or ordinance becomes legally effective and before the actions to realize the policy may be taken.

Rights in land can include more than the right of ownership. For example, there can be a right to use, such as that formalized in a tenancy lease which might be 'held' by someone other than the owner of the land or building. There can also be a right to graze cattle, or to hunt, or to gather wood, on someone else's land. There can be a right of way, or a wayleave, over someone else's land. Whether the formal planning procedures protect the legal rights other than ownership varies between countries and situations. Suppose for example that Mrs P has a residential tenancy in a house in a plan area, and the land on which that house stands is designated in the land-use plan for shopping use. The owner (Mr Q) of the land on which the house stands might be happy with that. If he does not want to sell the land or redevelop it, the plan does not oblige him to. If he does, then he makes a financial gain. Mrs P, however, does not want to be displaced from her house by a redevelopment scheme. Her tenancy rights might be protected so well in landlord-tenant law that she receives no other protection from the land-use planning procedures. On the other hand, the Dutch law on land readjustment (*Landinrichtingswet*), which can be regarded as a variety of land-use planning, protects the rights of the agricultural tenant explicitly and separately from the rights of the landowner.

If you study the formal procedures which land-use planning must follow, however, you see that they are designed to do much more than protect legal rights in land. It is not just those who hold rights in land in the plan area who are entitled to be consulted, to make their objections known, to appeal to a court of law. All sorts of other people are entitled to do that too: the details vary from country to country and from type of planning decision to type of planning decision. The law gives a place to these people in the planning procedures (what Alexander (2002a) calls 'planning rights') because they have a legitimate interest – in the view of the law maker – in how the land in the plan area is used, even though they hold no legal rights in it. For example, if the plan would change what someone else in my street may do with her land, then I have in some countries the right to make my objections known and to have them considered carefully. And if the plan would change part of a town centre, then the users of that centre (pedestrians, shoppers, etc.) might have the right to make their views known and taken into consideration.

It should be noted that those 'planning rights' are wider than the formal procedures laid down in the land-use planning legislation (statutory town and country planning, in English law terms). They include the principles of good government, 'due process' (in American terms), the 'unwritten rules of responsible public administration' (in Dutch terms, *de ongeschreven beginselen van behoorlijk bestuur*). They apply not only when protecting those with legal rights in land in the plan area, but also when taking into account the legitimate interests of those with no (other) legal rights.

We have talked of those with *legal rights* in a plot of land, and of those with an *interest* in that same plot. Is there a difference, and if so, what is it? I take the position that of all the various interests that there are and can be in a plot of land, it is only those which are protected by law which should be called a right.[8] When we say 'protected by law' we mean that the person with the interest can apply to the courts to stop others interfering with her exercise of that right and that the judge will order, if necessary, the police to act to protect the exercise of that right. An interest which is protected in that way is a right. So, if I am the owner of land and someone else occupies my land without my permission, I can go to the court to have the occupier rejected. However, if my neighbour four doors away paints her house bright pink, then my interest in her land – namely, in how it looks – is not protected by law. If I ask the court to require her to paint the house a more moderate colour, the court will say to me: you have no right to require that.[9]

Now suppose that there are land-use plans or public ordinances which make rules about the appearance of buildings, the sustainability of agricultural land use, noise in public places, etc. How can we discuss these in the language of rights and interests? There is a state agency which has made those rules

because it considers they are in the interest of the public, that is: you and me. The law maker has recognized that others besides the owner or user of a plot of land have an interest in how the owner or user uses that plot. And the law maker has decided to protect those interests. It does that by authorizing a state agency (such as a municipal council) to make and enforce rules on behalf of interested parties (unspecified), rules which affect the use of a plot of land. Do I then, as one of the interested parties, have a right in that plot of land? No: for if the plot is used in ways which harm my interests, I am not entitled to go to court as a plaintiff to require the defendant to change her actions. The law maker has recognized my interest, but not given me a right. However, if the plot is used in ways contrary to the rules laid down by the state agency, that agency can go to court to have them enforced. I have no direct right in that plot of land. But I might have the procedural right (that depends on the laws of the country) to go to court to require the state agency to apply the rules correctly in my interest. 'Perhaps what is at the heart of the matter is to be found in the concept of interest in land', says Booth (2003: 184–185).[10]

Rights in land affect land use

Let us suppose that there were no land-use planning. There are, of course, still rights in land. The way in which land is used in a particular location is affected by the rights which are held in land in that location (including how those rights are enforced). If, for example, there are squatters' rights, then the owners of land which might be occupied by squatters will use that land in ways to prevent others claiming squatters' rights. If the owner of land has a presumptive right to emit pollution, then uses sensitive to pollution will not locate nearby.

We give a fuller example. In Britain, leasehold rights may be traded, in the Netherlands not. One result is that business users take a long lease in Britain, for if their need for space changes, they can assign the lease to someone else. Business users in the Netherlands, on the contrary, rent for short periods, to avoid the inflexibility of a long commitment which cannot be assigned to another. A Dutch business user who wants security of tenure coupled with capital growth buys the freehold of the space, for a rental lease brings no capital growth to the lessee. As a result, more commercial space is held freehold in the Netherlands than in Britain. This results in smaller buildings and in the absence of business parks which are managed as a whole. In both countries there is a market in commercial space, but even without government measures (intervention) and even though the technical and financial requirements of the business users in both countries are similar, the land use is different. The cause of the difference is the difference in rights in land.

One more example is provided by the Dutch laws on transferring agricultural land from parents to children. The tax laws make it very unattractive to split the farm holding between the children. The result is that farm holdings are large and

contiguous. If someone wants to buy agricultural land for urban development, it is relatively easy to assemble plots for a large-scale development. This helps to explain the large and integrated housing schemes that one sees in the Netherlands.

It is not just that the nature of the rights affects the land use, it is also that who owns those rights in a given location affects the land use there. This issue was discussed by Coase (1988a) under the term 'the initial delimitation of legal rights' (115). He meant by that: who has responsibilities, duties, rights, liabilities, etc. with respect to which parcels of land. And he showed that the outcome of market processes with respect to a piece of land depends on the 'initial assignment' of those rights.[11]

If, for example, land ownership in an area is fragmented between many people, it will be difficult for those people to change the use of their land radically, for the use of one parcel is affected by the use of other parcels, and coordination between the landowners is very difficult to achieve. If the land in that area is owned by one person, he has many more possibilities to change the use. If, to take another example, all the land near to a proposed waste disposal site is owned by one rich person, he will be much more able to contest that proposal than if the land which would be affected is fragmented between several poor persons.

Influencing land use by land-use planning and by changing rights in land

It follows that a state agency which wants to change land use in a particular location has two ways of doing that. Planners have a professional reflex to think: it is desired to change the land use, so we will recommend changing the content of the land-use planning. But the land use can be changed *also* by changing rights in land. We forget sometimes that rights in land are a social creation, just as much as the land-use planning law and the content of the planning policy. It is society which decides to protect by law some interests in land and not other interests. The interests themselves arise independently of the legal rules: but it is the legal rules which make of some interests a right and of others no right. Or, as Bromley (1991: 5) puts it: rights are an 'instrumental variable'.

> We must not forget, however, that there can be great inertia in rights in land. Often it takes a long time to change them. One reason is that they represent deeply rooted moral beliefs. Many of the changes are fairly marginal and have the form of forbidding what previously was a presumptive right. For example, I might think that I have the right to play music in my back garden: the neighbour asks me to make less noise: I refuse for I regard playing music as my presumptive right: the neighbour tries to get the court to stop me: the judge says that the neighbour has no right to no noise nuisance from me (my

presumptive right is confirmed by law): changes in electronics make it possible to play music louder and louder: the interests of so many people are so harmed by this that politicians take up the cause: then the law maker gives people a right to freedom from loud music from their neighbours. The law has been changed. A new right in land has been created.

We now apply this legal language to the argument that land-use planning restricts freedom in the exercise of rights in land. This argument is obviously correct in one very important way. A land-use plan, or a planning ordinance, can restrict the way in which Mr X uses his plot. We must not forget, however, that that use can be restricted in very many other ways also, in particular if the use of that plot would harm the user (Mrs Y) of another plot. For Mrs Y might be able to use nuisance laws, or some such, to prevent Mr X using his land in ways which would harm her. That latter kind of restriction is acceptable because society has decided to protect one person's rights (those of Mrs Y) from being damaged by another person (Mr X) exercising his rights. With land-use planning, however, the restriction is not on behalf of one other person, but on behalf of 'the public', who have no rights: but they do have legitimate and recognized interests.

An introduction to the economic language

If land-use planners know anything about economics, it is something half remembered about two economists with unusual names (Pareto and Pigou) who somehow proved that it was justified to use land-use planning to intervene in market processes, in order to correct for market imperfections such as externalities. Land-use planners are grateful for that justification: but they should know that economic thinking has developed since Pareto (1843–1923) and Pigou (1877–1959). It is important for planners to up-date their knowledge of economics, for there are interesting arguments made by some economists that Pareto and Pigou were wrong, that it is economically better not to intervene in markets, that we would all be better off with 'more market and less planning'.

Creating markets in rights

For an introduction to these economic arguments and 'the economic way of thinking' (Heyne *et al.* 2003) we use some of the legal language just presented. If someone has a right in land and if that right includes the possibility of being able to transfer it to someone else (the right is alienable), then it can be bought and sold. There can be a market in that right.[12] There is an economic argument that free trade (in rights) leads to maximum efficiency in the use of scarce resources. This argument, in its most naive form, leads to the political conclusion: there should be no interference in free trade. Given that land-use planning is public

interference in how people use their rights in land, that political conclusion takes on the particular application: scrap land-use planning. Let the market do its work.

Both the argument and the conclusion have to be qualified, however. The reason that concerns us here[13] is that our discussion about rights has shown us that they are a social creation. If we say: 'let the market in rights do its work', we are obliged to specify to which rights the statement applies. For 'the one-and-only market' cannot exist, there is a multitude of possible markets, depending on which rights in land have been created. If the market in rights is to be left to do its work, the market in which rights?

The study of law and economics tries to find an answer to that question. The starting point is that the way in which a right (in land, or in some other thing) is created – the content of that right, how it is protected, etc. – affects the way in which it can be used and traded. And that affects the economic efficiency of the result of that use and trade. Suppose, for example, that everyone has a right to clean air, so much so that someone whose factory emits polluting fumes can be taken to court by anyone who considers that his interests in clean air are being harmed. Instead of taking legal action, the person with a right to clean air can enter into a contract with the owner of the polluting factory, whereby that latter buys the rights of the other to free air. What will be the result? In this particular case, it can be predicted that probably nothing will happen. For there are so many people whose rights in clean air are harmed, and the harm of each person is so small, that it is unlikely that they would take the trouble to cooperate in order to act against the factory owner. Take another example. Suppose that I have a right to uninterrupted sunshine on my land. My neighbour wants to build in such a way that my right would be harmed. Either I take her to court to prevent that happening; or she buys the right from me, builds, and compensates me for the loss of sunshine. The market in rights has not worked in the first case; it has worked in the second case.

If rights in land are an 'instrumental variable' (see above) then they can, in principle, be created and structured in such a way as to affect the outcome of the market in rights. And then, so goes the sophisticated version of the economic argument, it is the task of the law maker to create and structure rights in land in such a way that markets in those rights arise which produce outcomes which use resources efficiently.

Structuring markets and regulating markets

In those ways, a market in rights in land can be set up. Land-use planning 'intervenes' in that market in rights, it is often said. What is meant by that? First, there has to be a market. It is a common misconception that markets exist independently of the state. In fact, no market except the most simple will work without the state, for in a market people make contracts with each other, and they will not do that unless there is system of law to regulate contracts voluntarily entered

into (Underhill 2001). So the market is *structured* by the law maker creating rights and determining the rules about the way in which they may be used and traded. Then the law maker can let the market – the social traffic in property rights – do its work. But the law maker can *also* authorize state agents to take actions – such as forbidding certain types of development in certain locations, such as giving subsidies or levying charges, such as publicity campaigns to persuade people – in order to influence the way in which people act in the markets it has created and structured. In the extreme, those actions can go beyond influencing: a state agency might be able to bypass the market by compulsory purchase or pre-emption. This we call *regulating* the social traffic in property rights.[14]

This gives *two different ways* in which society can try to achieve a desired land use. It can create and structure rights in land in such a way that the desired land use is achieved by people working freely within that structure. Or it can influence, or steer, actions in the market in rights in land so that the outcome of people acting in that market is the desired one. And society can, of course, do both at the same time, so that the one complements the other. The argument from economic efficiency is: use that way, or that combination of ways, which uses scarce resources most efficiently.

The stance taken in this book

The arguments presented briefly above will be worked out in the rest of this book. I do that from the following stance.

I am in the liberal tradition in the sense described by Ogus (1994: 46): 'respect for individual liberty and acceptance of the distributions resulting from market processes, tempered with a concern for unjust outcomes'. As applied in this book, that means that if there are two ways of achieving a desired land use, by structuring markets or by regulating them, then if all other things are equal I prefer the former. The reason is the following. It is recognized that the exercise of a right is restricted by the market rules. But at least the parties involved have the freedom to decide whether or not to enter into a transaction in that market. Regulation, on the other hand, influences how people may operate within the market rules, and can restrict people in the exercise of their rights in an additional way, a way – moreover – which people cannot avoid by deciding not to take part in a transaction. Structuring sets the rules of the game for those who want to play it. Regulating imposes rules on all, whether they choose to play or not.

However, I am not interested in arguing for or against more emphasis being given to peoples' property rights in land-use planning (and see the appendix to this chapter).[15] Because I regard rights in land as being a social creation and not as a 'natural right' such as freedom of speech, I can regard those rights pragmatically. Namely, what are the effects of different rights in land? My liberal stance favours people being able to exercise their rights in land, my pragmatic

stance examines the consequences of how they do that and reserves the right to say: that exercise has good results, or bad results.

What do I regard as being a bad result, and what a good one? 'Efficiency and equity are the two basic criteria for evaluating land-use control systems', says Ellickson (1973: 688), claiming nothing special for this remark as it applies to most forms of public policy, and choosing words which apply equally well to control systems which structure markets and to those which regulate markets. So the results are judged: what is the effect on economic efficiency? What are the distributional consequences? However, this does not take account of the reasons why the land-use control system is being applied in the first place, namely to achieve certain policy goals, described in this book as 'a desired land use in a particular location'. Those goals are additional to economic efficiency and equity. So there has to be a third criterion: effectiveness in realizing the policy goals.

This requires me to take a stance on another issue: which policy goals should land-use planning be used to achieve? I bridle, as Grant (1998: 70) before me, when economists tell us what the goals of land-use planning should be. 'It is one thing to propose new tools to pursue new, more limited objectives for the planning of land use: it is another thing to understand how existing objectives might be more efficiently pursued through new tools'. Like Grant, I reject the first proposition and accept the second. In other words, in this book I take as the starting point the goals of land-use planning ('the ambitions for land use in a particular location') chosen by those state agencies which have the task of doing that. Those agencies can be local, regional, national, all purpose or special purpose. If one of those agencies adopts, after following the proper procedures, certain ambitions for the land use in its jurisdiction, then I do not presume to question that.[16]

This enables me to apply the third criterion for judging the 'land-use control system' used to pursue ambitions for land use. In addition to economic efficiency and distributional effects, we judge the effectiveness with which the land-use goals chosen by the appropriate state agency are being met. This approach – rights in land used as a planning instrument – might seem strange to those currently engaged in land-use planning, both academics and planners. For nowadays everyone is paying attention to matters such as pro-active planning, communicative planning, collaborative planning, consensus planning, and so on. These are all ways of drawing up and deciding upon the *ambitions* for land use in a particular location. My interest is different, namely how those ambitions could be *realized*.[17]

Let me make explicit the ambition of sustainability, which nowadays is given so much importance – correctly in my view – in land-use planning. In spite of that importance, I do not consider this separately from the above three criteria when judging the land-use control system. There are two reasons: one substantive, the other procedural. The substantive reason is that I regard sustainability as being a question of intergenerational distribution and, therefore, as one of the possible distributional effects of land-use planning.[18] In this I follow the definition of sustainability offered by the Brundtland report, published by the World Commission on

Environment and Development in 1987: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It will be apparent in the examples I give later of distributional effects that I consider intergenerational effects to be very important. The procedural reason why I do not give explicit attention to sustainability is that, whenever sustainability is one of the ambitions for land-use planning, it is included in the question: how effective has the land-use planning been in realizing that ambition?

Finally, let me say explicitly that I do not automatically distrust all state agencies, nor am I automatically cynical about their motives. On the contrary, I see state agencies as organizations brought into being by people in society in order to act on their behalf and, moreover, capable of doing that. I say this because a liberal stance (see above) is sometimes associated with a 'persistent suspicion of government' (Bailey 2003). That latter is not my stance.

The structure of the book

The next five chapters explore and develop the ideas expressed above. Chapter 2 looks in more detail at the two ways in which decisions about land use can be influenced, namely by regulating markets in rights in land (public law rules) and by structuring those markets (private law rules). Chapter 3 explores the concept of a right in land, what it means to hold such a right, and the limitations to exercising such rights. Chapter 4 explores the meaning that can be given to the statement 'making a good use of scarce resources' and how that can be achieved. Chapters 5 and 6 take some principles from law and economics and apply them to rights in land: Chapter 5 does this for rules under public law, Chapter 6 for rules under private law. The outcome is a set of statements about how different sorts of property rules might be expected to influence economic efficiency, distributional effects, and the realization of land-use planning goals.

Those general statements can be applied to all aspects of land-use planning. In the following two chapters they are applied to just two applications of land-use planning. In Chapter 7 they are applied to achieving neighbourhood quality. This has been chosen because many reasons have been put forward for thinking that neighbourhood quality could be achieved better through private law than through public law rules. Chapter 8 looks at the application to regional land-use planning. This has been chosen because there are good reasons for thinking that private law rules would be less effective in this application than public law rules. With these two chapters we test the applicability of our theoretical framework.

In Chapter 9 we return to the general argument. There we answer the question about how the application of existing property rules meets the three criteria, and we consider whether our ambitions could be better achieved by using private law rules instead of public law rules, and whether those private law rules (the rules about rights in land) should be changed for this purpose.

Throughout the book, the details of the argument and the illustration are taken from three countries: England, the Netherlands, and the United States. I use these three because I know them best; also because those three countries exemplify three very different ways of combining regulating and structuring in land-use planning. I expect that the conclusions are applicable to other countries too, but I cannot support this expectation in this book.

Appendix

A theory of property

The purpose of a theory of property, says Munzer (1990) is to inquire 'what property rights are justifiable and to evaluate critically existing property institutions' (ibid: 2). He continues: 'Nor may it suppose that only private property needs justifying. Justification is an issue for public property too.' I am agnostic on the question of whether property rights should be held privately or publicly, aligning myself with Bromley (1991: 159) when he says: 'I submit that it is the right to control which is the most interesting in contemporary property issues and conflicts; ownership is not in doubt, but full control certainly is.' Nevertheless, the writings on the justification of property rights raise issues which are fundamental to the questions raised in this book.

Becker (1977) in a very sober assessment, asks the question: 'What sorts of people should own what sorts of things and under what conditions?' (ibid.: 3). He identifies four 'sound' lines of justification for the institution of private property rights:

- labour. Under certain conditions, it is not wrong for producers to exclude others from the possession, use, management, etc. of the fruits of their labours
- desert for labour. People deserve some benefit from the value their labour produces
- utility. A system of property rights is necessary if people are to achieve (the means to) a reasonable degree of individual happiness and general welfare
- political liberty. Human beings will acquire things, try to control them, exclude others from their use, modify them, use them as wealth. The prohibition of such activities by eliminating private property is an infringement of political liberties to which people are entitled, morally.

Paraphrasing this, he says: 'People want their social institutions to be procedurally efficient and fair, to enable the realization of worthy collective and personal goals, to produce results which are just, and to leave them free to pursue what activities they themselves choose.' 'Most political philosophy', he continues, 'is –

among other things – an attempt to work out how deeply inconsistent these wants are and to decide what can be done about it. This book is no exception' (ibid.: 1). And – I would add – my book also wrestles with the same inconsistency.

Munzer (1990) comes to a similar conclusion. Solving the problem of justification and evaluation 'lies in a pluralist theory that consists of three main principles and an account of how those principles are related' (ibid.: 3) These are (ibid.: 4–5)

- utility and efficiency. Property rights should be allocated so as (1) to maximize utility regarding the use, possession, transfer and so on of things and (2) to maximize efficiency regarding the use, possession, transfer and so on of things.
- justice and equality. Unequal property holdings are justifiable if (1) everyone has a minimum amount of property and (2) the inequalities do not undermine a full human life in society.
- desert based on labour. People are responsible for changes in the world and deserve or are entitled to something as a result.

'However', says Munzer (ibid.: 3) the theory of property is pluralist 'in that it contains several irreducible principles that sometimes conflict: when conflicts occur, priority rules can resolve some, but not all conflicts'.

These 'sound lines' and 'principles' will recur in the course of this book; also the argument that they cannot be combined into one grand principle which can be used to conclude incontrovertibly that a particular system of rights in land or a particular property rights regime is 'the best'.

CHAPTER 2

TWO WAYS IN WHICH LAWS CAN INFLUENCE HOW LAND IS USED[1]

> The owner of a plot of land may not cause a nuisance to a degree or in a way which is unlawful … to owners of other plots of land, such as by spreading noise, vibrations, smells, smoke or gases, by hindering access to light or air, or by removing supports.
>
> (The Dutch Civil Code, Book 4, article 37)

> It is forbidden to build without, or in deviation from, a permit from the municipal executive.
>
> The building permit may only, and must, be refused if the proposed building works do not satisfy the following ordinances …
>
> (The Dutch Housing Act, articles 40 and 44)

In Chapter 1 we described land-use planning as the activity of a public agency 'to realize the ambitions which it adopts for the land use in a particular location'. In the first part of this present chapter we investigate how a public agency can do that: with what sort of measures and how those measures affect the exercise of rights in land. In Chapter 1 we pointed out also that the land use in a particular location is influenced by the way in which rights in land are created and structured and by the rules governing the 'traffic' in those rights, also by the initial assignment of the rights in that location. This means that land use is influenced not only by regulatory land-use planning but *also* by how that market in rights is set up. Here we give an overview of how both ways together influence the land use in a particular location. The last section makes the choice explicit: how should the public desire to influence land-use decisions be realized, with what combination of rules?

Decisions about using land

The starting point is the observation that in many countries of the world, state agencies want to influence the way in which land in their jurisdiction (whether it be in private ownership or not) is used. The concept of land use was defined in Chapter 1, also what we mean by public (= state) ambitions for the land use in a particular location. The ambitions can be such as: in a certain location, a valuable ecological resource should be protected; in another location, the quality of the housing should be improved; and in another location, existing factories should

be demolished and a new shopping street developed. It is for this reason that plans, in the form of (geographical) maps showing the desired development, are so often used.[2] The desired use can include more than the physical form. For example, it is not just that buildings suitable for retail purposes be developed, also that they shall be used only for shops and not for cafés. Or that the houses, after being physically improved, should be affordable by people with small incomes. The term land-use planning refers to the actions taken by a state agency to realize its land-use ambitions.

In a society where most land and buildings are owned privately, the land use comes about mainly by the decisions of many private individuals and organizations.[3] Choosing effective actions so as to achieve a desired land use must recognize this and should, therefore, be designed so that the actions achieve their effects by influencing private land-use decisions in a particular direction.[4] Planning should relate to the actions of private actors (Needham 2000). Failure to recognize this results in unsuccessful plans and disappointed planners:

> The planners' sense of frustration would be less acute and their time and effort put to better account if it had been possible for them to work in concert and co-operation with those in whose discretion lay the power of decision for the execution of land-use plans.
>
> (Denman 1978: 83)

The decisions which must be influenced can be described as decisions by the *final users* of space (built and unbuilt) to demand more or different space; and the decisions by the *suppliers* of that space. Where there are many decision makers, the personal decisions must be influenced impersonally, i.e. by changing the relevant contextual factors (Bressers and Klok 1987).[5] Many of those factors cannot be changed, such as the physical geography of the area, the economic determinants of the demand by the end users (e.g. the demand for housing or for office space), and the economic determinants of the supply of space (e.g. the price of factors of production). What can be influenced are the decisions about supplying space and about using it. How can that be done by land-use planning?

This way of looking at land-use planning focuses on the *use* of land and buildings: what sorts of use and – sometimes – by what sorts of people. There is a separate legal right to use something, as distinct from other rights in that thing such as ownership. Land-use planning tries to influence the exercise of that particular right in land, namely how landed property is used. The significance of this is that the other types of rights in land are not directly important for land-use planning. That latter does not aim to influence the right to legal control, the right to the income from the land, the right to alienate the property or any of the other rights which we shall identify in Chapters 3 and 6.[6] Of course, those other types of rights in land might be of concern to land-use planning, for the

state agency might want to influence them as a means of influencing the right to use. Obvious examples are the use of compulsory purchase and pre-emption as ways of bringing about a desired land use. Nevertheless, it is the right to *use* landed property which is the central concern of land-use planning.[7]

Public powers to influence individual decisions about land use: regulation

It is not only that in many countries people have, collectively, ambitions for their land use, but also that state agencies have been given powers to help them realize those collective ambitions. Where those powers are given explicitly for that purpose, we can call that statutory land-use planning. Those powers enable actions to be taken of the following sort: it is not permitted that agricultural land in a particular location be built upon; if housing is to be built in a particular location, then the building must not be more than 10 metres high; an existing house in a particular location may not be used as a café or shop; office building in a particular location is restricted or taxed, in another region it is subsidized.

The variety of such activities is wide even within the countries of the European Union: the Compendium (1997: 33–37) distinguishes four 'traditions of spatial planning': the regional economic planning approach; the comprehensive integrated approach; land-use management; urbanism. What they all have in common is state agencies taking actions to influence how others use their land, in order to achieve a desired land use specified by location. The scale of the specified location can vary, even within one country, between: a building (e.g. protecting a historical monument); a neighbourhood (e.g. improving a run-down area); a city (e.g. designating a growth centre); a region (e.g. regional development policy).

State agencies influence in other ways too how others use their land, in order to achieve a desired land use. These are where the actions apply in the same way throughout the whole jurisdiction. We call such actions *locationally generic*, in contrast to *locationally specific* actions under statutory land-use planning. Such locationally generic actions include the application of building ordinances such as: the minimum ceiling height in an office building; fire regulations; heat insulation requirements; openness to light and ventilation; connections to a clean water supply and to treatment for foul water. Locationally generic actions include also the application of environmental ordinances such as: petrol (gas, tank) stations must be at a minimum distance from other buildings; the noise made within a café must not outside the cafe be louder than so many decibels. Normally, locationally generic measures are not regarded as being part of land-use planning (and they are not regulated under statutory land-use planning). However, such regulations can have significant locational effects and in that way can interact with land-use planning. Because of that interaction, we shall not exclude locationally generic land-use actions from our investigation of land-use planning.

For example, if it is regulated that a café is allowed to make noise up to a certain level, and if that level is higher than most people would accept in a residential area, then the café will choose to locate in a town centre rather than in a residential area. This interaction is reflected in the fact that some countries choose to regulate a certain aspect by building and environmental ordinances, whereas other countries will regulate that by statutory land-use planning. If, for example, an industrial process is dangerous, it can be ruled that the factory must organize the process so that the risk within a zone of 50 metres is below a certain level: alternatively, a land-use plan can be made which prohibits that factory locating within 50 metres of any other activities. And see the enormous effect on house building in English cities of the public health by-laws introduced in the nineteenth century.

Some lawyers see locationally specific actions taken by a state agency as problematic. In general terms, this is because such actions do not apply to all cases of a specified sort, but only to those cases specified in a special document (in this case, a land-use plan). A building regulation is an example of a locationally generic norm: all buildings of a certain type must meet certain norms. This is laid down in regional or national legislation. When a state agency decides whether or not to grant a planning permit, it is applying a norm which is valid only in certain locations which are specified in a plan which has been adopted especially for that location.[8] Nowadays we might not experience this as a problem: but it was certainly felt to be so in the early days of land-use planning. And today too, most of the objections voiced against land-use planning arise because of its locationally specific applications.

The formative time and place for land-use planning legislation was Germany around the turn of the nineteenth to the twentieth century. It was formative, for that German experience affected town planning systems and legislation in much of Europe (certainly the Netherlands), but also in Turkey, Japan and the United States. This is discussed by Booth (1996: 71–71).

The emergence of zoning in its modern form as a means of securing the control of development comes with the passing of the Lex Adickes for Frankfurt-am-Main in 1891. What was achieved at Frankfurt was in effect a marriage of the regulations applied to buildings, with a concept of spatial planning contained in the town extension plans. The first stage of rationalising planning was to standardise regulations across urban and suburban areas, rather than to continue ad hoc regulations for new development when it arose. The second part was to realise that distinguishing between parts of the city was entirely appropriate if it was done consistently. … The early experience of Germany was formative, because the solution of coupling town extension schemes to regulation satisfied many of the preoccupations with the problems of controlling urban development.

Booth goes on to say, 'The system was scientific and rational. … It provided clear rules for action by government and developers. It was not arbitrary and it served to protect rights and freedoms'.

Such actions, whether locationally specific or generic, are intended to influence the way in which people exercise their user rights in land. The two main ways of doing this are by prohibition and by incentives. *Prohibition* we have already discussed: that is the essence of statutory planning and ordinances. This form of regulation is a serious matter in a society where the rule of law prevails, especially when what is being prohibited is something so sensitive as the exercise of rights in land.[9] The rule of law requires that the rules and the conditions under which they apply be specified in advance.[10] It is prohibited to do something which contravenes those rules.[11]

As we have seen, many of the prohibition rules are locationally generic, even when they apply to land use. They apply throughout the whole jurisdiction of the rule maker. They have the form: if you build a certain type of dwelling, then this has to meet certain minimal technical norms, it has to be a certain minimum distance from its neighbour, etc. This type of rule is very common for other types of action also: if you drive a car, then you have to keep within the specified speed limit, if you sell food then you have to meet certain hygiene rules, if you make paint then that has to meet certain environmental norms, and so on.[12] When it is desired to influence land use, there can be, in addition, locationally specific prohibition rules. They apply only to locations explicitly specified in a separate ruling, such as a land-use plan. They have the form: nothing may be built without prior permission (this is a generic rule) and in addition: if you want to build in that location it is not only the generic rules that apply but also rules specified in a land-use plan adopted for that location (such as that permission will not be given for building a house if the location has been designated for offices). Locationally specific rules are used only where location is important, such as to regulate what type of housing should be built where (De Kam 1996: 94–95). They are used also for some types of environmental policy (e.g. for reducing damage caused by spot emissions) but not for other types of environmental policy (such as for reducing the consumption of non-renewable resources) where location is not important (Kolstad 2000: 146, 163).

Influencing by *incentives* includes financial incentives (subsidies, fines, liability to pay compensation – Kolstad 2000: 139) and exhortation, appealing to a sense of duty, changing perceptions, mediation, planning agreements, getting people to 'internalize' collective values, etc. Such actions also can be locationally generic or specific.[13]

The prohibitions and incentives are often called 'interventions' ('the government intervening, in a variety of ways, in the private actions of firms and individuals': Kolstad 2000: 135). 'Intervening' has the connotation of being a busybody, meddling in other people's affairs. Ogus (1994: 2) prefers the term 'regulation'. This involves the use of public law rules 'for correcting perceived

deficiencies in the market system in meeting collective and public interest goals'. We follow Ogus and use the term regulation for this type of activity.

Pro-active planning

Trying to achieve a desired land use by prohibitions and incentives can be called *passive*, for the state agency takes no initiative to make things change. It waits until a private person or organization wants to do something, and then tries to influence that decision. A state agency can in addition take an *active* part in bringing about the desired change.

In the extreme, the state agency itself brings about the desired land use by itself changing the use of existing land and buildings. A local authority constructing an estate of affordable housing, then managing it ('council housing' in British terms), is an example of this. More common is when the state agency changes some key aspects of the land use, hoping in that way to stimulate others to bring about the other desired changes. The key aspect might be building a road or a bridge so as to stimulate economic development in a region, or inserting a new motorway junction to encourage owners of land nearby to change the use from agriculture to industry (infrastructure as a policy instrument), or to supply serviced land in the location where it wants development to take place (a common practice among Dutch municipalities). With that kind of project planning, the state agency is not just trying to influence the actions of people in the market for land rights, it is itself active in that market.

Another form of active planning is when there are just a few private persons or organizations who are in a position to make the desired changes, and when those few persons or organizations cannot or will not do that on their own initiative, sometimes actively seeking the direct involvement of a state agency. In such cases, the state agency can work closely with those few property owners, in the form of a public-private partnership, a joint venture, or some such, in order to help realize the desired land use.

There can be many reasons for this, such as:
- land ownerships are too fragmented for an integrated development;
- the land must first be drained or decontaminated;
- a new road, sewer or other infrastructure is required, and the private organizations do not want to provide this, although they would benefit, because others also would benefit without paying (free riders);
- the success of the project is dependent on factors outside their control, which makes the risk too great.

This 'co-operative planning' (Denman 1978: 83ff.) is attractive in that it is voluntary and that it can be used to find solutions which are tailor-made to the particular circumstances. Note that although it is voluntary, it is often dependent

on the fact that the governmental body can impose rules if cooperation is not accepted: what Scharpf (1993: 145) calls 'self co-ordination in the shadow of hierarchy'. And in practice it is always used in conjunction with prohibition (Needham 2003a). Its use is limited to those circumstances where only a few actors are (crucially) involved.

Setting up a market in rights in land

So far we have talked about how a state agency can change the way in which land is used, either by passive regulation or by active involvement in projects. However, the nature and content of the rights which are regulated and the rules by which they may be used and transferred have been taken as a given. Those actions by the state agency are taken in an existing 'market in rights'. In Chapter 1, however, we have seen that that market is itself a social creation, the market exists and works thanks to rules created by the law maker and enforced by state agencies. 'Markets need the state', say Webster and Lai (2003: 52). And, less prosaically, 'If the market is the dance, then the state provides the orchestra and the dance floor' (Lindblom 2001: 102).

Suppose that changes are made to rights in land. The result is that people acting voluntarily will exercise those rights differently, which will change how land is used. Given the fact that this is well known in the context of land reforms (Denman 1978: ch. 8), it is curious that most discussions of how to change land use in a given country ignore the possibility of doing this by changing rights in land. A possible explanation for this is the recognition that those rights are based on very fundamental aspects of the society which are not easy to change: the land rights are taken as a 'given', something which is taken for granted and as such is hardly visible. In this book, we want to make them visible and we do not take them for granted.

Land-use planning usually takes as its starting point the decisions which people and organizations would make about exercising their user rights in land and buildings, if they were free to do so. In this view, land-use planning is always 'government intervention', as its critics often point out. Here we take a more fundamental starting point by asking: what determines those private decisions, *before* there is any 'intervention' by state agencies? One of those determinants is the existing system of rights in land.[14]

Private law rules and public law rules which influence land use

There are rules about how (legal) persons can own, use and transfer their rights. If a property owner dies, who has the right to that ownership? If I rent a house, has the landlord the right to enter it against my will? If I sell a factory which is leased to someone else, what is the relationship between the lessee and the

new owner? If a river flowing through my land is polluted by the land owner upstream, have I recourse to compensation from that landowner? It is clear that a society will not function efficiently if such matters are not well regulated.

Often agreements are freely entered into about who may do what and under what conditions, such as a lease contract. Sometimes there are imposed obligations, such as that I may not dig a hole on my land which weakens the foundations of my neighbour's building. In all cases, if the rules are breached it is the aggrieved party who takes the initiative to have the law enforced. The plaintiff takes out a case against the defendant. No state agency takes that initiative. The role of the state is limited to determining the rules, to setting up courts to decide who is in the right and to imposing sanctions where necessary. This is what lawyers call *civil law*, or *private law*.

When a state agency regulates how people may exercise their rights in land *given those private law rules*, the situation is very different. Such regulations impose obligations one-sidedly, such as that no-one is allowed to build without a permit. Only a state agency is empowered to impose such obligations. It follows that if the rules are breached, it is the state agency which has imposed them which takes the initiative to have the law enforced. This branch of law is what lawyers call *public law*,[15] or *administrative law*.

> Under civil law, there are *three* parties involved in enforcing property rights: the aggrieved party (the plaintiff, who takes the case to court), the party who according to the plaintiff has breached the law (the defendant), and the state which sets the rules by which the dispute will be resolved. Under public law there are just *two* parties: the state agency which wants to enforce the law and the party who, it is claimed by the state agency, has breached the law. This difference is sometimes referred to as the *triadic* and the *dyadic* views of property rights.
> (Bromley 1998)

The distinction between private law and public law is central to the legal system in many countries. The way in which we have made the distinction – namely, who is it who takes the case to court, the citizen or the state? – follows Tak (1991: 57ff.)[16] and it is fundamental to our argument. When people interact within a framework of private law, the land use that comes about has been determined by 'the market'. That land use can be influenced in addition by a state agency regulating those individual actions by the use of public law.

A PREFERENCE FOR PRIVATE LAW RULES OR FOR PUBLIC LAW RULES?

The distinction between on the one hand creating and structuring rights in land and setting up markets in them and, on the other hand, regulating the exercise of rights within that market is not just analytical. It can have a great political

significance also. This is because many people prefer that the state exercise its influence at a distance. It should set the rules of the game, and then let the players (i.e. you and me) get on with it, rather then getting involved (intervening) in how you and I play the game.

The analogy with a game is used explicitly by Brunner (1985). He talks about a football match, whereby the players are the private actors in the society, and the ruling body (e.g. FIFA) are those who make policy. There are two ways of making policy, he says:

- policy makers are limited to formulating, monitoring and enforcing the general rules;
- policy makers *not only* determine the general rules *but also* the detail of the play in a shifting pattern in accordance with the state of play.

The first way he calls institutionalist or constitutionalist, because the general rules are usually embedded in a set of institutions. The second way he calls open-ended action-oriented policy. And he rejects it. The game analogy is used by Lindblom (2001: 36) also. 'Imagine members of a soccer team trying to co-operate to win a game simply by following prescribed rules and authoritative instructions shouted from the sidelines.'

Some of the proponents of private law rules without additional public law rules argue also that those private law rules should be formed in a particular way. Pejovich (1997: 84), for example, makes a distinction between endogenous and exogenous changes. The first arise through the working of the common law, the second through 'government using political and police powers to change prevailing property rights by fiat'. It is clear from the choice of words which one Pejovich prefers. Hayek (1989) makes a similar point when he favours 'a spontaneous order produced by the market through people acting within the rules of the law of property, tort and contract'. And Webster and Lai (2003) favour 'spontaneous adaptation' of public and private rules and practices, as distinct from 'top-down' attempts to steer urban development. It is clear that those latter writers have a strong distrust of the state. Not only should it not try to regulate through public law the exercise of rights, also it should play a passive or secondary role in the creating and structuring of those rights, doing little more than legitimizing common laws and customs and enforcing them when necessary.

The game analogy is attractive because it focuses attention on the *effectiveness* of different sorts of rules. However, the statement that letting the market work through private law rules will be more effective, is based more on expectation than on systematic empirical investigation. Furthermore, the expectation of greater effectiveness in achieving goals is based also on the assumption that the

goals which society chooses are simple and few. In a football game, the aim is to win the match. What we require of land use is usually very much more complex and subtle. The pragmatism of the football match is nevertheless something which we retain in our comparison of private law rules with public law rules. We ask which set of rules can be expected to be most effective in realizing society's goals for land use, which set will use scarce resources most efficiently and which has (or can have) the desired distributional effects.

There are, of course, other ways of making the comparison, ways which are not pragmatic. The wish to allow people freedom of action is an argument for private law rules, as is the related wish that state agencies do not have so much power that they use it insolently.[17] But what if some people do not want to exercise the rights of holding property and trust state agencies to do that on their behalf? That is an argument that there be adequate and effective public law rules, even if the relevant state agencies use those rules only when requested to do so – default powers.

Conclusions

People will be reluctant to use land, improve it, put buildings upon it, farm it, unless the state through its law makers creates and structures rights in land. Voluntary interaction between individuals where so much is at stake takes place only if the outcome is predictable and reliable. So there is no choice: with or without rules by the state? Also, there is no choice: with or without the market? For it is inconceivable that the market could ever be totally replaced by (public law) planning.[18] The choice is rather: how should a desire of the public, expressed through a state agency to influence land-use decisions in a particular way, be realized, with what combination of private law rules and public law rules? And, as part of that question: what kind of private law rules and what kind of public law rules?[19]

Those are the questions that will be explored in the rest of this book.

Appendix

The various ways in which the land use in a particular location can be influenced by state agencies

It is useful to summarize one part of the discussion in Chapter 2 by presenting an overview of the various ways in which the land use in a particular location can be influenced by state agencies. Figure 2.1 illustrates this.

At the most basic level are the constitution and the civil code. These delineate rights in land and lay down the basic principles of how they may be enforced. Also, they create the possibilities for a state agency to impose restrictions on the exercise of those rights (e.g. by allowing the possibility of regulation and

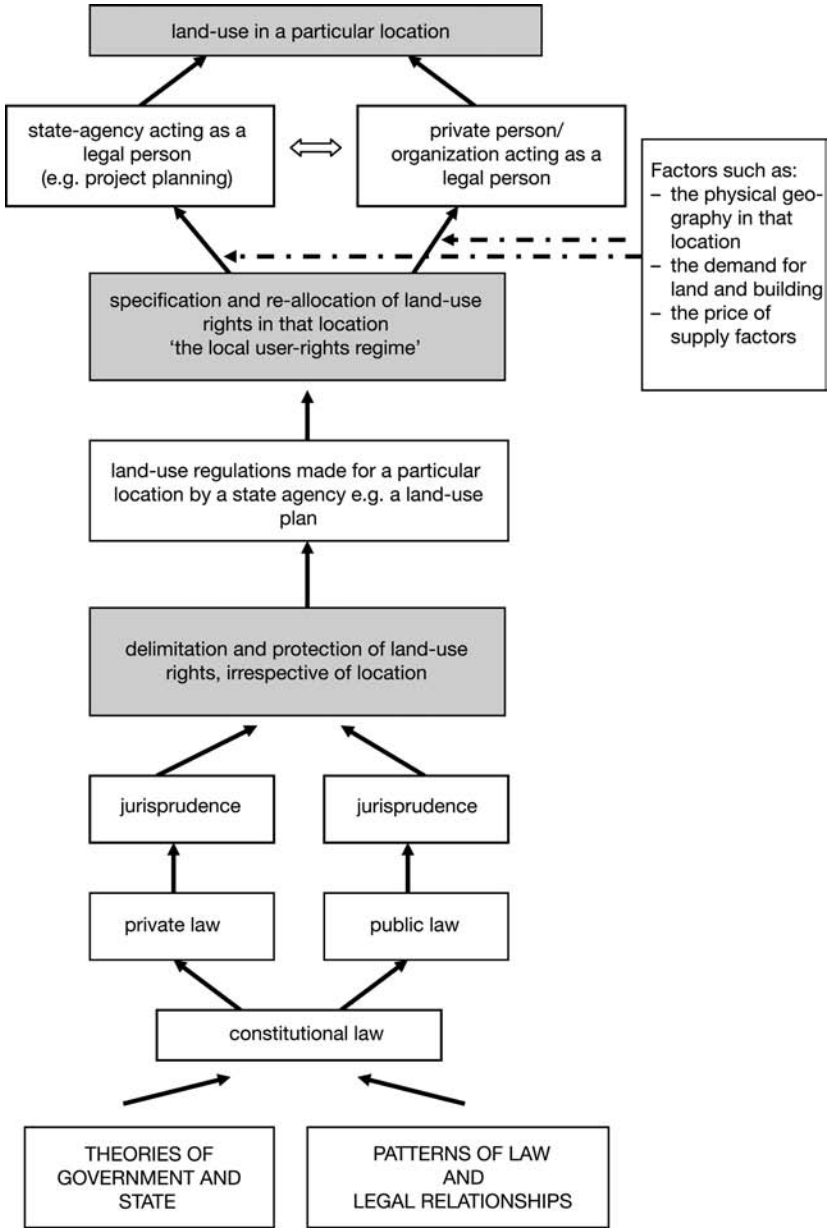

Figure 2.1 The various ways in which the land use in a particular location can be influenced by state agencies.

compulsory purchase). And they might be supplemented by common law and by case law. At this level also, there might be special rules about how a state agency as a legal person may itself exercise rights over its own land (e.g. is the body free to buy and sell land?). At the next level comes sectoral legislation about how a state agency may impose, using public law, restrictions on the exercise of rights. Here are found the law on statutory land-use planning, and the laws determining the locationally generic regulations and ordinances (for example the building and the environmental ordinances). At this level can be placed also the private law rules governing rights in land, such as landlord-tenant legislation. At the next level are the rules made by a local government administration which apply only within that jurisdiction, perhaps only with a specified plan area or for a specified project.[20] It is important to emphasize that all those rules are embedded in the basic institutions of the 'theories of government and state' and the 'patterns of law and legal relationships' in the particular country, which have in turn been shaped by the history of that country.

CHAPTER 3

THE LEGAL LANGUAGE: RIGHTS IN LAND[1]

> 'Who has any right but what the law gives them? If the law gave me the best estate in the country, I should never trouble myself much who has the right.'
>
> (The attorney's clerk, in *The History of Tom Jones, A Foundling*, by Henry Fielding, first published 1749, book 12, ch. 7)

> The Forsyte age and way of life, when a man owned his soul, his investments and his woman, without check or question.
>
> (John Galsworthy, *To Let*, 1921, ch. 11)

Rights in land

We have talked so far of rights in general and of rights in land in particular. For further discussion we need to clarify what we mean by these.

First, it is useful to make clear that we are not talking about personal rights, such as the right to education, or to free speech, or to vote, or not to be murdered. A property right is the *right to use some thing* in a particular way. There is an overlap, such as in the discussion: I have a personal right to vote, this attaches to myself, may I not transfer it to another?[2] The overlap is, however, marginal and we restrict ourselves to property rights, to rights over a thing.

The 'thing' can be a book, a piece of land, a house on the land, an idea, a musical composition. In this book, the 'thing' is landed property, that is a piece of land and 'things' connected to that land, such as woodland, a building, minerals. In some countries, the law regulating rights in land is derived from the law regulating rights in things in general: there is a general law of property, of which land law is a part. In other countries – including England and America – there is a separate law of landed property.

> There is a general law of property in some countries of Continental Europe (Newman and Thornley 1996), and in the Netherlands also, although in that country rights in a material thing – moveable or immoveable, are regulated separately from rights in an immaterial thing – intellectual rights. It is interesting to note that the French, when distancing themselves from feudalism, created a law for property rights which included both moveable and immoveable things. Land is regarded as just one type of thing in which people can hold rights. The newly independent Americans around the same period continued to treat land separately from other types of property. Nevertheless,

in that country the constitutional rules about protecting property rights apply to rights in all things, not just in land.

A right – we emphasized in Chapter 1 – is a social creation, or 'a socially recognized right of action' (Alchian and Demsetz 1973; and see Munzer 1990: 16).

So William Cowper (1731–1800) was mistaken when he let Robinson Crusoe say: 'I am monarch of all I survey/My right there is none to dispute'. For if there is no one else on an isolated island, the idea of rights is irrelevant. That emphasizes the fact that a right regulates the relationship between people and or organizations – more generally, between legal persons.

It is helpful to discuss this further using the ideas of Hohfeld (1913; 1917; quoted by Bromley 1991 and by Munzer 1990. And see further Bromley 2004). Hohfeld points out that whenever there is a person enjoying a right, there is another person with an associated duty. If I have the right to occupy a building in a certain way, all other people have the duty to permit me to do that. That relationship of right/duty needs to be regulated, otherwise the right will cease to have any significance. The relationship can have the form of an unwritten agreement.[3] More often, and certainly in modern societies, the relationship is written down and protected by the force of law. The function of that latter is to allow the owner of the right to oblige all others to carry out their duty and let him enjoy the right.[4]

Let us make this more concrete. Under Dutch law (Civil Code, book 5, article 42) it is forbidden to plant a tree within 2 metres of the boundary of the land without permission of the neighbour. The owner of the land on the other side of the boundary has, therefore, the right not to have a tree within 2 metres of her boundary. If I plant that tree without her permission, I have not fulfilled my duty to my neighbour. She might not be troubled by my tree, in which case she will not insist that I carry out my duty to her. But if she is troubled by it, she can ask me to remove it, and if I refuse to do so, then she may take me to court to oblige me to remove it. Take another example. There is a public right of way across a farmer's field somewhere in England. I and everybody else have the right to use that path, and the farmer – as owner or lessee of the field – has the duty to permit that.

The duty might affect different persons in different ways. Suppose, for example, that I rent space in an office building. Other possible users of that space have the duty to keep out, and the landlord has the duty in addition to let me in, provided I abide by the terms of the lease. Very often, the duty can be expressed in terms of inclusion and exclusion. The right includes some people (those who may enjoy it) and excludes all the rest (those who may not enjoy it). This does not apply to open-access rights (see later) nor in cases such as that described above of the right not to have a tree within 2 metres

of the boundary of our land. The exclusionary aspect of many rights in land is important for land-use planning. For example, the municipality may approve a land-use plan which shows a particular use on a particular plot of land. If the owner does not want to realize that use, he can exclude others from realizing it too. Then the only way in which the state can make the use come about is by taking away the ownership (expropriating).

It follows that a property right is a relationship between people – the person holding the right and all others – not a relationship between the holder of the right and the land.

The example of the tree serves one other purpose, namely to emphasize that rights are not 'natural' but are socially created.[5] In a country where there are no rules about planting trees near the boundary of the plot, the neighbour has no right to have no tree near her land. Or, as Bromley (1998) said: 'It is the fact that something is protected that makes it a right, rather than that something is protected because it is a right.' If there were no protection of the right, the right would not exist. It has been pointed out many times (see e.g. Barzel 1997: 17) that if there were no rights, valuable resources would go to those with the biggest machine gun, irrespective of who was prepared to pay the most. If the highest bidder acquired a plot of land, was evicted from it the next day by a gang of thugs, and no court of law recognized the right that had been bought, there would be no market in rights.[6]

The importance of rules about rights in land

Van den Bergh (1988: 19) describes how in feudal times a law-abiding citizen could be sitting peacefully in his garden, which is suddenly invaded by the local lord and his friends on horseback hunting foxes. The citizen has no redress in law, for the local lord has the right to do that. Later, the citizen shoots a wild pig which is rooting in his garden, only to find himself charged with theft, for the local lord has the right to that game also. It is no surprise that in the sixteenth and seventeenth centuries many people emigrated to the United States, in order to acquire land under conditions which gave them more certainty than the feudal land laws gave.

That history has led to the idea that property rights give, or should give, clarity, certainty and stability in the relationships between people with respect to a thing. Land is a 'thing': rights in land can give a person security. Not only security about how she might use that thing, but security also about realizing the value of that thing, for if the right is protected and if it may be traded, then it is also a source of wealth. Property rights can give security to others too, who do not own a particular plot of land but who might be affected by how the owner of that plot uses it.[7] The converse of someone having a property right is that other people are excluded from enjoying that right. In the case of rights in land, that

exclusion can mean poverty and hunger. Less extreme, it can mean poor housing or the inability to change land uses which are causing nuisance. When the rights are in landed property (land and buildings), the stability, coupled with the fact that buildings and other works on land can last a very long time, can mean that rights in land give continuity to the society. Our heritage is anchored in those rights, and what we decide today about those rights affects our children tomorrow, and our children's children. Those are some reasons why rights in land are very important, personally and socially. So there should be clear and enforceable rules about them.

In the past those agreements were very often made orally and passed by word of mouth from generation to generation. And although the rights were not written down, breach of them could be punished by force. Later, many of those rights were taken into common law, written down, and enforced when necessary by the courts. Much of English law on land rights is of this form. Other countries have chosen to codify their laws on land rights. One of the first to do this was France after the revolution in 1789: the enormity of the revolutionary change from the *ancien régime* to the Enlightened Society led to the decision to start afresh. The *Code Civil* was the result in 1804, and it was taken up by (or, during occupation in the Napoleonic period, imposed upon) many other European countries. Before France codified its property law, the settlers in the United States of America had thrown off the feudal law of the colonizing power, Great Britain. The American Constitution (1789) gave the separate states the task of passing much of their own law. These chose to retain common law as the main source of law. But what was to be the content of the land law in a new country with few court decisions to base common law on, and in a country moreover which did not want to adopt the feudal principles of a rejected Europe? As an answer to this, in the first few years of the nineteenth century many states passed statutes on – among other things – land law. And later, many states adopted a civil code (Zweigert and Kötz 1992: 246–251). Nazi Germany played with the idea of discarding its nineteenth-century civil code on property law, because it was based on bourgeois ideas of ownership rather than on national-socialist ideas (Van den Bergh 1988: 28). After the Second World War and under the surveillance of the occupying powers of the Allied Forces, the 'bourgeois' civil code was protected in the constitution so as to make it difficult for a dictatorial regime to take power again.

In whatever way the law on land rights has arisen, there is always provision for enforcing those rights by law. By that is meant that if Mrs A thinks that Mr B has breached her right, then there is a court set up by the state to which Mrs A can take her grievance, which will adjudicate, and which will, if Mr B is found in the wrong, punish him in ways legitimated by the state.

The discussion above illustrates the great attention that is paid to making rules about rights in land. The result is often very complicated, because the

society has decided that this is necessary in order to achieve what it wants. In this chapter we shall describe those rules in general terms and only in the detail that is necessary for the main argument of this book. The general description is valid for England, for the United States and for the Netherlands. It might be valid for other countries also.

The concept of property

There are particular difficulties with finding a concept of property which applies to countries with a Continental legal tradition and to countries with the Anglo-Saxon legal tradition. The Continental tradition (which includes both the Napoleonic and the Germanic legal systems) starts with the concept of the 'full ownership' of a thing. Ownership cannot be defined as a finite list of concrete rights over that thing, for ownership is of all possible rights, even those not yet thought of. The person with the right of full ownership might be entitled to split off certain rights, which are then exercised by others: those others do not *own* those rights but are merely *authorized* by the owner to exercise them. The Anglo-Saxon tradition is based on the feudal 'doctrine of estates': an estate is an interest in land which can be defined by and defended at law. Originally, the monarch was the ultimate, and only absolute, proprietor. No-one else owned land, but they could hold an interest in land. With this as the basis, ownership of the land arises when one person owns a certain minimum 'bundle of rights'. In the United States, this way of looking at rights in land has persisted, although the absolute proprietor is no longer the monarch but the owner 'in fee simple'.[8]

Jacobs (1998: 245–246) illustrates the American situation with:
A courthouse record shows that I am the owner of record of a parcel of land. What if, while owning the land, I sold the mineral right to a multinational mining corporation, sold the right to harvest old-growth timber to a paper company, donated the development right to a local land conservation organization and leased the access right for the fall hunting season to a local hunting club. I am the owner of record: I get the local property tax bill: yet who owns the land? I own the soil, maintain the fences, and pay the bills, while others own key rights some of which may be more valuable than the rights I have left in my portion of the property bundle.

In the Continental tradition there is no doubt who is the owner: all the others exercise their rights only with permission of the owner.

That difference has led to different ways of defining what is meant by property. In the Anglo-Saxon tradition, it is not the resource which is owned, but the rights in that resource: those rights are property.[9] This might sound very abstruse and far from the customary way we talk about property. 'This

land is my property', we say. On the other hand, we know that it is possible to take a lease on a building and to sell that lease. That lease is a right which can be owned: the lease is property even though it is intangible and the piece of paper on which it is written can be torn up. In the Continental legal tradition, it is the thing itself which is the property and which can be owned. If the owner of the thing splits off a right and authorizes someone else to exercise it, it might be possible for that person to trade that right: but that right is not property.

In spite of those fundamental differences, we think that it is possible to find concepts which can be applied to both legal traditions, certainly within the constraints of this book, which does not aim to be a legal text. The common concepts can be found by starting from the practice to be seen in many countries, namely that there can be very many different and non-competing ways of using the same thing, and that different people can have the right to exercise those different uses over the same land.[10] Then we make a distinction between:

- the right to use land in a particular way;
- the situation when one person has the right to use a piece of land in all possible ways (full ownership);
- the situation when one person has the right to use a piece of land in so many, and certain specific, ways that the person can be regarded as having ownership of the land (legal ownership).

The variety of property rights that can result from this will now be explored.

The right to use land in a particular way

We begin with this because we want to emphasize the enormous variety of rights which can be found in many societies (and which in part reflects the enormous variety in 'interests in land', although not all interests are regarded as rights). Discussions about property rights often limit themselves to one of the many possible rights, namely the right of ownership. This simplification then causes a simplification in discussions about the practical implications of property rights (Blomley 2004). The variety of property rights is great, so the implications for practice can be complex and subtle.

A particular way of using landed property – for example, using 500 square metres in an office building – is a right only if the law maker recognizes it as such. It follows that a full list of all possible property rights in land in a particular country at a particular time can be drawn up by studying which uses the law recognizes and will protect.

Making that list is comparatively easy in countries with a civil code where rights are created by statute law. In the Netherlands, for example, there is a limitative list of material – 'legal' – rights in land, stated in Book 5 of the Dutch

Civil Code. Personal – 'equitable' – rights in land are regulated by separate statutes, such as the right to hire a building, or to lease agricultural land. Occasionally, one of those rights is changed by an Act of Parliament, such as when the rights of a tenant are protected differently. It can happen that a practice arises which the law courts recognize (jurisprudence), whereby a new right is created.[11] The result is a clear system of rights in land.

Making a list of the rights in land in a country with a common law tradition is more difficult. The reason is that parties can make an agreement – such as that person X may shoot pheasant for two months of the year on moorland leased by person Y from person Z – and if the law courts are prepared to enforce that agreement, it becomes a right which others too can use. This leads to a situation in which the owner of one right creates an inferior right, the owner of that right can then create a subsidiary right in that, etc.[12] The result is an exceedingly complicated variety of rights which has grown over the centuries.[13] The situation at any one time can be written down, but it can change the next day.

Later in this chapter we make a classification of the various rights in land.

Full ownership of land

Not only do we find in many countries the situation where different people may use the same piece of land in different and non-competing ways, we find also 'in all mature systems of law' (Honoré 1961) the concept of full ownership, being 'the greatest possible interest in a thing' (Honoré 1961). He continues:

> There is a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China, or any other modern country one may care to mention. Everywhere the 'owner' can in the simplest uncomplicated case, in which no other person has an interest in the thing, use it, stop others using it, lend it, sell it, or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or to knock over his vase.

That is not to say, he adds, that all countries permit private ownership to the same extent. The Soviet Union, for example, permitted it less than many other countries. But, Honoré points out, the Russian Civil Code includes the statement (article 93): 'within the limits laid down by the law, the owner has the right to possess, to use and to dispose of his property': the Soviet Union, when permitting private ownership, conceived of it in ways similar to other modern countries.

The situation when all the possible rights over a thing are owned by one (legal) person is described by the Roman Law concept of 'dominium'. The Napoleonic Code took up this concept and then introduced into the many countries which Napoleon occupied. Dominium means being able to use something, enjoy it and dispose of it 'de la manière la plus absolue' (Code Civil de

Napoleon, 1804, art. 544) and it applies to any thing, not only land.[14] It is not recognized legally in countries in the Anglo-Saxon tradition, but it can still be used there didactically. Ellickson (1993: 1362) says, for example, 'Because land entitlements are highly variegated, it is essential to start with concepts whose simplicity strikes the imagination', and he starts with a 'pristine package of private entitlement in land'. Blackstone (*Commentaries on the Laws of England*, 1766, book III, ch.1), who influenced greatly American thinking about property rights, uses the concept of dominium: 'The right of property is that sole and despotic dominium 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.' And Denman and Prodano (1972: 30ff.), attempting to construct a universal theory of rights in land, start from the idea of absolute power over a piece of land.

It would be convenient if we could, as the next step, make a comprehensive list of what 'dominium' could possibly include: that could be used to give an overview of the variety of rights in land. That idea was explicitly rejected by the German legal dogmatists (the Pandectists) in the nineteenth century: ownership is absolute, they said, so even a right which is not included in the list belongs to the owner (Van den Bergh 1988: 67). And whether the attempt is rejected in principle or not, no agreed comprehensive list of rights has been produced deductively.

Some writers, however, have analysed the concept of full ownership empirically, by studying property rights in many different countries and listing the rights which may be exercised by the person considered to be the full owner. This was done by Kruse in 1939 after studying the civil codes, other juridical codes and the common law in a variety of countries. He concluded that the right of full ownership was found in 'a definite set of powers which constantly occur in all normally developed laws of property' and that this set constitutes 'the normal conception of the right of property' (Kruse 1939: 107ff.).

The set of powers identified by Kruse (1939) is:

(a) the power to use the good
(b) the power to 'alienate, pledge or otherwise by declaration or will to dispose of the good, to contract rights in it'
(c) the power to use the good, together with the owner's other goods, as the basis of credit
(d) the power of hereditary succession
(e) the power to protect the right to the property.

Power (b) can be used to create new rights in the good, and the full set of powers then applies to that new right also (unless limitations are specified, such as on the transfer of that new right). And so on.

Honoré (1961) identified no fewer than eleven 'incidents of ownership' which together constitute 'full ownership'.

The incidents of ownership identified by Honoré (1961) are:

(a) the right to possess: that is, exclusive physical control of the thing owned. If a thing cannot be possessed physically (e.g. a river), possession can be understood as the right to exclude others from the use or other benefits from the thing;
(b) the right to use: that is, for personal enjoyment and use (as distinct from rights (c) and (d) below);
(c) the right to manage: that is, to decide how and by whom a thing shall be used;
(d) the right to the income: that is, to the benefits derived from foregoing personal use of a thing and allowing others to use it;
(e) the right to the capital: that is, the power to alienate the thing and to consume, waste, or modify or destroy it;
(f) the right to security: that is, immunity from expropriation;
(g) the power of transmissibility: that is, the power to devise or bequeath the thing indefinitely (i.e. from generation to generation);
(h) the absence of term: that is, the indeterminate length of one's ownership rights;
(i) the prohibition of harmful use: that is, one's duty to forbear from using the thing in certain ways harmful to others;
(j) the liability to execution: that is, liability to have the thing taken away for repayment of a debt;
(k) the residuary character: that is, the existence of rules governing the reversion of lapsed ownership rights.

There is much overlapping between the two classifications, the advantage of Honoré's being that it is more precise. Two things should be noticed in Honoré's list. First, that it includes not only rights but powers and obligations also: for Honoré, ownership is more than a 'bundle of rights'. The second is related to this. Honoré talks not about absolute ownership, but of full ownership. Ownership, he points out, is never absolute, for it always includes obligations (the right to own the umbrella does not give the right to poke someone in the ribs with it).

This restriction is included in the civil codes quoted above. For example, the Dutch Civil Code, after defining ownership as 'the most comprehensive right that a person can have over an object', goes on to say: 'The owner (of the thing) is free to use the thing, excluding all other persons, as long as this is not in conflict with the rights of others, and taking into account restrictions

based on legal rules and unwritten law.' (Book 5, article 1, part 2). The German Constitution (article 14, 2) says: 'Ownership places obligations: its use must also serve the public interest.' And the German Civil Code qualifies the rights of the owner with 'as long as the law or the rights of others do not prevent' the exercise of those rights.

In the common law tradition this combination of rights makes up what Denman (1978: 28) calls the 'aggregate which is ownership'. In English law (and applied to land) this is called fee simple, or a freehold interest in land (fee simple absolute in possession – Sparkes 1999: 44) although this is never absolute, for in England all land is owned ultimately by the Crown. In American law the term is the same – fee simple absolute. In the Napoleonic and Germanic tradition, this is full ownership.

Legal ownership of land

In the Anglo-Saxon tradition, one owns one or more rights in a piece of land, not the land itself. Nevertheless, it can be necessary to be able to identify someone who is the 'owner of the land'. What 'bundle of rights' is it necessary to own to be regarded as the owner? In the Continental tradition, the owner of the land can split off and transfer to others rights over that land. How many rights can the owner let others exercise before she effectively ceases to be the owner?

This is a question which exercises Honoré (1961: 125) 'Each of the standard incidents of ownership can apply to the holder of a lesser interest in property. … Yet the owner of a lesser interest does not own the thing'. Is it necessary, in order to be regarded as the owner of the thing, to own one or more specific rights? Becker (1977: 20) takes Honoré's list of incidents as the starting point and says that the right to capital (the power to alienate the thing and to consume, waste, modify or destroy it) is fundamental to ownership: without this, there can be no question of ownership. In Roman law, ownership in its complete form includes:

- the right to use (usus)
- the right to the fruits (fructus)
- the right to disposal (abusus)

and that law says that the owner can part with the first two rights and remain owner, provided control over the right of disposal is retained (Carey Miller 2002). A complementary requirement for legal ownership of a thing is that the right is for an indefinite period. For example, fee simple refers to ownership which continues until the owner has no heirs to take it over.

That, however, is it too imprecise for legal practice. And that practice needs an answer. For it can happen that a state agency places restrictions on the

exercise of property rights which are so great that the owner says: 'I am not able to be regarded as the owner any more. In effect, the state agency has expropriated my property. Therefore compensation is due.' Practice needs an answer, and gives it in the form of jurisprudence. We return to this point later in this chapter.

A CLASSIFICATION OF PROPERTY RIGHTS

We have seen that there is potentially an enormous variety of possible property rights in land. All that we do here is identify the main dimensions by which property rights can be classified.

If a way of using land is to be a right, it must be recognized by the law. There are various possible uses which the law does not recognize. We are not thinking of the ways of using land which would be criminal (such as harbouring terrorists) or morally unacceptable (such as being prepared to sell the land to a white person but not to a black person). There are possible uses which the law will not recognize because they would cause economic inefficiency or legal uncertainty. An example is that 'excessive decomposition' – splitting off very many derivative rights – is not recognized. There are other possible uses which the state reserves for itself (a private person is not allowed to exercise them, such as building a nuclear power station) and which the state says may not be owned by anyone (that use must be in 'the public domain', such as the right to sail on a lake). We return to these points in Chapters 5 and 6.

The rights which the state does recognize can be classified according to the following dimensions (and see Stake 2000):

- the right to use a piece of land in a particular way, where that use can co-exist with other uses of the same land. A fishing right is an example of this, as is a right of way;
- the right to use part of a piece of land (or landed property), where others are excluded from that part. The part can be separated from the rest horizontally (e.g. a field on a farm) or vertically (e.g. mining rights, air rights);
- the right to use all of the piece of land, where other uses are excluded and where the duration of the use is specified. If the duration is limited, it is specified to whom the right (the future interest) will revert at the end of the term. An example is a leasehold interest. The duration can be 'in perpetuity', in which case there is no future interest.

A right in land can include a combination of the above three dimensions.

Another dimension is the entitlement to split off a part of the right and to transfer it to someone else.[15] An example is the right of a tenant to sub-let part of the premises. And yet another dimension is the entitlement to transfer the right to someone else (to alienate the right). The present holder of the right may not

be entitled to do that, may be entitled to do it unconditionally, or only under conditions. An example of the latter is where the owner of a landed estate is not permitted to specify in his will that the estate be split among the heirs. The present holder of the right may be entitled, when transferring it to someone else, to place conditions on how that new holder may exercise the right (as with a restrictive covenant).

Finally, it can be specified that the holder of a right in land is entitled to the exercise of that right without hindrance from the activities of others on other pieces of land.

How the law creates and enforces those rights differs between countries. The entitlement to exercise the right without hindrance from activities on other pieces of land can, for example, be regulated by property law or by nuisance law. Tenancies, for example, can be regulated by land law or by contract law.[16]

One final point in this section on the variety of property rights: is there anything inherently different between rights in land and rights in other resources? The discussion above of the essence of property rights, as distinct from the illustrations which have been from landed property, applies to all types of property. Nevertheless, land has some peculiarities which demand separate attention.

Rights in landed property are the rights to use a piece of land, including the things attached to that land, on, under or over it. The things attached to it include building works, also crops grown on it. The extent to which the right to use air space above the land belongs to that land is a question determined by law.[17] The same applies to the right to use things under the land: this no longer extends in all cases 'ad infernos' – to the centre of the earth.[18] The right to use a moveable thing (e.g. a photocopying machine, or a gun) on a piece of land is regulated by the rights belonging to that moveable thing, not by the rights belonging to that land, because the moveable thing is not 'attached' to the land.[19]

Varieties of property regime

In principle, any legal person can hold any property right.[20] Whatever the nature of the legal person holding the right, that is still 'private ownership' in the sense that the holder can go to court to protect his right. And yet it is customary to distinguish between three types of holder:

- private legal person (individual or organization);
- a community (such as a cooperative);
- the state (central government, local government, a public corporation).

This distinction is ancient, being made first by Justinian and it is still widely used (e.g. Denman 1978: 102). Why is it so widely made?

The answer is that it can be expected that each of the three types of holder will use the right in a different way:

- the private legal person will use it to pursue their own aims;
- the community will let it be used by its members;
- the state agency will appoint officials to manage the property on behalf of the public.

That is, however, not necessary. For example, a state agency might own an office block for its own administration: it will then exercise its rights over that block as if it were a private owner. For that reason it is better to speak not of different types of holders of property rights, but of different ways of holding – or managing – property rights. For this we follow Bromley (1991: 31) and talk of *property regimes*. This allows a much more refined discussion of property rights. In particular, it avoids the trap of thinking that there are, in practice, only two important sorts of rights – private ownership and state ownership. The oversimplification is what Blomley (2004: 7) calls 'the ownership model', and he illustrates that coarse ways of thinking can lead to coarse ways of using land.

Table 3.1 Four types of property regime

Property regime	Rights and duties
State property	Individuals have *duty* to observe use and access rules determined by the controlling or managing state agency. The agency has the right to determine the use and access rules.
Private property	Individual owners have the *right* to undertake socially acceptable uses, and have the *duty* to refrain from socially unacceptable uses. Others (non-owners) have the *duty* to refrain from preventing socially acceptable uses and have the *right* to expect that only socially acceptable uses will occur.
Common property	The management group (the owners) has the *right* to exclude non-members, and non-members have the *duty* to abide by the exclusion. Individual members of the management group (the co-owners) have both *rights* and *duties* with respect to use rates and maintenance of the thing owned.
Non-property	No defined group of users of owners and the benefit stream is available to anyone. Individuals have both *privilege* and *no rights* with respect to use rates and maintenance of the asset. The asset is an open-access resource.

Note

The concepts of privilege and no rights (a non-property regime) refer to the idea that someone has presumptive rights (see Chapters 1 and 5).

Bromley (1991) is very critical of the loose discussions about common property.[21] Since Hardin published his article 'The tragedy of the commons' (1968) it has become customary to say that common ownership of property leads to wasteful practices and environmental degradation. 'The Hardin metaphor is not only socially and culturally simplistic', says Bromley (1991: 22), 'it is historically false'. It is false because there are examples of common property being managed responsibly for centuries.[22] It is partial because there are examples of private ownership leading to wasteful practices and environmental degradation (such as abandoned land in old parts of some cities). It is simplistic because it confuses open access resources with resources in common ownership.

> This distinction is very nicely made in a public notice (it is displayed in the Minions Area Heritage Project) about the common land around Minion on Bodmin Moor. 'Commons around Minion are private with no formal right of access.'

And, I would add, the Hardin metaphor is ignorant because it ignores the distinction made in the seventeenth century by Pudendorf (1934 [1688]), who pointed out that things can be held in common both 'positively' (jointly owned, everyone having a well defined share) and 'negatively' (owned by no-one, but equally available to everyone). If a resource is owned by a collectivity and managed for its members, then its members have property rights and – crucially – property obligations. This is 'positive' common ownership. 'Negative' common ownership gives what we call nowadays open access to resources: then there are no property rights, only possession. Open access resources will tend to be over-exploited; there is no reason why commonly owned resources should. If they are, it is because of 'institutional failure': the courts are not used, or they refuse to act to punish breaches of the property rights (Bromley 1991: chs 6 and 7).

So Bromley (1991) adds a fourth type of (non-)ownership to the above three property regimes.[23] And he compares them using Hohfeld's scheme of rights and duties (see above) (Table 3.1).

It will be obvious that a state agency can manage its property not only under a state property regime but also under the private property and the non-property regimes (a public park is an example of the latter).[24] This shows another advantage of analysing in terms of property rights regimes rather than in terms of types of owner or holder.

Restrictions on the exercise of rights in land under private law

The discussion above of rights and of the duties that those involve enables us to deduce that the exercise of a right in land can be restricted in the following ways.[25]

(a) Suppose that Mr M is owner of a right X on land A. Remember the statement by Honoré above, that ownership is never absolute, for it always includes obligations. So M will not be allowed to exercise his right X if this would harm others in ways deemed unacceptable by the law maker. The law maker can order this in two ways. One is by *land law*: the owner Mrs N of another right (Y) on land B, who is being harmed by the exercise of right X can (if the right Y is protected in law) request the courts to restrict the exercise of right X. This is the way followed in the Netherlands.[26] The other way is by *nuisance law*: if Mrs N suffers nuisance as a result of the exercise of right X, she can seek redress from the court. This way is followed in England and the United States.

(b) Suppose that Mr M with right X can split off from this a right Z and has granted that to another person, Mrs P. Mr M has restricted what he may do with his right X

For example, the owner of a freehold interest in land can grant a building lease on it. During the period of the lease, the first owner may not enter onto the land without permission;

(c) Mr M has split off from his right X the right Z and has granted that to Mrs P. Mrs P has to exercise her rights within the limits agreed with Mr M.

For example, the owner of the building lease has to comply with the agreement reached, such as to maintain to a certain standard the building erected.[27]

Figure 3.1 illustrates this.

These restrictions are inherent in the nature of rights in land and they are regulated by law as a necessary condition for what is called 'the traffic between persons'.[28] Moreover, the state sets the rules not only for how people may traffic with each other, but also what they may traffic with each other. There are certain things which people are not allowed to include in a property right, even though all parties might be willing to agree to it. This is investigated further in Chapter 6.

Denman (1978: 55) reports from the annals of the Carray Estate in Cardiganshire that in 1860 the landlord sent to each of the tenants the ultimatum: 'attend our church services with your family and thus support its principles or otherwise (if your conscience will not allow you to comply with my request) you must quit the farm you hold from me'. Nowadays, such a clause in a landlord/tenant agreement would not be recognized in law. And McAuslan (1975: 302) reports that the Lands Tribunal may modify or discharge a restrictive covenant if, for example, it is racially restrictive.

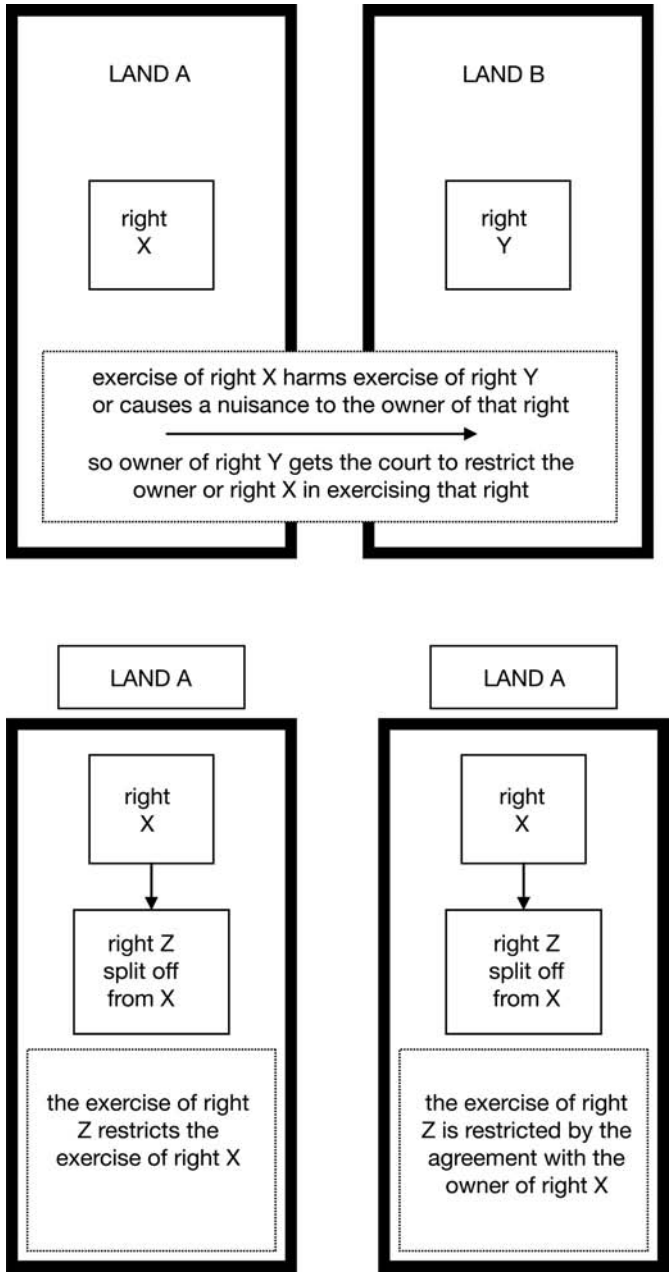

Figure 3.1 Restrictions on the exercise of rights in land under private law

Restrictions in the exercise of rights in land under public law

'The law', say Denman and Prodano (1972: 135), 'has a private and a public face'. The public face is seen when the law allows a state agency to impose one-sidedly restrictions on the exercise of user rights and to take away or attenuate a right. This gives two restrictions in addition to the three already listed, namely:

(d) the state may impose restrictions on the use.
For example, if you want to build on your land, you must follow the building regulations;
(e) the state may compulsorily take away the right or a part of that right.
For example, the state may expropriate the freehold interest of the land, or a part of that right such as the right to alienate it (under a pre-emption right), or the right to develop it.

Restriction (d) attenuates the exercise of a right by its owner, but does not take it away. It freezes, as it were, a part of the right. If the restriction is permanent, that amounts to destroying a part of the right. Restriction (e) takes it (or a part of it) away. The difference between a restriction which freezes the exercise of part of a right and a restriction which takes it away is that in the first case no-one may use that right, in the second case the right is transferred to someone else (usually a body of the state, which may exercise it or 'retire' it).

The legal basis for regulation

The restrictions imposed by public law have to be based on legal principles. What are the principles for restricting the exercise of a property right (restriction (d))? In countries which follow the tradition of Continental law (this includes the Netherlands) the legal principle is found in the idea (taken from Roman law) that the state has the power of imperium. In America, 'the social contract meant that private landowners remained subject to the great triad of government powers: taxation … eminent domain … police power' (McEvoy 1998: 96–97). It is police power which is used to restrict the exercise of rights in land through zoning and environmental laws, in the interests of health, safety, welfare and morals. 'typically, anything short of outright expropriation of an owner's title qualified as a reasonable exercise of the police power, no different from a food inspection law, say, or a speed limit' (McEvoy 1998: 103; and see Blaesser and Weinstein 1989; Burke 2002: ch. 1). In Britain, the legal basis has to be found elsewhere. When building regulations were introduced (and that began many hundreds of years ago) the basis was the prevention of fire and protecting public health. The private law regulations under nuisance might allow one person to take her neighbour to court for fire hazard or unhy-

gienic practices, but it is possible that many more persons are at danger than the immediate neighbours: hence the need for public laws on fire and building hygiene. When planning permissions were introduced, another basis had to be found. English law does not know the principle of imperium, so the basis was created by nationalizing development rights in 1947.[29]

The legal basis for taking

Clearly, the state has to be legally entitled to acquire compulsorily a right in land and that entitlement has to be justified, or justifiable, constitutionally. In the Netherlands that justification is – once again – to be found in the idea that the state has the power of imperium. In the United States, the power of eminent domain is similarly justified, as the term itself suggests. 'It is the power to acquire and take possession of property in order to promote the health, safety and welfare of the citizenry' (Burke 2002: 12). In England, the justification – as is usual there – is implicit rather than explicit, but the right of the state to acquire compulsorily is not in doubt and is regulated in both common law and statute law (Denyer-Green 2000).

In all three countries, the complications arise when the exercise of a right is regulated so strongly that the owner says: 'My exercise of this right is restricted so greatly by the state that I can no longer be regarded as the owner of the right. State, you have in effect taken away my ownership compulsorily.'[30] This is a very hot issue in the United States, for whereas a regulation under police powers does not need to be compensated, a 'taking' does, as established by the Fifth Amendment to the American Constitution. A taking (expropriation) is regarded as a much greater restriction on individual freedoms than a regulation. It is, therefore, usually much more strictly regulated in law. But it is not always easy to make sharp the distinction between regulation and taking. Paul (1987), in an article which is typical of many on this subject, talks of the 'eminent domain – police power muddle'. The muddle needs clarification, for if attenuation of a right by a regulation goes so far that it is no longer possible to use that right profitably, the regulation has become, in effect, a taking and the state must compensate the owner. In England, under the Town and Country Planning Act 1990, someone who considers that there is no 'reasonable beneficial use' to be made of his land because of planning restrictions, can serve a purchase notice upon the local authority requiring it to buy the property. And if the presence of a development plan reduces the value of a property considerably, even making it unsaleable, the owner can serve a blight notice on the local authority requiring it to buy the property at an 'unblighted' price. In the Netherlands, the issue has been resolved legally in two ways. First, article 49 of the Spatial Planning Act gives the owner of a right in land the right to claim compensation if a change in a land-use plan reduces the value of his right.[31] Second, the doctrine has arisen that public regulations

may not go so far that the legal owner of land has no more possibility of exercising his rights on that land (Van Zundert 1980: 125ff.).[32]

Conclusions

A right in landed property is the right to use that land in a particular way and under the protection of the law: the law gives you that right and imposes on others the duty to let you exercise it. However, such a right is never absolute. Even if you have full ownership of land (you own all the possible rights in it) you can still be restricted in your exercise of that right by the obligation not to do so in such a way that others are harmed. And if you split off and alienate rights, those restrictions increase. In addition, the state may impose restrictions on your exercise of those rights, and may even take them from you.

For those reasons, we end this chapter by emphasizing not what property rights enable you to do with your land, but by summarizing the restrictions on the exercise of property rights. The sum total of restrictions is the result of both private and public law: both restrict the 'dominium' of the absolute owner. This is formulated nicely in the Dutch Civil Code (Book 5, article 1, part 2) as follows: 'The owner (of the thing) is free to use the thing, excluding all other persons, as long as this is not in conflict with the rights of others, and taking into account restrictions based on legal rules and unwritten law.' Figure 3.2 illustrates how the exercise and transfer of rights can be restricted by both private law and public law.

The *transfer* of rights in landed property	**The *exercise* of rights in landed property**		
Voluntary agreements under civil law	Imposed by a state agency under public law		Imposed only if one of the private parties wishes to
Voluntary transfers	Imposed transfers	Restrictions under public law	Restrictions under civil law
e.g. sales; creating new rights	e.g. compulsory purchase; land re-allocation	e.g. planning and building restrictions; environmental permits	e.g. noise nuisance; maintaining boundaries

Figure 3.2 How the exercise and transfer of rights in land can be restricted by both private law and public law.

Appendix

The land system, the planning system, and the legal system

One of the benefits of cross-national studies is that they face us with differences in the land-use planning rules between various countries and challenge us to explain those differences (see e.g. Newman and Thornley 1996). Booth (1996) studied four countries (Germany, the Netherlands, the United States and Hong Kong) and concluded that they 'demonstrate very clearly an interlocking pattern of theories of government and state, patterns of law and legal relationships, and the question of land ownership and property rights' (ibid.: 87).

The assumption is that in one country both the system of rights in land (the land system) and land-use planning (the planning system) are, in any case in a mature society, rooted in the same legal system (what Booth calls the underlying principles of 'theories of government and state' and 'patterns of law and legal relationships').

Two things follow from this. One is that there are limits in a country to what may be achieved by using the public law rules of land-use planning, for those rules must remain within the country's constitutional roots.

> The use of project and pro-active planning (see Chapter 2) can often be understood as an attempt to realize land-use ambitions which are beyond the reach of the formal rules. In the Netherlands, for example, it is explicitly forbidden to grant a building permit conditional on a financial contribution: so Dutch municipalities try to acquire the development land in advance and in that way ensure a financial contribution. But, of course, that project planning also has to be consistent with the constitutional foundations of the country. The example just given, of a municipality acquiring building land, is possible in the Netherlands, for a municipality there is free to act as a private legal person: in Britain this might be regarded as an act of 'ultra vires'. And transferable development rights, for example, which are an important instrument of land-use planning in some states of America, are very difficult to achieve under Dutch law.

The other conclusion is that we can expect that within one country there will tend to be consistency in the rules governing rights in land. The result is what Denman (1978: 100–101) calls 'the land system', which is 'patterned on property rights, and property rights are but formal expressions of authority between persons and groups of persons'.[33] The various rights in land in a country will tend to be consistent with each other and to constitute a coherent whole.

Moreover, if countries can be grouped according to their legal system, then one might expect there to be the same grouping according to the land system, such as:

- legal system A, land system X: countries 1, 3, 5
- legal system B, land system Y: countries 2, 4, 6
- legal system C, land system Z: countries 7, 8, 9.

On the other hand, there are good reasons for expecting that countries cannot be grouped according to the characteristics of their land systems. One reason is that there can be different property rights regimes (see above) within one country: the legal and constitutional bases of a country allow more than one way of creating and regulating rights in land. A second reason is the possibility that all countries experience the same pressures when creating and regulating those rights, with the result that all countries have a similar land system.

This is supported explicitly by Denman (1978: 101), who says: 'the classification of property rights derived of the human relationships which lie behind the specificities of land tenure patterns and land systems take common forms which can be broadly classified'. Kruse (1939) implies the same when he says that the property rights he identifies (see earlier in this chapter) derive from certain basic needs in any society: his right (a) is the basis for production; right (b) the basis for distribution; right (c) the basis for credit. Van Zundert (1980: 18–19) points to functional reasons for creating property rights, reasons which are common to all societies. And Honoré (1961: 109) says: 'The standard incidents of ownership do not vary from system to system in (an) erratic, unpredictable way … but … have a tendency to remain constant from place to place and from age to age'. This is not to say, he adds (ibid.: 101) that all countries permit private ownership to the same extent (the occurrence of the different varieties of 'property rights regimes' might vary from country to country), but the ownerships which the countries do recognize have common features. And finally we mention the theory that property rights within a society evolve as technology changes, as population grows, and so on, in such a way as to make it possible to achieve higher economic efficiency under the new circumstances. Ellickson (1993: 1392) says 'Land regimes evolve in pragmatic fashion to exploit scale efficiencies and spread risks.' If this theory is true, then all countries which adapt to the same technological changes will tend to have the same land system.

Whether or not there are regular differences between the land systems in different countries is an empirical question, not to be answered by theorizing. What has in any case become clear is that the characteristics of the legal system influence, in some degree, the characteristics of the land system. We have discussed this in terms of 'legal traditions', distinguishing between the Anglo-Saxon and the Continental legal traditions. It is useful to introduce here the concept of legal families, which is more rigorous than the concept of legal traditions.

The study of comparative law compares private law in different countries. Zweigert and Kötz (1992) claim, with others before them, that countries can be classified according to the legal family into which their (private) law system falls. They claim further that the criteria for classification are to be found not in the *content* of the law but in the *style* of the legal system.

> The following factors seem to us to be those which are crucial for the style of a legal system or legal family:

- its historical background and development;
- its predominant and characteristic mode of thought in legal matters;
- especially distinctive institutions [as examples they give 'the amazing casuistry of tort law' in common law systems, the extent of strict liability in tort in Romanistic systems];
- the kind of legal sources it acknowledges and the way it handles them;
- its ideology.

(Zweigert and Kötz 1992: 69ff.)

Of the legal families they identify, the ones most important for this book are the Romanistic (which includes the Netherlands and France), the Germanic, and the Anglo-American.

CHAPTER 4
THE ECONOMIC LANGUAGE: MAKING A GOOD USE OF SCARCE RESOURCES

> 'Buying land – what good d'you suppose I can do buying land, building houses? – I couldn't get four per cent for my money!'
>
> 'What does that matter! You'd get fresh air.'
>
> 'Fresh air! What should I do with fresh air?'
>
> Engaged for fifty-four years … in arranging mortgages, preserving investments at a dead level of high and safe interest, conducting negotiations on the principle of securing the utmost possible out of other people compatible with the safety of his clients and himself, in calculations as to the exact pecuniary possibilities of all the relations of life, he had come at last to think purely in terms of money. Money was now his light, his medium for seeing, that without which he was really unable to see, really not cognizant of phenomena.
>
> (John Galsworthy, *The Man of Property*, 1906, ch. 3)

> Markets are highly articulated institutional arrangements to channel individual initiatives and avarice into putatively benign – but, if lucky, useful – directions.
>
> (Bromley 1991: 20)

A GOOD USE OF SCARCE RESOURCES

Economics is the study of how people use scarce resources in order to produce things which they want. These are goods, like cars and houses and food and clothes; and services, like mobility and music and a day in the country. Many of these things have to be produced, and for this resources are necessary, such as labour and expertise and raw materials and machines. Other things which we want are there already and do not have to be produced, such as land and a fine view, but they might still be scarce and irreplaceable. The land use in a particular location has been produced using scarce resources, and it provides goods and services which we want. Economics can study how that land use was produced, which goods and services it provides, and who enjoys those.

It is that things are scarce that gives rise to the study of economics, for then choices have to be made. Scarcity is a relative concept: it means that there is less

of something than we want. There is (at the moment) no scarcity of air to breathe, in some countries there is no scarcity of water to drink, in other countries no scarcity of building land. But often there is a scarcity of good housing, of playing fields, of road space, of attractive views. If the things which we want have to be produced and we want more of them, then the limit to those things is set by the resources available for producing them. Are we going to use labour and machines to produce more houses or to produce more roads? Are we going to use land in a particular location to produce more playing fields or more housing? And if the things we want are there already (like attractive views) but are threatened, do we preserve them if that would mean not having something else which we want: do we preserve the countryside which pleases us, or do we build offices and factories on it?

We – individuals, households, firms, other organizations – make these choices; and economists study how we do that. But economics can go further than that analysis, by asking: is the way in which scarce resources are used a good way? This branch of the study is called welfare economics. And if the answer is: scarce resources could be used better! then the question arises: how could that be done?

These are questions which concern what has been called 'the co-ordination of social life'. As Lindblom constantly reminds us, we need to 'think society, not economy' (2001: 19). The choices which we make individually about how to use the scarce resources available to us are made in the context of many other people making related decisions. If we decide to spend our money on a new house, then it is necessary that a developer decides to build that house, and for that it is necessary that others decide to offer their labour to the builder. Those individual decisions have to be coordinated in some way. It is customary to distinguish between three 'co-ordinating mechanisms' (Frances *et al.* 1991; Woltjer 2002). The distinction which we use is between prices, imposed rules, and mutual trust.[1] Coordination can be achieved through people reacting to prices, reacting to rules which they have to follow, and trusting each other. In all cases, coordination takes place within rules made and enforced by the state. In the case of prices, coordination takes place within the rules of civil, or private, law: in the case of imposed rules, these are rules of administrative, or public law;[2] in the case of mutual trust there is private law to ensure that agreements entered into on the basis of trust are carried out.

So society is faced with a decision: what kind of rules do we want the state to make as a framework for the individual choices about the use of scarce resources? You will see that this is a re-phrasing of the question already asked in Chapter 2: how should land use be influenced? Should this be by private law rules or by public law rules? In the language of welfare economics, the question takes on the form: what should the land-use rules be for a *good use* of scarce resources?

Welfare economics, in seeking an answer to this, has produced the idea of *allocative efficiency*. This expresses the relationship between the input (allocation) of scarce resources and the output of desired goods and services. The application

of this idea to land-use planning is considered in more detail later in this chapter. For the moment it is sufficient to say that, in the search for the conditions under which resources will be used more, or most, efficiently, most theories of welfare economics start from price as the coordinating mechanism working within the structure of a market. This is not a bad starting point, for it is inconceivable that there could be production of goods and services (including the production of the land use) without any contribution from markets (Lindblom 2001). And it is a starting point with a long history, being first formalized by Adam Smith in his *Wealth of Nations* (1776).

> Give me that which I want, and you shall have this which you want … and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.
>
> (Book I, ch. II)

The market provides an 'invisible hand' which coordinates individual actions so that together they produce a certain use (which might not be the best use) of scarce resources.

Others have worked out those ideas in great detail. The neo-classical economists studied markets and how they might work under various conditions. Pareto provided a formal specification of what could be meant by 'the optimal allocative efficiency' (what has come to be called the 'Pareto optimum', formulated in his *Manual of Political Economy*, first published in 1906). And the doctrine was developed that the market, working under certain conditions, would *on its own* achieve the Pareto optimum. If this doctrine is correct, then it has great consequences for land-use planning. Namely, if the goal of land-use planning is the best use of scarce resources, then it should be scrapped!

The goal of the best use of scarce resources

The idea that there is one way of allocating scarce productive resources so that the production of goods and services is then the best possible – this is called 'the welfare optimum' – has been very influential in public policy, including land-use planning. What is curious about this, is that it is not possible to observe, let alone measure, the amount of welfare in a society. It is therefore impossible to say, conclusively, whether or not the welfare optimum has been reached. Public policy based on this idea is, therefore, based on a theorem. This is, that a market working under certain conditions will *necessarily* result in the best use of scarce resources. It follows, if you believe this theorem, that public policy measures to

create the stipulated 'certain conditions' will increase welfare. That increase cannot be measured: it is assumed to be realized.

What are the appropriate public policy measures? The classical treatment is by Pigou, in his *Economics of Welfare*.[3] His argument was that, if the conditions were not those required for optimal allocative efficiency – there were 'market failures' – then it was the task of the state to correct for those market failures in such a way that the allocative efficiency would be better than the market itself would achieve under the 'imperfect conditions'.[4] The corrections could have the form of taxes, or subsidies, or restraints, or state production, or state coordination.

> Pigou himself applied this to land-use planning.
> It is as idle to expect a well-planned town to result from the independent activities of isolated speculators as it would be to expect a satisfactory picture to result if each separate square inch were painted by an independent artist. No 'invisible hand' can be relied on to produce a good arrangement of the whole from a combination of separate treatments of the parts. It is, therefore, necessary that an authority of wider reach should intervene and should tackle the collective problems of beauty, of air and of light, as those other collective problems of gas and water have been tackled. Hence, shortly before the war, there came into being, on the pattern of long previous German practice, Mr. Burns's extremely important town planning Act. In this Act, for the first time, control over individual buildings, from the standpoint, not of individual structure, but of the structure of the town as a whole, was definitely conferred upon those town councils that are willing to accept the powers offered to them. (Pigou 1932: 195)

Since then, many others have worked out further the practical implications of Pigou's ideas (e.g. Ogus 1994: ch. 3), including their implications for land-use planning (e.g. Harrison 1977; Heikkila 2000). It is customary to point out the following conditions which give rise to market failures. As the examples will show, they are often present when private decisions are made about land-use development.

One type of market failure is called an external effect. By this is meant that decisions are made and agreements entered into which have consequences which affect others than those who make the decisions and agreements. The factory chimney which emits polluting smoke is one of the classical examples of this. The Pigovian correction is that the state should tax the factory, or prohibit the emission of dirty smoke.

Another type of market failure arises when there are monopolies. If there is a monopoly, then suppliers do not compete against each other. In the case of land use, some plots of land have a location which is both unique (or very scarce) and desired: the owner has then a monopoly over the services which that plot

can render. An example is the land required to complete a road link, or to round off a new shopping centre. The Pigovian correction is that the state should purchase the plot compulsorily.

There can also be imperfect information. Suppose, for example, that a developer is considering building houses in a particular town. He does not know for certain how many of those houses he will be able to sell nor at what price. Another developer, faced with the same uncertainty, might make a different decision. It is unlikely that both decisions would give the best allocation of resources. The Pigovian correction is that the state should provide overviews and forecasts, and so provide a more certain framework for investment decisions.

Public goods also can lead to market failure. A public good is something which is produced, which is valued, but which the producer cannot easily sell, because she cannot easily or commercially exclude non-payers from consuming the good or service.[5] A town park is a good example. The services of the park can be sold by putting a fence around it and charging for admission. Those who do not want to pay will not enter. But if they did enter, and if the park did not thereby become overcrowded, they could enjoy the park without putting the provider to any extra expense and without reducing the enjoyment of those who had paid. So total enjoyment would increase without any extra costs. But the provider does not benefit from that. The Pigovian correction is that the state should provide public goods, or subsidize the private provision.

Finally, coordination can fail. Suppose there is a street of run-down houses. One person (Mrs X) considers improving her house, which would cost M. If others do not improve their houses, the value of Mrs X's house will increase by less than M, for the other houses in the street remain unattractive. If all others do improve their house, at the cost of M, the value of each separate house will increase by more than M, for the whole street has become more attractive. But how can Mrs X get all those other people to do what is in their individual interest, but which works out only if everyone agrees to take part? The Pigovian correction is that the state takes on the role of neutral and trustworthy coordinator.

Pigou's ideas were widely accepted, perhaps because they offered a justification for the deep unease felt by many people when confronted with the results of the workings of an unbridled market. The dominant political philosophy at the time was free market, which was supposed to lead to maximum welfare for the society. Yet no-one with their eyes open could fail to doubt this. And particularly not when walking round towns and cities. One did not need the objectivity of the many government reports into living conditions there[6] to be able to conclude, 'This cannot be the maximum welfare that is possible at this moment.'

Pigou's ideas have since been developed, modified, and in some respects rejected. The critics use arguments from a mixture of economics, law and philosophy. The subject matter is exceedingly important for land-use planning. For if the Pigovian analysis is correct, land-use planning can be employed to

improve economic efficiency by correcting for market failures. If there are no market failures, there is no economic justification for land-use planning (which does not mean that there are no other reasons for planning land use). If there are market failures, then the nature of the failures in a particular situation determines the content of the land-use planning which will improve economic efficiency in that situation. If there are, for example, external effects, then measures should be taken which correct for these. For decades, the economic justification for land-use planning, and thereby for the content of many land-use plans, has been determined by the Pigovian analysis. Is it correct? Below we set out a number of shortcomings in the analysis which others have pointed out, although we do not agree with those critics in all respects. Then we put forward the analysis which we prefer.

External effects

The first serious alternative to Pigou's analysis and to the policy which flows from it came from Coase. In 1960 he wrote 'The problem of social cost', which he supplemented in 1974 with the sparkling essay 'The lighthouse in economics' and in 1988 with 'Notes on the problem of social cost'.[7] Coase was concerned with the 'actions of business firms which have harmful effects on others' (1960: 95). These are externalities which Coase calls 'social costs'. But this is a misleading term because, as Bromley (1991: 19) points out, most externalities are *personal* costs. 'What is at issue … is the private interests of one party … as against the private interests of another'. It is an issue not of one person/firm against society, but against another person/firm.

Coase argues, quite correctly, that if one person/firm (A) is prevented from taking an action which imposes costs on another person/firm (B), the sum of the welfare of (A + B) might be less than if A was allowed to take that action. The proverbial dog in the manger is a good example: the horse (A) should not be prevented from removing the dog (B) from the manger in order to be able to eat from it. For the gain to A from the action might be more than the cost to B. Coase shows that this reasoning is followed by the courts too, when ruling on a private action taken against nuisance. The judge will sometimes allow the defendant to continue to cause a nuisance to the plaintiff, if the gain to the defendant is great and the nuisance cannot reasonably be remedied.[8] 'Nothing could be more anti-social than to oppose any action which causes any harm to anyone', says Coase (1960: 144).

From this, Coase distils the statement which has become famous:

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is, How should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A. The real question that has to be

> decided is, Should A be allowed to harm B or should B be allowed to harm A?
>
> (Coase 1960: 96)

Many people involved in land-use planning will have difficulties with this statement, for much of that planning is concerned with trying to prevent externalities occurring. Party A (a fish-and-chip shop) wants to locate next to party B (residents in a quiet street); that would harm B; so planning permission is refused. Is Coase recommending something else? Yes! 'It is all a question of weighing up the gains that would accrue from eliminating these harmful effects against the gains that accrue from allowing them to continue' (1960: 131). So perhaps the fish-and-chip shop should be allowed to trade in that street, and if the residents do not like it, they can always move.[9]

Coase himself conducts his economic argument in terms of rights. 'If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect … is also a factor of production' (1960: 155). Clearly, property rights can have a financial value and – equally clearly – there is nothing new in the fact that they can be bought and sold. But we think of rights as giving security too. If we are living in a quiet street and a fish-and-chip shop wants to locate next door, we think we have the right to continue to live there undisturbed by smell and eaters on the street. We expect the courts to 'protect our rights'. And we accept a reduction of those rights only if imposed by a state agency (compulsory purchase, or changing a land-use plan). We do not expect to be told: 'If you don't like the fish-and-chip shop, you can move elsewhere, because that would maximize welfare.'

The examples he gives make this crystal clear. He takes the contamination of a stream and says,

> If we assume that the harmful effect of the pollution is that it kills the fish, the question to be decided is, Is the value of the fish lost greater or less than the value of the product which the contamination of the stream makes possible?
>
> (1960: 96)

Note the assumption that the effects can be measured in money and in that way one bookkeeping can be made of all the effects. If fish are killed by contamination, this is a money cost, rather than environmental damage of which one should be ashamed. Another of his examples is the familiar one of the factory chimney emitting smoke which harms nearby residents and firms. Land-use plan-

ning would try, customarily, to tackle that by not allowing the factory to locate there. Environmental policy would require the factory to reduce the emissions. Coase, on the other hand, says, 'Suppose that those who suffer the damage could avoid it by moving to other locations or by taking various precautions' (1960: 151). And he says that, if a tax is to be levied on the factory as an incentive to install a smoke-prevention device, then a tax should be levied on the residents also 'to deter people and businesses from locating near the factory and adding to its costs, when it would be less costly if they located somewhere else' (1988a: 185).

Transaction costs

Coase pointed out the importance of transaction costs as early as 1937.[10] If I buy a good for the price X, the total cost to me is usually more than X. And the producer who sells me that good for X has to incur costs considerably more than the direct production costs. The difference in both cases lies in the costs of making the transaction. These are usually divided into: search (or information) costs; bargaining costs; and enforcement costs (Cooter and Ulen 2004: 92).

With respect to the activity of physical development we can identify many transaction costs and fit them into the above classification.[11] If we consider buying a building, we make forecasts of what might happen that might affect the value of that building: these are search costs. If we buy the building privately, there might be a lot of bargaining. If we want to change the use of land, we might first have to acquire planning permission. This costs us time and money, and also some state agency has to pay the costs of making a land-use plan, of testing and issuing the planning application, etc. All these are examples of bargaining costs. If we have bought a building under certain conditions, someone will have the costs of checking that those conditions are being met. If a planning permission has been granted, the state agency will have to monitor that this is being obeyed. These are enforcement costs.

In his 1960s analysis of social costs, Coase argued that many transactions do not take place, although the outcome would have been advantageous to all the parties, because the costs to the parties of making the transaction would have been greater than the gain to them. We can illustrate this with an example from urban development. There is a block with mixed uses in a city centre. The capital value of that is M. If that block were redeveloped the value would be M + N. The gain (N) could be divided so that all the parties involved agreed to the scheme. Why does it not take place? Because the transaction costs are greater than N. These are the costs of researching whether the scheme might be profitable, the costs of discovering who has what rights, the costs of negotiating with all the parties, the costs of finding a financier and convincing her, and so on.[12]

A good understanding of transaction costs is very important for our argument, because those costs are affected by the way in which the market in land rights is set up. Different ways of setting up those markets – of 'structuring property rights' – will give different transaction costs. And that will affect the land use which people realize among themselves, irrespective of regulation (such as planning permissions) by a state agency.

Coase argued a particular variant of the general statement about the importance of transaction costs. He said that if transaction costs were zero, then the outcome of people bargaining among themselves would not be affected by 'the initial delimitation of legal rights'. What he meant by that can be illustrated by the smoking factory chimney. Suppose the 'initial delimitation' is that the factory has the right to produce filthy smoke: but that it is prepared to produce less, or none, if compensated by the residents who want clean air. Now suppose instead that the 'initial delimitation' is that the residents have the right to clean air: but that they are prepared to accept polluted air if compensated by the factory which finds it profitable to emit filthy smoke. Coase says that if the transaction costs are zero, the outcome of the negotiations, in the sense of the final allocation of resources, will be the same in both cases. And, moreover, that that outcome will maximize total wealth.

You must not dismiss this as one of those silly mental games that economists play – for transaction costs will never be zero – for it can have important implications for land-use planning.[13] If the aim of that planning (or at least one of its aims) is to use economic resources efficiently, then according to 'the Coase theorem' (as it has come to be called) that will be achieved by actions which minimize transaction costs. Land-use planning should be directed to reducing transaction costs. The implications of this will be worked out later in this chapter. There we shall see that land-use planning to reduce transaction costs can be very different from land-use planning to correct for market failures.

Regulatory failures

Land-use planning which is directed to correcting for market failures takes the form of market regulation. The market has outcomes which are not desirable, so a state agency intervenes in that market with measures based on public law (and see Chapter 2). But will that inevitably produce an improvement? Markets can fail: but regulations also. There is a wide literature on what has been variously called 'public failure' or 'government failure' or 'non-market failure' (Wolf 1979), or 'regulatory failure' (Ogus 1994: ch. 4).

In order to make this more concrete we take an example frequently given of how a regulatory failure can arise in land-use planning (e.g. Ellickson 1973). This is when a state agency makes a land-use plan which includes zoning in order to prevent negative externalities – that is, to prevent nuisance arising between

neighbouring land uses. Nobody denies that there can be nuisance. But before tackling it in this way, the questions should be asked:

- How big is the nuisance?
- What is the cost of tackling it by zoning? There are transaction costs, such as for making and enforcing the plan, and processing planning applications. In addition there might be extra production costs if one of the excluded land uses has to choose a less efficient location;
- Is the cost of tackling it in that way greater than the cost of the nuisance?
- Could the nuisance not be reduced more cheaply? For example, by requiring the parties to take precautionary measures, or by stimulating them to do so by the threat of injunctions or damages;
- Does the state agency operate under the conditions which are necessary to guarantee that if it does introduce and enforce zoning, the result will be better than without zoning? The conditions include good information and correctly motivated politicians and public officials.

It is correct that these questions be asked. We must be aware that there can be many reasons why state agencies, when they take action for a better use of scarce resources, might not be successful, and might produce results which are worse than the 'unregulated' market would. But we do not need to accept uncritically the statements made by some critics of land-use planning and other forms of public policy.

The difficulty for a state agency in getting the information necessary to correct the market has been stressed by Hayek (1989). It is often said that 'the market' is better placed to know what people want, that 'the market', unlike 'the government', is under the discipline of competition to get this information correct (for if it does not, the firm will go bankrupt), that 'the market' does not make the mistake made by 'government planners' of imposing on the ordinary citizen middle-class and professional values and the wishes of lobby groups (Gordon and Richardson 1991). Those statements seem to me to miss the point. If a state agency is to set up a market, or to regulate it, then this requires a different sort of information than that which market parties have, namely about the probable effects of the combined actions of *all* producers and consumers. Sometimes, producers in one sector set up a trade association to collect that information for their own use. But that is partial. And even then, it does not always prevent mistakes, as the recurrent booms and busts in the property development sector demonstrate.

Attention for this type of 'regulatory failure' (caused by inadequate information) glosses over equivalent types of market failure: private firms too make mistakes in forecasting and assessing 'the market'. And whether or not such mistakes are punished by bankruptcy, they waste a lot of resources. We can name 'planning mistakes' caused by faulty information, such as too much land zoned for industrial estates in the Netherlands in the 1970s and 1980s. And we

can name 'market mistakes' of the same kind, such as the 20 per cent vacancy rate in office space in Amsterdam in 2003. Nevertheless, it is correct to point out that state agencies are not omniscient. And perhaps it is more undesirable that a state agency wastes public money than that a private firm goes bankrupt and thereby wastes money belonging to its shareholders or the bank.

Another possible source of regulatory failure is the motivation of the state agency. Does it always act in the public interest? Does the voting system reflect the wishes of the public. Do politicians and public officials act as selflessly as they are supposed to? There is a branch of academic study – public choice theory – which assumes that a state agency does not act in the public interest. It assumes that 'citizens and interest groups use their voting power to extract from collective decision-making the maximum benefits for themselves … and that politicians and political parties act as entrepreneurs to provide those benefits in exchange for voting them into power' (Ogus 1994: 59). If that is so, then state actions taken for policies such as land-use planning 'can be predicted as being a response by politicians to the demands of interest groups who will derive benefits from the measure' (Ogus 1994: 71).[14] And there are academics who are, quite frankly, cynical of all state agencies and their officials (e.g. Gordon and Richardson 1991).

Public choice theory does not convince me. A healthy scepticism towards state agencies is warranted; automatic cynicism is not. If a positive planning theory (Poulton 1991) based on empirical research shows that state agencies sometimes act to promote the interests of politicians and civil servants, this has to be taken account of when evaluating public policy. But that is different from assuming that state agencies do nothing other than that. Public choice theories, however sophisticated, do no justice to the complexities of local and national politics, nor to the realities of what state agencies do, nor to the constraints on arbitrary and self-seeking action imposed by long-established institutions (Hoogerwerf 1995). My position might be coloured by the fact that my knowledge is mostly of Britain and the Netherlands, both regarded as having fairly trustworthy governments, reliable, competent officials and stable institutions. That might not be so at all times in those two countries, and it might not be so in some other countries. If that is the case, then the proponents of public choice theory should at the least say under what conditions their theories apply.

Moreover, I find the criticism one-sided. People in the public sector should act in the public interest. It is correct to expect that. But, it would seem from the writings of the public choice theorists, people in the market sector may act completely selfishly, without incurring any criticism. And often they do act with a total disregard for the effects on others, as the recurring news of swindles and frauds illustrates. But that – apparently – is not a market failure, because Adam Smith's invisible hand ensures that all is for the good, ultimately! Some people have an amazing faith in 'the market', which can best be described in Samuel Johnson's words: 'A triumph of hope over experience'.

The 'highest and best' as the goal of public policy

The last criticism of Pigovian welfare economics that we consider here is that it takes as the goal of public policy achieving the optimum of welfare. Trying to find a policy which would achieve the optimum has been called 'the Nirvana fallacy' (Furubotn and Richter 1991: 12): we can describe it in other mythical terms as 'the search for the Holy Grail'. There are three problems with this search.

One is that it takes no account of the statement in Chapter 1, that markets are a social creation. Rights, we said there, are a social creation. Rights are exchanged in markets. It follows that there is a multitude of possible markets, depending on which rights in land have been created. From this it follows that the idea of 'the perfect market' cannot be sustained. And if we abandon that idea, then policy based on trying to achieve the perfect market has to be abandoned too. For that policy is directed to correcting for market failures in such a way that the existing market becomes more like the perfect market.

The second problem is that Pigou compares an actual situation with an ideal one. The ideal is the market working under conditions which result in an economic optimum. If a real situation falls short of that high ideal, then there is a case for government intervention. However, that might be unrealistic, for the ideal might be unattainable. What needs to be compared is the actual situation with an achievable and viable alternative.

> the analysis proceeds in terms of a comparison between a state of laissez faire and some kind of ideal world. … But the whole discussion is largely irrelevant for questions of economic policy since, whatever we may have in mind as our ideal world, it is clear that we have not yet discovered how to get to it from where we are. A better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change, and to attempt to decide whether the new situation would be, in total, better or worse than the original one.
>
> (Coase 1960: 154)

That is, we should look for improvements (what is better) rather than for the best.

The third problem is more technical. It is assumed that, when there is more than one market failure, correcting for those failures separately will move the market in the direction of 'perfection'. Yet this assumption is difficult to sustain.[15]

The goal of a better use of scarce resources

Let us summarize the argument so far. An important consideration when deciding how land-use planning should be practised, is that scarce productive

resources be used efficiently. Nobody will deny the importance of this. So we want to be able to give a practical meaning to it and to work out the implications for land-use planning. Our starting point is that we want to make *comparative* statements. In particular, we want to find an answer to the question: which form of land use would use scarce resources more efficiently, that produced by public law rules (regulating markets) or by private law rules (structuring markets)? We are not searching for 'the best'! Two ways of making such a comparative statement will be investigated.

A Paretian improvement

Pareto (1906) argued that a change would be an improvement if, as a result of the change, at least one person became better off without anyone becoming worse off (a 'win-win situation' in present-day terms). This is unexceptionable. The question is: how useful is this formulation in practice? For it is usually only marginal changes, certainly in land use, which make no one worse off. In order to widen the scope of this measure, Kaldor proposed that there be an improvement if those who become better off could afford to compensate the losers, while still retaining enough of the improvement to be better off. And Hicks proposed that there be an improvement if the losers would not be prepared to pay the winners for the loss to the winners by reversing the change (Woltjer 2002: 57–58). Note that neither Kaldor nor Hicks said that the compensation needed to be paid before there was an improvement. There is an improvement in the use of scarce resources if the change gives a benefit to some people of 100 units and a loss to other people of 90 units, even if the gainers are already rich and the losers already poor.

This ignoring of distributional questions is a serious objection to using the idea of a Paretian improvement; but before we discuss this we should recognize that the significance of the objection depends on the size of the change, or on the amount of scarce resources being used. If the change is small – e.g. demolishing a redundant school and building houses on the site – the gains and losses to the various parties can be easily identified, moreover there is a real possibility of the gainers compensating the losers. With a bigger change – e.g. using an urban park for a large housing project – the gains and losses are greater and the gainers and losers more numerous.

Remediability

An alternative has been proposed by Williamson (1995; 1999). Efficiency, he says, should be 'judged not in absolute but in remediableness terms' (1999: 340). When considering a policy question, it is not sensible to compare the existing situation with the optimal situation, but with feasible alternative ways of pursuing the same policy goals.

> Lapses into ideal but operationally irrelevant reasoning will be avoided by (i) recognizing that it is impossible to do better than one's best, (ii) insisting that all of the finalists in an organization form competition meet the test of feasibility, (iii) symmetrically exposing the weaknesses as well as the strengths of all proposed feasible forms, and (iv) describing and costing out the mechanisms of any proposed reorganization.
>
> (Williamson 1995: 229)

Williamson has developed this idea from his research into transaction costs, in both private and public organizations. Transaction costs are inevitable. It is not sensible to say: 'a particular policy arrangement is bad because it involves high transaction costs', if feasible alternative policy arrangements involve even higher transaction costs.

Cost-benefit analysis

What both approaches – Paretian improvements and remediability – have in common is a comparison of the economic effects of two practical, feasible situations. This comparison has to be made with some form of cost-benefit analysis. Below, some aspects of cost-benefit analysis are criticized: but the analysis itself cannot be avoided. The aspects which we shall examine critically are: the treatment of distributional effects; and the treatment of non-economic goals.

Distributional effects

One problem with the idea of the Paretian improvement is that gains and losses are measured in money and that the measurements are made by using market prices. But 'Individual preferences, as revealed in market behaviour, are a function of [people's] income and wealth' (Ogus 1994: 58). It follows that the outcome of measuring gains and losses and weighing the one against the other depends on the initial assignment of income and wealth. All sorts of things (such as the right to inherit) can affect what economists call 'the starting position'.[16] This was recognized by Pareto himself when he proposed this criterion in 1906.

One solution to this is to attach 'weights' to the gains and losses experienced by different people (see for example Teulings *et al.* 2003). This makes it possible to give a greater importance to the effects felt by – say – poor people than by rich people. The advantage of this is that it makes clear the arbitrariness of the market outcome, for the market counts one Euro loss to a poor person the same as one Euro loss to a rich person. There are, however, problems with the utilitarian game of making one grand calculus of human welfare, with adding up the welfare of separate people ('interpersonal comparability'). As Little has not tired of saying (1957; 2002), this always involves an ethical judgement. Whose ethical judgement should we follow?[17]

Some of those who favour using the Paretian measure for determining whether the use of scarce resources has improved have a different answer to the problem that the outcome depends on the initial distribution of income and wealth. The idea that the market working on its own will, if the necessary conditions are met, achieve the best use of scarce resources is called the First Fundamental Theorem of welfare economics. It is admitted that this might not be socially optimal. Then comes the Second Fundamental Theorem of welfare economics: 'Any efficient allocation can be supported as a competitive equilibrium provided that the government can levy lump-sum taxes' (Dutta 1994: 16). This needs explaining. The market outcome will be the most efficient, with the given starting position. The state can use lump-sum taxes and subsidies to change that starting position, and the market will then reach another outcome. That new outcome will be the optimum for that new starting position. In that way, the state can guide the market so that it reaches an outcome that is both economically and socially optimal – the allocative efficiency is optimal and the distribution of wealth and income is optimal.

What is interesting is how the proponents of the market use this argument. They say: let the market do its work, with the only state action being the creation of the conditions necessary for the First Theorem. We do not need to worry about distributional effects. If the state finds those distributional effects unacceptable, then it can try to correct them through the tax system.[18] 'With specific reference to property law, that conclusion can be read to say that property law should seek to allocate and enforce entitlements so that a society uses resources efficiently, and should then use the tax-and-transfer system to achieve distributive equity' (Cooter and Ulen 2004: 112 n26). Now, there might be good arguments for trying to reach distributional goals through the tax system, rather than through rules about how rights should be exchanged (as is argued by Shavell – 1981; 1994). But that is not the point. There is nothing in the First and Second Fundamental Theorems to say that they should be applied *in that order*, namely that the market should first be allowed to do its work and the resulting equity problems should be mopped up later. Why not the other way round: first redistribute rights, income and wealth in more equitable ways; second, let the market work under that new 'starting position'? There is an old adage: 'Nothing is more unequal than the equal treatment of unequals' (quoted in Harvey 2000: 76). Trying to achieve allocative efficiency by letting the market treat unequals equally produces unequal results. It might be better first to reduce the inequality, then let the market treat everyone equally.

A recognizable example will make this clear. On the whole, people who rent housing are poorer and in a weaker position than the landlords. If we let the market first treat unequals equally, then correct for the resulting equity problems, we do not try to regulate the relationship between landlord and tenant. There is a 'free market' in rented housing. If that results in poor people

which they cannot afford, that can be corrected by income tax rebates. If we follow the reverse order, we first try to reduce the inequality. This we can do by legislation to protect the rights of tenants: there is a redistribution of property rights from the landlord to the tenant. Then we let the market do its work.

There is one more fundamental objection to the utilitarian calculus of adding and subtracting the individual gains and losses which result from a project (such as a land-use planning scheme). There are, we have seen in Chapter 1, several principles to be taken into account when evaluating the use of property rights. Munzer (1990: 4) points out that the principles should recognize the rights of persons, which rest on

> a conception of the equal moral worth of persons. The conception would differ, however, from the utilitarian conception of equal worth as equal counting, for the latter upholds sacrificing the individual utility of some in order to promote overall utility. Any such sacrifice ignores or undervalues the separateness of persons – that is, the idea that persons have rights not to have certain of their interests traded for overall utility.

The conclusion has to be that it is not defensible to include *distributional effects* in a comparison of the *economic effects* of policy alternatives. The distributional effects should be considered explicitly and separately.

Non-economic goals

We consider this point because some economists consider that it is possible to include all the goals of public policy within one economic evaluation. We disagree, and consider how to treat non-economic goals. Ogus (1994: 46ff.) lists distributional justice, paternalism, and community values such as protecting the countryside and supporting the arts.[19] The first we have just discussed. Some writers consider the other non-economic goals by treating them as though they were economic and in that way incorporating them into a measure of allocative efficiency. Intergenerational justice is considered by 'discounting the future' at a low rate,[20] protecting the countryside by estimating the psychic utility that people get from enjoying a view, the value of a Shakespeare play by what people will pay to see it. Some advocates of measuring economic efficiency can pack a lot into that concept!

There are objections to this treatment. One is that it uses tautological statements with no predictive value. Suppose we want to compare two schemes for redeveloping a town centre: one of the schemes would retain an old and attractive street, the other would demolish it. We take account of this by saying 'the old and attractive street gives psychic income'. But, unless we can measure

independently how big that psychic income is, this statement says nothing more than that people find the street attractive.[21] It is a pretentious statement, because it claims to mean more than is legitimate. Another objection to trying to include everything in one measure of economic efficiency is that it takes discussions out of the hands of politicians and puts them into the hands of 'the experts'. Grant (1988) says of Pearce (1987):

> He insisted that, by developing a sophisticated concept of total economic value, economists can embrace such concepts as existence value, altruism and stewardship, and assess preference in relation to them. It is probably with that final step that non-economists feel most uneasy, even if it means opting instead for the safety of paternalism and the loose fallback of democratic accountability.

We can dismiss the idea that an economic evaluation can include all the goals of public policy. That still leaves the question unanswered: when comparing the economic effects of public policy, which effects can legitimately be included? My answer would be: include only those effects which are commonly traded in the market, directly or indirectly, and for which therefore there are market prices which can serve as an accurate indication of how we value those effects. Intergenerational justice and attractive countryside should not be included, nor should a Shakespeare play or an attractive town centre.

Comparing the economic efficiency of property rules

In this book we want to compare the use of scarce resources resulting from different sorts of rights in land. There are alternative ways of ruling how a person may exercise his rights in land. Should the right be alienable or not? How long should the right be valid? Should the rights over a particular type of resource be exercised by a public or a private (legal) person? Should splitting off rights from full ownership be recognized in all circumstances? The efficiency with which scarce resources are used is a legitimate concern for the law maker who on behalf of society determines the rules about rights in land. Can economic theory help the law maker in this task?

I think it can, and how it does that is the subject of Chapters 5 and 6. The doubts expressed above about the scope of the statements which economic theory can validly make are answered in two ways. The first is that I discuss the consequences for economic efficiency separately from the *distributional* effects.[22] The second is that I do not try to include the non-economic goals of land-use planning in the economic evaluation. This follows not only from the discussion above about non-economic goals, but also from the concept of 'remediability' used by Williamson (see above). For by using that concept, we compare alternative feasible ways of achieving given goals of public policy: we

do not question those goals, nor subject them to an economic analysis (and see Chapter 1). From this it follows that the economic evaluation does not include an evaluation of the absolute *effectiveness* of different sorts of policy rules.

> Maximum national income … is not the only goal of our nation as judged by policies adopted by our government – and government's goals as revealed by actual practice are more authoritative than those announced by professors of law or economics. (Williamson 1999: 318, quoting Stigler 1992: 459)

As a preparation for the evaluation of different sorts of policy it is useful to examine in more detail a number of economic concepts introduced in this chapter. We do this in the following appendix.

Appendix

Some economic concepts for analysing land use

In the above chapter we introduced a number of economic concepts that we want to use actively in the following chapters. These are: transaction costs; public goods/private goods/mixed goods; resources in the public domain; external effects. We need to understand them better before we can use them actively. That is the purpose of this appendix. We pay particular attention to how these concepts can help to predict the economic effects and the distributional effects of using land.

Transaction costs

Above we discussed the argument put forward in the first instance by Coase, that the existence of transaction costs influences the outcome of interactions between people over the ownership and use of resources.

Suppose you are considering buying land and erecting a factory on it. Your decision will depend on whether the land is polluted or not, what takes place on the adjacent land, how the demand for the product from your factory will change, how judges will interpret the relevant nuisance legislation, how the lawmaker will change fiscal rules, etc. You have some of this information, you can get more by spending time and money, the rest you can only guess at. You decide to spend a certain amount of time and money (transaction costs) on this, and on the basis of that information you buy the land, acquire all the necessary environmental permits, build and start to produce. Someone buys land nearby and erects houses on it. Then the house owners complain about noise nuisance from your factory. You had thought your rights were clear, for you have met all

the conditions. But the neighbours take a private law action against you. If the costs of the actions necessary for foreseeing that had been lower, you would not have bought the land.

Legal rules can affect transaction costs. They can, for example, delineate property rights more or less clearly, in that way affecting what Webster and Lai (2003: 95) call 'property rights ambiguities'. There can be clear and simple procedures for protecting property rights.[23] Professional standards and legal requirements can reduce the chances of being caught by opportunistic behaviour, what is rather quaintly called 'moral hazard'. This refers to the possibility that the person with whom you strike a bargain might not be completely honest, might withhold the truth, might act according to the letter rather than the spirit of the law, etc. And property rights can be registered, for example in a cadastral or public land registry, which is open to the public.

Other activities of the state can affect transaction costs as well, namely activities which affect the uncertainty surrounding a decision. If the state makes, for example, surveys about population change or housing wishes, or projections about how the economy will change, this reduces uncertainty and makes it unnecessary that private persons carry out those investigations. This is 'Providing land markets with subsidized strategic intelligence' (Webster and Lai 2003: 26; and see Buitelaar 2004). It is not only the preparation for the land-use plans, but those plans too which can reduce uncertainty. Cooter and Ulen (2004: 174) say that the power of the state to regulate use of property 'reduces the clarity and certainty of property rights'. This might be true for the property rights exercised by one person. But that person has economic benefit from knowing how *others* will use *their* property rights. Land-use planning reduces the uncertainty about the economic context for investment decisions: unless, of course, the land-use plan is not upheld and is applied very flexibly.

> The well-known paradox applies here: each private actor wants the land-use plan to be applied flexibly to his own land, but inflexibly to the land of all others. If an investor knows that the land-use plan will be applied predictably to all others, this reduces the transaction costs of the investor (and see Needham 2004b).

We must not forget that, to some people, transaction costs are income. People working with land and property want information in order to reduce uncertainty and are prepared to pay others to provide that information. If a state agency makes that information available free, there is less demand for consultants to do that. In some countries, a tax is levied on every transfer of land (stamp duty). And some people can earn money by working in the shady margins of ambiguous property laws. In his novel *Bleak House* (1853: ch. 65), Charles Dickens described with malicious glee the euphoria among lawyers

when they had succeeded in dragging out the litigation about Jarndyce and Jarndyce for so long that the total value of the estate had been absorbed by their legal fees.[24]

The economic consequences of transaction costs were investigated by Coase in a 'thought experiment' in which he assumed that there were no transaction costs (and no restrictions to private bargaining, such as existing property rights). That would produce maximum economic efficiency, he argued, independent of the initial assignment of rights. It follows that if transaction costs are lowered, this will encourage free bargaining and the outcome will become economically more efficient (in addition to the benefit from paying fewer transaction costs). The prescriptive conclusion can be drawn: 'Structure the law so as to remove impediments to private agreements' (known as the 'normative Coase theorem'). Lowering transaction costs 'lubricates' bargaining (Cooter and Ulen 2004: 97).

Transaction costs have distributional effects also. Lowering transaction costs can correct for unequal bargaining strengths.[25] For if one party has much more knowledge and expertise than the other, its transaction costs will be lower than those of the other, and that gives it an advantage. If one party is richer than the other, it can afford to pay transaction costs, whereas the poorer party might be deterred from seeking a good bargain by the level of the transaction costs. Often the seller has an information advantage over the buyer. The person from whom you buy your house does not tell you that there is dry rot in the roof timbers, or that the neighbour's son repairs cars in the front drive, or that what you are buying in the poke is not the pig that you wanted but a cat.

Actions to change transaction costs can have another distributional effect, namely between private persons and the state. Take the example of a public land registry. If you are considering buying a house, you or your lawyer can use the registry to check whether the person who claims to be the owner actually is, and whether the property is encumbered by unannounced claims such as a mortgage. The public land registry not only reduces transaction costs, it affects also who pays them. If there were no land registry, the potential buyer would have to bear the costs of searching for this information. As it is, the state bears the costs (although it might recoup some of them by charging fees for the use of the registry). It can be cheaper for the state to incur transaction costs on behalf of all of us (who pay for this service through taxes) than for each of us to do that individually.[26] To this can be added that the state always pays some of the transaction costs of reaching private bargains. For the bargain reached will be influenced by the knowledge that if it is breached, it can be enforced, and that requires the intervention of the courts. It might be that legal damages will cover some of the costs which the state incurs in maintaining the courts, judges, etc. But maintaining and enforcing private law agreements always costs the state (and therefore the taxpayers) money.

Public goods, private goods, mixed goods

For some goods, there is rivalry in their consumption. This means that the more that one person consumes, the less there is for others. Examples are food, housing, books, etc. For other goods, there is non-rivalry: even if one person consumes more of it, this does not reduce the amount which others can consume. Examples of the latter are clean air, the view over a river, a big park.

For some goods, it is relatively cheap to enforce the rights of the owner to exclusive use of them. For example, my right to exclusive enjoyment of my back garden can be relatively easily enforced, for if an unwanted and uninvited person enters my garden I can call the police and they will reject her. For other goods, enforcing the rights of the owner to exclusive use can be very difficult. Take as an example the view over the river. I might own the right to that; but it is very difficult to prevent others from enjoying it too.

Goods or resources where consumption is rivalrous and where unwanted consumers can easily be excluded are called 'private goods', the opposite are 'public goods'. These terms are in common use but still confusing,[27] because they suggest that the distinction is between who should provide and own them: private persons for private goods and public agencies for public goods. The relationship is, however, not so simple. A town hall, for example, is provided and owned by a state (public) body, but it is nevertheless a private good.

There are goods (mixed goods) which fall between public and private, such as a small park. It is possible to put a fence around it and charge for entry. Consumption is non-rivalrous but excludable.[28] A train or bus with spare capacity is another example. A good can change from public to private. The streets of central London, for example, could be used freely by anyone until the introduction of a 'congestion charge' in 2003. A technical innovation made it possible to charge for what was previously a non-excludable right. The charge was introduced in central London because of traffic congestion. That congestion meant that consumption of the public highway had become rivalrous: more use by some meant less use by others, in contrast to the use of uncongested roads. Use of roads in central London had become rivalrous and was non-excludable: technical means were introduced to make the use excludable. (For a fuller discussion, see Webster and Lai 2003: ch. 6.)

A good or resource which is public (collective) or mixed is likely to be produced and consumed differently from a private good or resource, and that difference can have important economic consequences. The non-exclusivity means that it is difficult to charge for the use of the good: even if some honest users were to agree to pay, there might always be free riders who took advantage of that. So public goods are not likely to be provided privately.[29] However, if the result was that the good was not produced, that would not necessarily be economically efficient, for there might be a demand for it, which would not be satisfied. In that case, it is more efficient that a public agency provide the good

than that it be not provided. This is the traditional – and still valid – reason for state agencies providing public parks, public highways, etc. Nevertheless, there are still very many questions remaining about the economic efficiency of providing public goods. There is no 'discipline of the market' to determine how much of the public good should be produced, nor how it should be produced most efficiently, nor how to organize that it be not used frivolously. The economic consequences of non-rivalrous consumption become apparent if we consider a mixed good such as a small park. If this were provided privately, fewer people would use it than if it were provided publicly and free. Yet more people could use the park, without reducing the enjoyment of the existing users (consumption is non-rivalrous). So the private provision of such goods is economically not the most efficient. However, it is more efficient than no provision at all: and it might be more efficient than public provision which is not subject to the 'discipline of the market'.

The difference between the ways in which a public and a private good are produced and consumed has distributional effects also. If a private good is provided privately, those who cannot afford it are excluded. If a private good is provided by the state, that is not so. Obviously, there are still distributional effects, because consumption is rivalrous: some people have to be excluded from consuming the good. But the distributional effects are not determined by income. Examples of private goods provided by the state are social housing and health services. If a public good is provided privately (which is unlikely, unless it is a mixed good where use is excludable) people who cannot afford to pay for it are excluded.[30] If a public good is provided publicly, everyone may use it.

Resources in the public domain

This concept refers to the access which people have to a resource. The term must be used precisely. A good starting point is the distinction made in Chapter 3 between state property, common property and non-property. State property is owned and managed by a state agency, which has the right to determine the use and access rules. Common property is owned by the members of a group and managed by some of its members on behalf of the whole: the management group determines the access by the members. Non-property can be used by anyone, there are no rules, it is an open-access resource. A public highway is state property: the state rules that it can be used only by people in cars which are roadworthy and for which the vehicle licence has been paid: it is not an open-access resource, but action is not rationed by price. A public park also is state property, for which the access rules are different: anyone may use it, provided they behave decently. A sports ground can be common property, to be used only by the member of the sports club. If, however, the grounds are used freely by the public in the evenings and the police will not take action against this although asked to do so by the club committee, the sports ground becomes

an open-access resource. The air, the sea outside the territorial limits, and unclaimed land is non-property, 'res nullius', and everyone can use it although no one has a right to use it. A public or collective good, in the sense used above, is also a resource in the public domain to the extent that consumption is non-excludable, for then access is open to everyone.

If a resource is in the public domain, it is likely to be produced and consumed differently from a resource in the private domain. No-one wants to produce it, and everyone can consume it. If the resource is valuable and scarce (consumption is rivalrous) it can be exploited without restriction, and might become overused and depleted (such as fishing on the high seas). However, not all resources in the public domain are scarce. Most wild flowers, for example, can be picked freely without endangering the species. The use of the seas for navigation beyond the territorial limit causes no problems.

Resources in the public domain can give rise to other economic effects. One is rent-seeking. In Britain, planning permissions are to some extent a resource in the public domain, for anyone can apply for permission for any use anywhere. Property developers spend huge amounts trying to increase the probability that they will be given planning permission. Rent-seeking can be regarded as a transaction cost, which it is desirable to reduce as being a waste of money. But it can affect the outcome also: the property developer who can afford to spend more money on market research and hiring lawyers has more chance of getting planning permission.

If the resource that is in the public domain is valuable and scarce, people will attempt to claim it and there is no system of rights to regulate it. The distributional effects are clear: the strongest party wins. Or, as the saying goes: 'the world will be taken over by the shameless'. People claim 'presumptive rights' to use a resource (Bromley 1991: 33). The tortoise that wanders into my garden I claim as my own. Or I extend my garden by moving the fence one metre into the public open space. Or the fishermen buy bigger and better and faster boats.

External effects

The external effects of an activity are physical effects which are not experienced by the person who decides upon the activity.[31] That person might therefore ignore them when making the decision. Of course, he might not, he might 'think of the others': but he is not obliged to. These effects can both harm others (negative external effects) and benefit others (positive external effects).

In land-use planning we are often concerned with externalities which have a geographical dimension: they are caused by an activity in location X and the effects diminish as you get farther away from X. Examples are noise, smell, visual intrusion, traffic generation and parking problems, which can make locations near to X less attractive. The external effects can also be positive: what I do on X makes adjacent locations more attractive, such as offices for certain types of

use attracting similar offices, or a smart housing development which makes the housing in the same neighbourhood more valuable.

It is important to note that the physical effects caused by an activity can be an external effect under some circumstances, and an internal effect under other circumstances. One reason is the geographical circumstances. If the activity which causes the effect is placed in the centre of a very big plot of land, the externalities will be negligible on adjacent plots. All effects are internal, that is within the extent of the property owned by the one causing them. If the effect is positive, boundaries can be deliberately drawn to as to include them: this is called 'scoping'. This allows the person causing the effect to reap all of the benefits, because they fall within his land. For example, building a multi-storey car park in the town centre will benefit not only the owner, but also nearby retailers: if the car park is built as part of a new shopping centre, the one developer can recoup that externality. Webster and Lai (2003: 155) give, as other examples of scoping, shopping malls, business parks and university campuses. If the effect is negative and internal (for example, a large factory locates the most noisome activities in the centre of its plot of land), the only person suffering from it is the one who causes it.

> Owning a very large plot of land can also be used by someone wishing to protect herself from negative externalities caused by others. The bigger your garden, the less nuisance you suffer from your neighbour. And very rich people have been known to buy unbuilt land next to and within sight of their house, so as to prevent others from using that land in ways which would reduce the enjoyment of their house.

Another reason why a physical effect can be external in some circumstances and internal in others, lies in the definition: an effect is external if it is not experienced by the one causing it. Suppose an office block is built which results in many more people wanting a parking space. If they may freely seek that space in the surrounding street, that physical effect is external to the decision making about the office development. If it is not permitted to build an office in that location without making provision for the demand for extra parking, the physical effect is internal to the decision making. As we shall see in Chapter 6, private law rights in land can be created so that the effects outside the parcel X caused by the activities on X have to be taken into account by the person deciding on that activity. This internalizes the externality.

CHAPTER 5
AN EVALUATION OF PROPERTY LAW: RULES UNDER PUBLIC LAW

> Individualism for us meant muddle, meant a crowd of separated, undisciplined little people all obstinately and ignorantly doing things jarringly, each one in its own way. Each . . . snarling from his own little bit of property, like a dog tied to a cart's tail . . . The man who owns property is a public official and has to behave as such . . . What he does with his property affects people just the same . . . No one is really private but an outlaw . . .
>
> (H.G. Wells, *The New Machiavelli*, 1911, ch. 10)

> what has the deepest and most permanent effect upon oneself and one's way of living is the house in which one lives. The house determines the day-to-day, hour-to-hour, minute-to-minute quality, colour, atmosphere, pace of one's life: it is the framework of what one does, of what one can do, and of one's relations with people.
>
> (Leonard Woolf, *Downhill All the Way*, 1967, ch. 1)

Types of property rules

We want to compare different sorts of property rules for influencing decisions about land use. In the previous chapters we have made the necessary preparation for this comparison. Two sorts of rules have been distinguished, those working through public law and those working through private law. The comparison we make will be pragmatic rather than ideological: we compare the rules according to their effectiveness in achieving the goals of land-use planning, according to their effects on economic efficiency, and according to their distributional effects. This is the instrumental approach to rights in land which we chose in Chapter 1: rights in land as an instrumental variable.[1]

For a pragmatic evaluation, the distinction between public law rules and private law rules is too coarse. So we make a finer distinction, as follows:[2]

- public law rules about property rights which a state agency may not hold and about property rights which a private legal person may not hold;
- public law rules about the ways in which a state agency may restrict the exercise of property rights held by others;

- public law rules about the way in which a state agency may acquire property rights from others;
- private law rules about how property rights are established and verified;
- private law rules about the remedies for the violation of property rights;
- private law rules about the holder of a right splitting off a part of that right and letting others exercise it;
- private law rules about the holder of a right alienating it;
- private law rules about the holder of a right determining the duration for which others may use that right should he alienate it, and/or the duration for which other may use a right which he splits off from his own right;
- private law rules about the holder of a right being able to exercise that right without hindrance from the activities of others on other pieces of land.

Law and economics

Law and economics is the application of economic theory to predict how people respond to laws and the effects on economic efficiency and the distribution of income and wealth (Cooter and Ulen 2004: 3–4). In this and the next chapter we use concepts and insights from law and economics to make those predictions. For each of the types of property rule listed above we investigate:

- why that type of rule is important (the question of effectiveness);
- the main rules within that type;
- the economic consequences of the rules (the question of economic efficiency);
- the distributional effects of the rules (the question of equity).

In order to avoid writing one indigestibly long chapter, we treat in this chapter only the public law rules. The private law rules are the subject of the following chapter.

It is good to point out that there are other ways of using law and economics than the way used here, namely in order to predict how people respond to laws. There are at least two other ways. Some writers prescribe how rights in land should be chosen, namely in such a way that economic efficiency is maximized. Then they deduce which rights in land will best achieve economic efficiency, and propose those. This we can call the *normative* version of law and economics. I do not adopt it, for I think that rights in land should be chosen for a number of reasons, not just economic efficiency (and see Chapter 4). There is another version of law and economics, which I call the *explanatory* version. This attempts to explain the laws regulating property in general, rights in land in particular, and changes in them, by saying that they evolve so as to reduce transaction costs. The moving force is the search for ever greater economic efficiency, and that is achieved by lower transaction costs. Versions of this theory were put

forward first by Demetz (1967) and have since been refined by others.[3] If such theories were true, they would be very relevant for the argument in this book, for although I might propose changing property laws in ways which did *not* reduce transaction costs, this would be swimming against the tide and not likely to be adopted. However, the burden of proof is on the proponents of the theories. They illustrate their statements with empirical examples, but that is not a rigorous empirical testing. A variant of the explanatory version of law and economics says that property law can better evolve through courts building up common law, than by parliament passing statute laws: the laws should 'grow' rather than be 'made' (Chapter 2). I find that argument both unproven and of limited use, as it cannot be applied to countries which do not have a system of common law.

Public law rules about property rights which a state agency may not hold and about property rights which a private legal person may not hold

Why this type of rule is important

The state has a dominant position in property rights. It sets the rules which all persons must follow when exercising those rights; it too can exercise property rights; it can limit itself in exercising those rights; and it can reserve the exercise of certain property rights for itself.

Should the state limit itself in the exercise of property rights? This concerns possible abuses of state power. It is clearly convenient that a state agency may own and manage private goods, for a municipality needs a town hall, and national government a parliament building. Moreover, there are certain goods for which there is a demand but which no private person wants to provide: these are the public goods discussed earlier.[4] We are only too happy that a state agency is prepared to do that, which means that it must be able to exercise the relevant property rights. Yet suppose that a state agency which is pursuing public policy has the choice of doing this by restricting the ways in which others use their rights in land (using public law) and/or by using its private law powers as the owner of rights in land. It will be clear that a state agency, if it has that choice, can put itself in a very strong position in the market for land and buildings. It might succumb to the temptation either to use its private law powers to reinforce its public law powers without the checks and balances that surround the use of the latter powers, and/or it might succumb to the temptation to use its public law powers to strengthen its position as an actor in the market in competition with private actors.[5]

Should the state reserve the exercise of some property rights for itself? This concerns desired goods and services which could be provided privately, but where that private provision could give rise to so many problems that the state

says: we shall do that, and private persons may not. This can be the case when the size of an externality is potentially very large and dangerous (e.g. a nuclear power station), as a result of which the state says: this should not be in private hands. And it can also be the case when there is a natural monopoly. This is where the economies of scale are so great, that it is not efficient that the good be supplied by more than one person or firm, or where a newcomer cannot hope to compete against an established supplier.[6] If monopoly is more efficient than competition, should this be exercised exclusively by the state?

The main rules within this type

The relevance for our argument about rights in land is that it is sometimes possible to create or change those rights so that natural monopolies and public goods *can* be provided privately or commercially. An often quoted example of a natural monopoly is the railways. However, it is only the rail system which is a natural monopoly, not the train services. A right to use the rail system can be created; providing the rails can be a state monopoly and providing train services a commercial activity. Sometimes rights can be adapted so that a public good can be provided privately or collectively: it becomes what Buchanan calls a 'club good' (Webster and Lai 2003: 106, 123–126). The road in a residential cul-de-sac can be a public highway: but it can also be made the responsibility of the residents. 'Entrepreneurs assign rights to a good that is consumed collectively within an excludable public domain' (Webster and Lai 2003: 136). Potential 'club members' might want the state to make that possible, perhaps also to refrain from owning those goods so as not to compete with the private provision. The state will often be only too pleased to do both those things, for that would be cheaper than the state itself owning and managing the goods. Private toll roads are another example, as are private security forces.

The economic consequences of the rules

The economic consequences of the state giving itself the monopoly of exercising certain property rights can be serious. There is a strong and well known economic argument for why *private goods* should in principle be owned and managed by private (legal) persons:7 but this cannot be applied to the rights to which the state gives itself a monopoly. Without the discipline of the market, there is no inbuilt mechanism which helps to ensure that goods produced exclusively by the state are produced and consumed efficiently. The same applies to *public goods*. If the state has a monopoly in these, it is not because that is imposed but because nobody wants to compete. But the issue is similar, namely how can public goods be produced and made available in an economically efficient way.

The distributional effects of the rules

Prima facie, this is a question of the distribution between state agencies and private legal persons. To go behind 'the face', we need to pay attention to what the state agency would do with its powers and to who the private persons are. If the state agency acquires for itself a very strong position in the market for land and buildings which it uses arrogantly, that is undesirable; if it uses that position purposefully to redistribute to those who are weak (such as making land available for social housing), that is desirable. If the rules make it possible to provide 'club goods', if those are available only to richer people, if state agencies do not make the same sort of goods available to poorer people also, the distributional effects are undesirable. This latter possibility is illustrated by private parks.

Public law rules about the ways in which a state agency may restrict the exercise of property rights held by others

Why this sort of rule is important

There is a presumption in favour of the owner of a property right being able to exercise that right freely, subject only to the restrictions of private law described in Chapter 3. Nevertheless, there can be good reasons for wanting to influence that exercise by public law also.

One of the best known of these reasons, and one that is very important for our argument, is when the exercise of a right causes a nuisance to others. We have discussed this already, mentioning how this can be tackled by private property law (the nuisance violates the property rights of others). It can also be tackled by public law restrictions, such as the requirement that a permit be obtained for certain types of action.

Another reason is when the exercise of property rights interferes with the performance of certain public tasks. One solution is for the state agency to acquire the property, amicably or compulsorily. But often that is not necessary, and the state agency can carry out its tasks by requiring that the owner of the property accept a restriction. This can be the requirement that the owner of a building accepts that a board with the name of the street be fastened to the outside wall, or that overhead wires be attached to the building, or that power cables are put under the ground.[8]

A third reason is when the market gives signals which produce a result which most people do not want.

Cooter and Ulen (2004: 182ff.) give the example of a run-down harbour area which is a good location for housing. The greatest value would be if remaining industries located elsewhere and the harbour area was redeveloped for housing. In order to cause factories to move out and residences to move in,

the residential developers should bid up the price of harbour land relative to land in the interior, so that factories move out and make way for residences. However, no-one wants to live next door to a factory (housing and factories are conflicting goods), so residential developers are unwilling to pay much for harbour land as long as industry is present. Instead of factories moving away from the harbour, the opposite may happen: as industry expands, residences may be driven farther away from the water. In economic jargon, there are complementary goods and conflicting goods: industry and residences are alternative uses for the location, but they conflict with each other. As a result, there is a non-convexity in the production technology. Then the optimal solution is a 'corner solution' (cf. an 'interior solution') that is either wholly industrial or wholly residential.

Pigovian welfare economics discusses this type of case in terms of 'missed opportunities'. Private persons acting within the market are not able to realize what they would all of them want. In terms of Coasian analysis, the reason is that the transaction costs are too high.

A fourth reason for imposing public law restrictions is when the exercise of private rights would have serious irreversible effects, such as pollution causing irreversible ecological damage (e.g. global warming), and irreplaceable resources being used up (e.g. tropical hardwoods). These are negative external effects which will harm future generations. Mainstream economics takes account of future effects by discounting them at a certain rate per year.

If we apply a discount rate of 5 per cent p.a., for example, this means that we are saying: when we have predicted what will happen thirty years in the future (the next generation) we will give that a weight of only 23 per cent when we take our decision today. For €100 thirty years in the future has a present value of €23. Pigou recognized that this conclusion was not in line with many of our actions (it is certainly incompatible with our present concern for sustainability) and expressed this by saying: individuals have a 'defective telescopic faculty'. A state agency should, according to Pigou, take a longer term view. Some economists try to take account of this by discounting the future at a 'community rate of discount', say 2 per cent instead of 5 per cent. Then, when taking decisions today, we give a weight of 56 per cent to what will happen in thirty years time. For €100 thirty years in the future has a present value of €56.

However, the whole procedure of discounting the future is doubtful. The reason is that it is future generations whose interests are at stake, and our generation can say nothing about what their values will be, let alone what discount rate they would choose. An intertemporal solution is a case of 'missing markets', says Bromley (1991: 86). Our generation has a 'privilege' and the future generations have no rights. He suggests that future generations be given rights in irreplaceable

resources, rights which are at the moment inalienable. This approach is similar to that propagated by 'no-regrets planning'.

The main rules within this sort

Public law can restrict the exercise of a right in land in several ways. Ogus (1994: 151ff.) distinguishes between setting performance or specification standards against which the exercise of the rights can be tested *after* they have been carried out, and requiring prior approval *before* the rights are exercised. Making cars is an example of the first: the makers know which standards they have to meet and if they do not meet them, they can be punished. Building houses is an example of the second: one is not allowed to build a house without first having been granted a building permit.

When the restriction on the exercise of the right requires prior approval, refusal can be compensated financially. This is, however, not common, the reason being that the restriction is applied 'for the public good', and such restrictions are the price we pay for living in a society. That is certainly the argument for not giving compensation for having to meet standards: the car makers might complain that having to meet safety standards (e.g. better brakes) will increase the price of a car, but we who buy the cars pay that price, if not happily then 'more in sorrow than in anger'. Nevertheless, if it is decided that the restriction severely disadvantages just a few people, whereby those people suffer disproportionately for the good of others, it can be decided to pay compensation, especially when the restrictions are so great that they amount to a 'taking'.[9] The law in the Netherlands seems eminently sensible, namely that if the rules are *changed* (re-zoning) as a result of which the value of your land decreases, then compensation should be paid (Van Geest *et al.* 2000).

Finally, we must not forget also the rules requiring the owner of a right to accept certain restrictions concerned with the exercise of public tasks. These types of restrictions, such as having to accept a street name board on your house, are usually eligible for compensation, for just a few people are required to accept a restriction for the good of the many.[10]

The economic consequences of the rules

When the exercise of property rights by one person has negative external effects for others and it is desired to correct for this, what is the best way of doing that? By setting standards or by requiring prior approval? This is partly a technical question. If the damage which the exercise of the right could cause is great and difficult to undo, then prior approval is appropriate. This is the reason why building development is not allowed without a permit: if the development is checked against certain standards after it has been built, it might already have irreversibly damaged natural and ecological values. And it is partly an economic

question. Prior approval in comparison to setting standards delays development, is more expensive to carry out, and does not stimulate innovation. Performance standards in particular stimulate the search for new ways of solving problems.

And should the person whose actions are restricted be compensated? For economic efficiency, it can be desired to reduce smoke nuisance from a factory chimney without reducing production from the factory. Restricting smoke production without compensation gives a stimulus to improve techniques so that production makes less smoke. Restriction with compensation can have the opposite effect: if the injuring party knows that he will receive compensation, the stimulus is to belch out smoke in ever greater quantities. On the other hand, restricting without compensation costs the state nothing, so the measures should be carefully administered so that they do not go further than is economically justified, with resultant loss of economic efficiency.

If the market sends out the wrong signals, then it can be expected that, if the market could be 'helped', everyone would be better off. If that is so, then financial compensation is not appropriate, for the financial reward will come on its own. The market can be helped by restrictions which steer in the right direction.

The other reason for using public law to influence the exercise of property rights was when there were serious irreversible effects. It is questionable whether the science of economics can make useful statements about this. For the accepted way of analysing this economically is by 'discounting the future', yet this is patently contradictory to the current concern for sustainability and for safeguarding the position of future generations.

The distributional effects of the rules

Reducing negative external effects will always benefit the injured. If the reduction is effected by public law restrictions without compensation, there is redistribution from the injuring party to 'the public'. If the reduction is affected by restriction with compensation, there is redistribution to the injured (the public), there is no redistribution from the injuring party, there is redistribution from the public which has to pay the compensation. If the use of public laws rules to correct for negative external effects is blunt or unrefined, that will have wealth effects which might be difficult to justify. This is an argument made against the way that zoning laws are often applied (Ellickson 1973: 699ff.).

Public law rules about the ways in which a state agency may acquire property rights from others

Why this sort of rule is important

A state agency might want to acquire property rights from others for many reasons, but for land-use planning there are two which are most relevant.[11] One

is so that the state itself can provide certain goods and services, such as roads, public buildings and military training grounds.[12] The other is to enable the market to provide goods and services when circumstances prevent that and the state considers that it would nevertheless be socially useful.

This latter practice began when private companies provided canals and railroads. It often happened that those companies could not acquire some of the necessary land along the route, so they applied to the state to do that for them, using a power which private companies do not possess, namely compulsory purchase. Nowadays, that type of infrastructure is not usually provided by commercial parties. Nevertheless, compulsory purchase is still used to enable the market to provide certain goods and services if these are considered socially useful and the market actors cannot acquire the necessary land. Examples are a town centre development, or a housing scheme, for which a land-use plan has been approved: the approved plan gives the legitimation that the development is socially desirable and that the use of compulsory purchase for a private scheme is therefore justifiable.

A related example out of England's history is the Enclosure Acts. The state considered that it was socially desirable that common land be enclosed. The owner of that land was not able to terminate the existing rights. So he applied for an Act of Parliament to achieve that.

The preferred way for the state agency to acquire the property rights is by amicable acquisition. However, that does not always work. The owner of a plot of land along the route of the infrastructure or within the approved development scheme has a 'locational monopoly': the project cannot go forward without the owner's land, she knows it, and she 'holds out' for a price higher than the market value. It is in the interest of each land owner separately to hold out for a price which would absorb all the profits from the scheme: and if each land owner does that, the scheme is financially infeasible and there will be stalemate so the scheme will not go ahead. If the state agency considers that there are good reasons in the public interest why the scheme should go ahead, and in that location, it will create public law rules which enable a state agency to acquire property rights, rules which are not available to private parties.

The main rules within this sort

The preferred method by which a state agency acquires property rights is by amicable acquisition: the current market price for the right is paid and the owner sells it willingly. Then the state agency is using private law rules available to any other person. The main alternative is compulsory purchase (eminent domain). This is usually regulated very carefully, for it is the most drastic intervention in a person's property rights.[13] Part of that regulation is the price that must be paid as compensation. In some countries there is another possibility,

namely pre-emption rights. Here, someone wanting to dispose of a right has to offer it to a state agency, and only if that agency does not want to acquire it, may the owner offer it to others. A variant of this is that, after a private deal has been agreed, it is not valid until a state agency has been given the opportunity of replacing the buyer.

We have talked here about the state acquiring property rights without specifying what those rights are. This is often the right of full ownership, or a freehold interest, but it can also be a lesser right such as an easement. A particularly interesting question is whether the state should be able to acquire such lesser rights compulsorily. In England, all development rights were nationalized in 1947 without the state acquiring the freehold interest: in some parts of the United States development rights can be acquired compulsorily, without acquiring the freehold ownership at the same time (Blaesser and Weinstein 1989: 85ff.). This is not possible in the Netherlands, for the right to build is regarded as being fixed to a specific location.

The economic consequences of the rules

If a right is acquired amicably at the market value, then there are no especial consequences for economic efficiency, provided that the right is put by the state agency to good use. It is in the same category as a public agency buying bricks, or labour. If the right is acquired by compulsory purchase, there can be two reasons for this. One is that the agency wants to be able to pay less than the market price. This cannot be justified economically. The other reason is that the agency offers the market price but the owner 'holds out' for a higher than market price because she has a 'locational monopoly' (see above).

If the state acquires compulsorily at market price (with compensation in addition for disturbance), it might be thought that this would achieve economic efficiency. However, there might be a complication. Suppose that the reason why the owner would not sell at market price was not cupidity but because the property had an emotional value for her higher than the market value (the owner is 'hyper-sensitive'). Economic efficiency requires that she be paid that higher value. However, because it is difficult to judge whether the claim of high emotional value is more than opportunistic, compensation for compulsory purchase usually ignores it.

There is one further complication which must be considered when a state agency buys property rights from others. That acquisition should be at the full market price, we have said. But that price can have been raised by the action of the state agency to initiate a development scheme. Consider a shop in a run-down town centre. It has a low market value. No developer working on his own could take the necessary actions to redevelop the centre ('missed opportunities' – see above). The municipality makes a redevelopment plan. If it were to be realized, the shop would increase in value. The owner refuses to sell, using her

'hold out' powers. The municipality acquires the property compulsorily. But what price should be paid: the value without the scheme or the (higher) value with the scheme? Usually, the higher value is paid,[14] the reason being that a state agency should not benefit financially from its own land-use plans.

The economic advantage of the state acquiring a right in land less comprehensive than full ownership is not only that it is cheaper for the state, but also that the owner of the full right is still able to exercise that right (albeit now diminished) in the way that he considers most profitable.

The distributional effects of the rules

If the state acquires property rights from others at the full market value, then there are no distributional effects. A state agency acquires the right, this is made available, directly or indirectly, to the public, and the public pays through taxation.[15] The owner loses the right, and is fully compensated for it. The exception is when the owner valued the right more highly than the market price; then there is redistribution away from the owner.

For completion, it should be pointed out that a state agency can influence the exercise of property rights by private persons in ways other than by using public laws concerning property rights. It can use financial means to change the costs or returns of exercising a right. If it is desired to reduce the exercise, the cost is made higher by levies or taxes, if it is desired to stimulate the exercise of a right, the cost is made lower by grants or subsidies. It can use persuasion and publicity. It can undertake project planning and pro-active planning. These have been mentioned in Chapter 2.

Conclusions

Here we draw no conclusions from this above evaluation of property rules under public law, for in the following chapter we evaluate property rules under private law, and it is better to draw conclusions for the two together.

CHAPTER 6

AN EVALUATION OF PROPERTY LAW: RULES UNDER PRIVATE LAW

> My views have always been driven by factual investigations. I've never started off – this is perhaps why I am not a libertarian – with the idea that a human being has certain rights. I ask: 'What are the rights which produce certain results'?
>
> (Ronald Coase, in T.W. Hazlett, 'Looking for results – an interview with Ronald H. Coase', *Reason Magazine*, January 1997)

> It is not necessary to say to a man, 'this land is yours', in order to induce him to cultivate or improve it. It is only necessary to say to him, 'whatever your labour or capital produces on this land shall be yours' … There is no more necessity for making a man the absolute and exclusive owner of land in order to induce him to improve it, than there is of burning down a house in order to cook a pig.
>
> (Henry George, *Progress and Poverty*, 1879, book VII, ch. 1)

In this chapter we investigate property rules in the same way as in the previous chapter. We ask: why that type of rule is important (the question of effectiveness); the main rules within that type; the economic consequences of the rules (the question of economic efficiency); the distributional effects of the rules (the question of equity).

In the previous chapter, we asked those questions for property rules under public law; in this chapter we consider property rules under private law. Those property rules are classified into various types, as explained in Chapter 5.

Private law rules about how property rights are established and verified

Why this sort of rule is important

In earlier chapters we set out the paradox that private property rights are a social creation. And we explained this by pointing out that something is a right only if the state protects the exerciser of that right from others who might interfere with that exercise. In other words, all property rights are assigned to (legal) persons by

the state: the state 'endows' people with rights. Often this endowment took place a long time ago: the state defined what a particular property right entitled the owner to, someone became in one way or another the owner of a particular right, since then that right has been transferred perhaps many times, and the current owner has all those entitlements. But the state can give and the state can take away. Why should it want to do that, why should it want to change the existing assignment of rights?

The state might consider that the existing assignment has undesirable economic or distributional effects, and wishes therefore to *re-assign rights*. An example of the former would be increasing the duration of copyright, if the existing duration was too short to stimulate people to create new intellectual property. An example of the latter would be a change in the rules for domestic tenancies, if the existing rules gave too much power to the landlord.

There can be resources in the public domain over which there is no assignment of rights, and it is desirable to *assign rights for the first time*. This can arise if it is not clear who is the owner of a valued resource. Water, oil, wild animals move around. Who can claim ownership over them, who has the 'fugitive rights'? Should this be the person who finds them: the 'rule of first possession' otherwise known as the rule 'first in time, first in right'? Or should it be the person who owns the surface of the land where the resources are found ('tied ownership')? And what about resources which do not move around but which are nevertheless unowned? This can be previously unsettled land (to the extent that the state does not want to recognize the native inhabitants as already owning rights in the land). The establishing of private rights on land regarded as being unowned and therefore freely available, or on land which has been taken from 'the conquered' by an occupying power or from 'the natives' by a colonizing power has resulted in resources being assigned which have later turned out to be extremely valuable.[1]

Another reason why it can be desirable to assign rights for the first time is when a previously unvalued resource becomes economically valuable or ecologically scarce. A resource which previously had no value can become valuable because of technical change. An example is the use of the ether for radio transmission, another is drilling for oil under the sea and outside the territorial limit. And when air travel started to grow, it was found necessary to take the resource of air space out of the private domain (previously it had belonged to the owner of the ground under the air space) and put it into the public domain (either an open-access resource or state property). Resources which are ecologically valuable and become scarce can also be taken both out of the private domain and the public domain (nobody is permitted to pluck protected wild flowers or capture protected birds, even on her own land). A resource which is in the public domain and which is threatened by the external activities of others can be taken into the private domain: an example which we shall investigate in Chapter 7 is the attractiveness and reputation of a neigh-

bourhood, which in some housing schemes is made a right belonging to the residents.

Yet another reason can arise when the exercise of a right causes a positive externality which is in the public domain: anyone can benefit by that action, but the person taking the action cannot profit from it. An example is putting up a building with a pleasing appearance, another example is a farmer eradicating a pest on his land and therefore stopping that pest invading neighbouring farms. That action will probably be undersupplied: for if the supplier could profit from the benefit to others, she would supply more. A remedy is to take the benefit from the public domain into the private domain by creating the appropriate rights. A good example is that of the orchard holder who inadvertently provides pollen and nectar for the beekeeper nearby, and benefits by having the fruit trees pollinated: this was given by James Meade as proof that there were some goods which the market could not supply: until cases were found where orchard holders and beekeepers made contractual arrangements with each other to continue the mutually beneficial services (Cheung 1973).

The main rules within this sort

The state can make existing rights clearer, by resolving ambiguities over contested resources. If it is not clear, for example, whether my neighbour has right to daylight in her back garden, I can exercise a presumptive right and grow very big trees in my back garden. A ruling that there is a right to daylight in one's back garden takes my presumptive right to grow a large tree in my garden away from me. In Dutch law, there is a ruling that rights in land which belong to no-one (res nullius) belong to the state (Civil Code book 5, article 24).[2]

The state can create a new right, such as the right of amenity (Mishan 1967, quoted in McAuslan 1975), or re-assign existing rights.

> What is being proposed is an alteration of the legal framework within which private firms operate in order to direct their enterprise towards ends that accord more closely with the interests of society . . . The recognition of amenity rights has favourable distributional effects also. It would promote not only a rise in the standards of the environment generally: it would raise them most for the lower income groups.
>
> (McAuslan 1975: 71)

The possibility mentioned in Chapter 5 of creating or changing rules so that 'club goods' become possible fall in this category. Actual examples of re-assigning existing rights are giving protection to tenants (the law no longer protects the owner if he tries to evict a tenant, protecting the tenant instead) and leasehold enfranchisement (the holder of a long lease acquires the right to buy the freehold and the freeholder cannot refuse to sell it to her).

It can be decided that certain types of rights be owned or exercised only by certain types of persons. The state, in its role as law maker, can decide that farms bigger than a certain size may be owned only by a state body or by a recognized cooperative, and not by a private person. Or that land with certain properties or in certain locations (such as wetlands, or mountains) may not be owned by private persons. In the Netherlands, all rights to extract and exploit mineral deposits are owned by the state. Related to this are rules which make it impossible to own some rights as private property, restricting them to state or common property or even non-property. The example of air space has already been given (and see Chapter 5).

The economic consequences of the rules

When the state is deciding whether to assign rights for the first time, or whether to change the existing assignment, and it is desired to take account of the effects on economic efficiency, there is a widely quoted rule: Assign rights to the party who values them most (Cooter and Ulen 2004: 98). The argument is that such an assignment makes exchange of rights unnecessary, saves the costs of transaction, prevents coercive threats and eliminates the destructiveness of disagreement.

A corollary to that rule, also widely quoted is: assign rights over a resource in such a way that all possible rights are in the hands of one owner. 'The more property rights we hold in a good, the smaller is going to be the gap between private and social costs' (Pejovich 1997: 84). This rule can be socially dangerous, for it can lead to an accumulation of rights: and we must not forget that one man's rights are another man's duties. The 'gap between private and social costs' is the result of externalities: there are other ways of reducing the undesirable effects of externalities than by concentrating rights.

Both those rules are derived from what is known as the normative Hobbes theorem: Structure the law so as to minimize the harm caused by failures in private agreements (Cooter and Ulen 2004: 97). However, that latter theorem does not necessarily lead to the assignment or re-assignment of rights. For if the transaction costs that would result from changing the existing assignment of rights would be greater than the increase in economic efficiency, it is economically better to leave the rights as they are. An example is navigation on the high seas (see Cooter and Ulen 2004: 148; Webster and Lai 2003: 189). An everyday example is traffic lights. It is in principle possible that road users be given rights so that they could cooperate privately to coordinate how they would use a busy road junction. In practice, we prefer to let the state regulate that for us with traffic lights and with sanctions if we 'drive through red'. This sort of regulation is 'not really forcing people to do what they don't want to do, but rather enabling them to do what they want to do by forcing them to do it' (Bromley 1991: 41).

The distributional effects of the rules

The initial assignment of rights in land has enormous distributional effects. It is not just that some people own huge areas of land and others very little or none at all. It is also that the initial assignment can affect the bargaining which could lead to rights being re-assigned, for the owner of a right can always (under private law) refuse to bargain. And if he bargains, the distribution of the costs of re-assignment are affected by the initial assignment. Suppose, for example, that my neighbour has the right to sunlight in her garden and I grow tall trees in mine: she can require me to cut down the trees. Suppose I have a right to grow tall trees in my garden and my neighbour does not like the shade in her garden but has no right to sunlight: she can pay me to cut down the trees. The end result is the same although the initial assignment was different. But to achieve that end result in the second case costs my neighbour money. (This is discussed at length in Bromley 1991: chapter 3.)

Here, however, we are concerned with the distributional effects of *changing* the initial assignment of rights in land. Some people gain and others lose.[3] The state, through its law-making organs, has to make a decision. There might be a preference for the status quo, in the social and economic interests of stability. But we must not forget that the status quo is strongly influenced by how in the past the state has recognized or endowed rights: and for that reason the existing assignment might contain distributions which are difficult to defend today.

We must recognize that a re-assignment made in order to further economic efficiency might have undesirable distributional consequences. Take, for example, the statement: assign rights to the party who values them most. A richer party will usually value a right more highly than a poorer, simply because the richer party can put more money behind what he/she wants. A firm wants to extract limestone and make it into cement in the Peak District National Park in England. That firm values highly the right to the land on which that can be done, far more than a farmer would. Yet the majority of the users of the park would prefer that the farmer have the land. And if a settler in a new colony can buy the rights to hundreds of square kilometres of land from the natives for a few guns and baubles, this also is in accordance with the efficiency rule, but would nowadays be regarded as unacceptable exploitation.

Private law rules about the remedies for the violation of property rights

Why this sort of rule is important

A use is a right only if it can be defended in law. Someone's rights are violated, that person (the plaintiff, the injured party) can ask the courts to take action against the violator (the defendant, the injuring party) in order to prevent that violation, or

to correct it. There are different ways in which that can be done, and they have different consequences for the effectiveness with which the right can be used.

The main rules within this sort

The injuring party can be required to pay damages to the injured party. This is called the 'legal' remedy or the 'liability rule'. The requirement can be to pay compensation for damages that have already been incurred, but also for damages that are expected to arise in the future from the violation. Alternatively, the injuring party can be enjoined to take, or refrain from taking, a specific act. This is an injunction, called the 'equitable remedy' or the 'property rule'. The injunction can be either temporary or permanent. Note that an injunction allows the owner (this plaintiff) to defend her right from violation: but the owner might not choose to do that. If my neighbour's right to use her garden peacefully is violated by my mending cars in the back yard, she can get an injunction to stop me. Then she can make an agreement with me not to enforce that injunction. This can be in return for money, or services (such as that I mend her car for free).

A combination of the two rules is 'compensated injunction' (Ellickson 1993: 738ff.) or inverse damages. Here, the plaintiff enjoins the defendant's conduct, but only if he compensates the defendant for the defendant's losses caused by the injunction. In non-legal language: suppose someone in my street starts to sell second-hand cars from his front drive. I and my neighbour suffer nuisance from this, and we take the dealer to court. The judge orders him to stop and requires that I and my neighbour compensate him for the loss of business. This is an appropriate rule when the person causing the damage does not have much benefit from that action, but that action damages the other person greatly.

It can be determined that some rights are inalienable. An inalienable right in this sense (Bromley 1991: 43ff.) is protected absolutely by the law. If it is violated, that cannot be compensated by money; if an injunction is placed on the violator, that may not be bargained away; and the owner may not dispose of it even if she wants to. An example is a public right of way over private land: in England, this can be alienated only by an Act of Parliament. Bromley (1991: 86) argues that the rights of future generations could be protected by declaring them by law to be inalienable. Ellickson (1973: 773–774) points out that some activities, although unneighbourly, should be 'constitutionally privileged' in order to protect civil liberties and equality of opportunity: an example would be hanging a poster in the front window of your house urging others to vote for the political candidate whom you support.

The economic consequences of the rules

These rules can be judged according to how they stimulate bargaining and innovation. Bargaining gives the parties the possibility of reaching a mutually desired

solution, innovation can result from making it possible to continue the activity in such a way that it causes no damage. In principle, both the damages rule and the injunction rule allow bargaining and can stimulate innovation. Requiring that damages be paid can lead the injuring party either to pay up and stop, or to pay up and continue, or to try to reach a bargain with the injured party so as to avoid having to pay the damages, or to look for new ways of continuing the activities in such a way that there is no longer damage to another's rights. Issuing an injunction can cause the injuring party to stop the damaging activity, or to try to reach a bargain with the injured party so as to prevent the injunction, or to look for new ways of continuing the activity in such a way that it causes no damage.

However, bargaining will not always be possible. That will depend on the transaction costs. If one person's actions transgress the rights of just a few others, there is the possibility of bargaining, and both damages and injunctions allow this. If one person's action transgresses the rights of many other people, such as fumes from a factory damaging many homes, then bargaining is well nigh impossible.[4] In that case, damages are to be preferred to injunctions, because the former allows the injuring party to continue the activity, if that is still worthwhile after paying the damages, whereas an injunction excludes that possibility. That is, in any case, the theory (Cooter and Ulen 2004: 104–105; Bromley 1991: 46). But the transaction costs of calculating the damages and who is harmed, and of making the payments, can be very high. It is for those reasons that the simpler method of injunctions is often used, for example to stop the factory emitting damaging fumes. (For a much fuller discussion, see Ellickson 1973.)

If the right is inalienable, then other considerations apply. There is a general economic principle that it should be possible to trade resources freely, for then they can be enjoyed by the party which values them most. Protecting a right by making it inalienable rules that out. The reason for doing that is not economic but moral (for example, protecting the interests of future generations) and/or distributive (for example, to prevent a concentration of power or money). An example from land is a public right of way across private land. The owner of the land is not allowed to agree with the users (even if this were possible) that the right be terminated, for it is desired to keep this right for future generations.

The distributional effects of the rules

The aim of protecting property rights is to keep the existing distribution unchanged. Compensation is a compulsory transfer, designed to return the situation to the status quo ante: the plaintiff is 'made whole'. The redistribution which had occurred because of the violation of the right is cancelled out. An injunction is designed to prevent the redistribution (from injured to injuring party) taking place: but no compensation is liable for any temporary redistribution which might

have taken place before the injunction came into effect. And if the temporary redistribution is in fact permanent – for example, the fertility of my land has been destroyed by deposits from a nearby factory – then an injunction is not enough to restore the distribution. Damages should be paid as well.

In order to protect property rights under private law, the defendant has to take an action against the plaintiff. In the real world, this takes time, money and knowledge. If one of the two parties has more time, money and knowledge than the other, this will affect the outcome of the action. Concretely, if a firm pollutes the water that flows through my land, I might have the right to take the firm to court to correct for that: but David usually loses against Goliath.

It can, of course, be decided *not* to protect a right in land, precisely because it is *not* desired to retain the existing distribution. This was an issue in Britain in the 1930s, when many ramblers trespassed in a coordinated way on private grouse moors. They put forward the moral argument that a few rich owners of huge landed estates were preventing many ordinary folk from enjoying a harmless walk in the countryside. The trespassers won their case.

Private law rules about the holder of a right splitting off a part of that right and letting others exercise it

Why this sort of rule is important

The right to own land includes the right to use it for very many different sorts of actions, some of which the law recognizes separately and some of which it does not (see Chapter 3). Then the possibility arises that the owner of the right wants to split off one or more lesser rights (the right to perform one of those actions) and dispose of them (sell them or give them away). Such an agreement is not a right unless the law recognizes it. Then there is the question: how should the state decide which lesser rights over your land you may let another person exercise? Or, expressed negatively, why should the state not recognize all the rights which the owner wants to split off?

The answer to the negative question is: the state should not recognize the splitting off if that would have undesirable effects in the future, for example for those who were not party to the agreement, but have taken over the rights and duties. So the state imposes 'constraints on excessive decomposition' (Ellickson 1993: 1374ff.)[5]. Ellickson (1993) puts it this way: the owner who splits off very many rights becomes an authorized manager of land, and the collectivity has the right to expect competent management.

The main rules within this sort

Again we take our lead from Ellickson (1993) by distinguishing between three types of right which can be split off and which the law might want to recognize:

the right to allow another to use your land in one particular way, the right to allow another to use a part of your land, and the right to allow another to use your land for a certain period. The first is an easement: someone acquires the right to hunt on your land, or to pass over it. The second is a lease (you do not want to sell that part of your land, merely to let another use it temporarily). Under this second type of right falls also a covenant: you do sell part of your land, but conditions are agreed upon about what the new owner may do with it. An example of the third type of right is a leasehold interest.

The economic consequences of the rules

The general principle is that if two parties want to enter into a bargain (one party acquires a right in land from another party), this will be of mutual economic benefit. Nevertheless, there can be economic reasons why the state refuses to recognize certain types of transaction. This is where 'excessive decomposition' of the bundle of ownership rights might lead to economic inefficiency. This can arise when the right is a 'legal right' (it runs with the land), so that it binds not only the two parties who made the agreement (who, it can be assumed, can look after their own economic interests) but all successors. It is for this reason in particular that the state is often reluctant to recognize positive covenants, that is covenants which oblige all future owners of the land not just to refrain from doing something but also actively to do something (e.g. to construct and maintain a road).

The distributional effects of the rules

Once again, the principle is that if two parties want to enter into an agreement, they have taken account of the distributional effects and society should accept that. The exceptions are when the obligations become a burden to subsequent owners of the rights (see above) and when the two original parties had very unequal bargaining strengths. That latter consideration is often reflected in the details of landlord and tenant legislation.[6]

Private law rules about the holder of a right alienating it

Why this sort of rule is important

This is the question of whether the legal owner of the land, or the owner of a lesser right in that land, is free to sell it, give it away, or bequeath it to whomsoever she pleases and under any conditions that she wants to impose. If there are no rules, then the rights in land within a particular location (a neighbourhood, a town, a state, a country) may become dispersed, or concentrated, also 'excessive

decomposition' of rights in one piece of land can arise. If it is judged that the existing owner is not the best person to take those future effects into account, rules can be made about alienating rights in land.

The main rules within this sort

There can be restrictions placed on to whom the owner of a right may transfer it. These can be restrictions on the voluntary transfer, such as the restriction on sale to a black person, which was valid in some parts of the United States but is now outlawed. Some countries still impose the rule that land may not be acquired by a non-national.

More common are restrictions on to whom the right may be bequeathed. May I bequeath my property to whom I want, or must I bequeath it only to my eldest son, or in equal parts among all my children?[7]

There can be rules also about the types of restrictions which the owner of a right may impose on the new owner. In the past, when family and landed property had more emotional significance than now, there was a bewilderingly complicated practice of placing restrictions on how the heirs might use the property they inherited. If I wanted to bequeath my farm to my son, but I did not want him to have that responsibility until he was 21, I could stipulate that trustees would exercise ownership until my son reached that age. If I wanted my property always to remain within the family, I could stipulate that my son must not sell it or bequeath it to anyone outside the family. Nowadays, the law allows much fewer 'restrictions on alienation'.

> See for example the will of Timothy Forsyte:
> All the rest of my property of whatsoever description I bequeath to my Trustees upon Trust to convert and hold the same upon the following trusts namely. To pay thereout all my debts, funeral expenses and outgoings of any kind in connection with my Will and to hold the residue thereof in trust for that male lineal descendant of my father Jolyon Forsyte by his marriage with Ann Pierce who after the decease of all lineal descendants whether male or female of my said father by his said marriage in being at the time of my death shall last attain the age of twenty-one years absolutely it being my desire that my property shall be nursed to the extreme limit permitted by the laws of England for the benefit of such male lineal descendant as aforesaid.
>
> (John Galsworthy *To Let*, 1921, ch. 11)

Much more relevant nowadays is the question of covenants. A covenant can be agreed upon when land is exchanged: it is an obligation entered into by the buyer of the land, or by the seller regarding land which remains in her possession, to use that land in a particular way. Are those conditions binding on

subsequent owners? The law maker can decide that certain conditions are binding, and others not. This topic is particularly relevant for the practice of trying to protect neighbourhood qualities by private law instead of by land-use planning (see Chapter 7).

There can be rules which prevent the owner of a right from alienating it at all. We have already mentioned above that some *rights* may not be alienated. Here we refer to the possibility that private law can prevent some *owners*, or owners under certain conditions, from disposing of their property. A common occurrence of this is when a trust holds property on behalf of somebody else. Another example comes from landlord–tenant legislation in England. A lease agreement which avoids giving the tenant security of tenure is not recognized in law, for the tenant's right to security is inalienable: she may not even willingly sign it away.

Some lesser rights may be alienated without the permission of the legal owner, other lesser rights only with that permission or not at all. This is regulated in countries with a legal system based on Roman law, in terms of the distinction between a right in rem and a right in persona. The owner of a right in rem may dispose of it to whom he wishes, for the right attaches to the land: the right exists regardless of who the owner is. The owner of a right in persona may dispose of it only to the person who created that right in the first place, for a right in persona is valid only for the person named. If the named person dies or wants to terminate the right, the right ceases also: it may not be transferred to another person, only back to the creator of that right. In English law, this is similar to the distinction between a legal right and an equitable right. The right to lease a building is in the Netherlands a personal right, in England a legal right. So in the Netherlands, the lessee is not permitted to sub-let, whereas that is permitted in England.

A particular sort of alienability is when a lesser right may be separated from the one piece of land and exercised on another (transferable development rights): some private law rules permit this, others do not (see Chapter 8).

The economic consequences of the rules

The general principle is that economic efficiency is advanced if people are allowed to alienate their rights. There are two reasons for this. One is that someone else might value it more highly than the owner, so a transfer will improve economic efficiency. The second reason is that if you are able to sell your right, you have a good reason to use it so that it maintains, or increases, its value. The economic argument against free alienability is if it would lead to excessive decomposition of partial rights in one plot (this is the reason for making some rights 'rights in persona'), or an excessive fragmentation of land ownerships so that possible re-use becomes more difficult,[8] or land being owned by persons who might damage the economic interests of other landowners (such as land owned by non-nationals).

The distributional effects of the rules

The other reason for this sort of rule is social, to prevent undesirable distributional effects. Inheritance laws are designed partly to protect children from the whimsical wishes of their parents, also to hinder the building up of huge landed estates and the concentration of power that this can bring. Restrictions on alienation can be used to stop outsiders penetrating the community and to stop one person building up an unhealthy concentration of economic power.

Private law rules about the holder of a right determining the duration for which others may use that right should he alienate it, and/or the duration for which others may use a right which he splits off from his own right

Why this sort of rule is important

The duration of a property right affects how it is used in that period. If the duration is short or uncertain, the owner of the right will be unwilling to invest time and money in improvements. That effect can be mitigated by rules about compensating the temporary owner when the property reverts to the freeholder. And a very long duration can produce complacency, leading to inefficient use of the right: then it can be desirable to terminate the right.

The main rules within this sort

Rules can specify the term for which a right is valid. A freehold right is held 'in perpetuity', which means that it endures as long as the first owner has heirs who can take over the right.

For other rights, the duration is limited and specified.[9] These are lesser rights split off from full ownership, such as tenancies and building leases. In some countries it is nevertheless possible for the owner of the full right to dispose of a lesser right for an indefinite period: the municipality of The Hague, for example, sells for an indefinite period building leases on land which it owns.

A variant of this is where it is specified that a right is valid only for the time it is held by a named person. A lesser right which 'runs with the land' or 'at equity' attaches to the land regardless of who owns it (a 'right in rem' – see above). Other lesser rights expire when they cease to be held by the person named in the deed of contract (a 'right in persona'). A variant of this is the 'life interest'.

Benjamin Disraeli, Prime Minister of Great Britain in the middle of the nineteenth century, married in 1839 a widow whose late husband had left her a

life interest in a house. Disraeli and his wife lived there for thirty-three years until she died, leaving Disraeli a widower. He had to move out of the house.

The economic effects of a temporary right depend on agreements made about compensation of the temporary owner when the right terminates. If there is no compensation, the freehold owner gains all the value increase during the term, including that caused by the temporary user: alternatively it can be agreed that the freeholder pays the temporary user some or all of that increase.[10] If the temporary right is a right in rem (a legal right), the temporary owner may sell it for full market value at any time.

The law can specify the conditions under which a right, although it has been created for an indefinite period, is deemed to have expired. If a resource has not been used fully for a certain period of time and there are others who want to use it, then the law might deem that the right of the first owner has expired and transfer that right to those who will use it fully. This is the legal doctrine of 'adverse possession'. The first owner 'sleeps on his rights', and for that reason the law no longer protects that right. 'Squatters' rights' are an example of adverse possession, where the rights of the first owner are not deemed to have expired, but are suspended.

The economic consequences of the rules

The usual economic argument for rights in land with a very long duration (such as freehold) is that it is 'a low transaction costs device for inducing a mortal landowner to conserve natural resources for future generations' (Ellickson 1993: 1368). Conversely, 'Usufructs tempt temporary owners to underinvest and to overexploit' (ibid.: 1367). That argument is, however, too simple. The first statement can easily be refuted by empirical evidence: many freehold owners have a short time horizon, which is understandable considering the effects of discounting.

'The current market value of a fee ... is the discounted present value of the eternal stream of rights and duties ... A rational and self-interested fee owner therefore adopts an infinite planning horizon when considering how to use his parcel', says Ellickson (1993: 1369). However, as we have seen in Chapter 5, the time horizon depends on the discounting rate used. At a discount rate of 5 per cent, 100 Euros 100 years in the future has a present value of only 0.8 Euros. The 'rational and self-interested fee owner' will at that discount rate adopt a time horizon considerably less than 100 years.

Moreover, leasehold interests can also be for a long duration.

'Walter Kendal of Lostwithiel was founder of this house in 1658 and hath a lease for three thousand years which had beginning the 29th of September 1652': hewn into the cornerstone of a house in Losthwithiel, Cornwall.

There is evidence for the correctness of the second statement: but only when the temporary user receives no compensation at the end of the term (as Henry George was fond of pointing out). Rules for adverse possession (and to a certain extent rules about squatters' rights too) should encourage the owner of rights to use them efficiently.

The distributional effects of the rules

The rules affect not only the economic value of the rights, but also who enjoys that value. If there is a right in persona in landed property, and the value of that right increases, that increase goes to the owner of the freehold right, not to the owner of the lessor right: if the right is a right in rem, the owner of the lesser right benefits from the value increase. The distributional effects of adverse possession and squatters' rights are even clearer: there is a redistribution from the sleeping owner to the active occupier. Because the sleeping owner is usually richer than the active occupier (for otherwise the owner would not be able to afford to sleep), this is a redistribution from rich to poor.

Private law rules about the holder of a right being able to exercise that right without hindrance from the activities of others on other pieces of land

Why this sort of rule is important

In Chapter 4 we discussed the external effects of exercising rights in land, making a distinction between positive and negative external effects and paying particular attention to external effects with a geographical dimension. There is a wealth of private law which takes account of these effects: in some countries this is regulated under nuisance law, in other countries (such as the Netherlands, where it is called 'good neighbour law') under land law.

We begin with the rules about not causing a nuisance to your neighbour, rules which are designed to allow the holder of a right to exercise that right unhindered by activities on the adjacent land. These concern the damage that A can cause to B by carrying out certain activities on his (A's) land. It can be ruled that you may not do things which harm your neighbour, or that your neighbour need not accept harm caused by you. Whichever way it is ruled, if A causes the harm, it is B who must initiate the legal action.

The actions of A can have also positive external effects on B. We have seen (Chapter 4) that such actions are usually undersupplied, leading to 'missed opportunities', and there we pointed out that private law rules can help to correct for this. For if there are benefits to be enjoyed by cooperating with your neighbour (as distinct from benefits of not being hindered by your

neighbour), then it can be desirable to anchor such agreements in law. One way of doing that is by property law. Suppose, for example, that three neighbours agree to use land in front of their houses for parking their cars. Who is the owner of that land? If one of the three neighbours sells her house, does the buyer have the same rights to use that shared land?

The main rules within this sort

Most countries have rules about not causing a nuisance to your neighbour, where the nuisance can include noise, vibrations, not maintaining fences, discharging water or extracting water, windows and balconies which interfere with privacy, restricting natural light, overhanging branches, and so on.

Property laws which make it easier to cooperate with your neighbour are less frequent and more difficult to create. Dutch law offers a solution through the construction which is called *mandeligheid*. Certain items of real estate may be owned only by the owners of parcels of land which benefit from those items. Examples are common walls, garages, forecourts. Who may own the shared items and what the rights and obligations are, are specified in the deeds of ownership of both the shared items of property and the property which benefits from those shared items.

The economic consequences of the rules

A nuisance is a negative external effect. The general economic principle is that if someone (Mrs A) takes an action which has negative effects which she does not have to reckon with, that will not give the best economic efficiency. However, we must not conclude that an effective law which prevents that nuisance will automatically improve economic efficiency. This was discussed at length in Chapter 4.

If private law rules about getting on with your neighbour allow positive external effects to be supplied in such a way that not only the receiver but also the supplier benefits, the economic effects are clearly desirable.

The distributional effects of the rules

Causing nuisance has distributional effects which society usually deplores. Mrs A should not be allowed to shift her problems onto Mr B. If nuisance laws can prevent or reduce that, that is a distributional effect which society wishes to see. As Ellickson (1973: 729) puts it: a plaintiff in a nuisance case is not benefited by being awarded judgement, he is simply made whole. The defendant is not harmed by an adverse judgement, he is merely required to make good the damage he has done. And to the extent that private law rules can encourage actions which generate positive external effects, the distributional effects are desirable.

Conclusion

This chapter, together with Chapter 5, has provided instructions for how to use the tools in a tool chest. 'Give us the tools and we will finish the job', said Winston Churchill in a broadcast to America in 1941, asking for more help in winning the war. 'The job' in our case is realizing ambitions for land use in a particular location. 'The tools' are rights in land. So we need to know what can be achieved with what tools. These two chapters offer that information, at least partially. We must not think that we can 'pick-and-mix', this tool from here and that tool from there. For we have seen (Chapter 3) that there is a system of rights in land in a society, which has to be consistent with the legal and constitutional system in that society. Nevertheless, there can be no rational consideration of which tools would be desirable (if the constraints would allow it) without knowledge of the economic consequences and distributional effects of the various tools. In the following chapters we shall put this knowledge to use.

To do this, we choose two particular applications: but there are of course many more possible. The tools we have made can be used in many different ways. In Chapter 7 we take one type of ambition for land use, namely to achieve a high level of neighbourhood quality. And we ask: could that be realized better by using private law rules than public law rules? In Chapter 8 we ask the same question, but with respect to another type of ambition for land use, namely at the scale of the region.

CHAPTER 7
APPLICATION: ACHIEVING NEIGHBOURHOOD QUALITY

> I let my neighbour know beyond the hill:
> And on a day we meet to walk the line
> And set the wall between us once again.
> . . . He only says 'Good fences make good neighbours.'
>
> (Robert Frost, 'Mending wall', *North of Boston*, 1915)

> Carol retained a willingness to be different from brisk, efficient, book-ignoring people: an instinct to observe and wonder at their bustle even when she was taking part in it. But . . . as she discovered her career of town planning, she was now aroused to be brisk and efficient herself.
>
> (Sinclair Lewis, *Main Street*, 1920, ch. 1, section III)

> they went back together to the village, in which he at last began to discover a certain consistency, signs of habitation, houses disposed with a rough resemblance to a plan. The road wandered among them with a kind of accommodating sinuosity, and there were even cross-streets, an oil-lamp on a corner, and here and there a small sign of a closed shop, with an indistinctly countryfied lettering.
>
> (Henry James, *The Bostonians*, 1886, ch. 35)

In this chapter we apply the concepts and theories from law and economics to one of the central questions in land-use planning: what can be done to realize a high quality of the land use in a neighbourhood? This question can be asked of both a residential neighbourhood and an industrial/business park. If the location is small and the users are fairly homogeneous, then the users themselves should be able find it quite easy to agree on what qualities they want in their neighbourhood. Then the interesting possibility arises: can those people arrange between themselves (that is, using private law) that those qualities are achieved and maintained, rather than that a state agency do that using public law?

This is even easier if there is a geographical self-selection, whereby people with the same ambitions for the quality of the land use choose to live near to each other. This is what Tiebout (1956) advocated for local government areas, but applied at an even smaller scale. Geographical self-selection

creates, by definition, geographical segregation, with all the dangers which that brings. In practice, it might be necessary to weigh up the dangers of geographical segregation against the wish of (certain) people to create the neighbourhood quality which they want. A possible solution is to take measures so that a homogeneous neighbourhood cannot be too great.

This is an alluring idea and for many years people have been looking for ways of doing this. If quality in a neighbourhood is defined as what the residents of that neighbourhood want, it should be in their common interest to realize it and to maintain it. The defining characteristic of private law rules is they are enforced by those who are harmed by the rules not being followed. A characteristic of a neighbourhood is that you are not forced to live there: if certain private law rules are in force in a neighbourhood and you choose to live there, then you are choosing also to live under those rules. The neighbourhood is then a club in Buchanan's terms (1965): it has its own rules for environmental quality, the members know that those rules apply and accept them, the members enforce those rules. Put negatively, the residents do not have to accept public law rules imposed and enforced by a state agency. Then you have what Ellickson (1973: 711) calls 'a collective system for the enforcement of privately negotiated agreements'.

An extreme example of this, which can serve as a reductio ad absurdum, is Vinkenslag, a large caravan settlement in Maastricht in the Netherlands. It was a very efficient community in internalizing externalities among the residents. And the residents did not want to accept any public law rules. As a result, this settlement caused externalities which were borne by people elsewhere. Electricity was tapped illegally, cannabis was grown on a large scale, income tax officials were too scared to assess tax obligations of the residents. In 2004 the burgemeester of Maastricht got the police to intervene.

What is neighbourhood quality?

What the people mean by the quality that they want for where they live is, in principle, for them to decide.[1] It can be the types of land uses (housing, retailing, industry, petrol stations, churches, etc.), it can be the building and subdivision details (plot sizes, building densities, building heights, open spaces), it can be details such as mowing the front lawn, painting the house white and not mending the car on Sundays. As long as certain minimum standards for public health, safety and hygiene are met (to avoid fire risk and dangerous traffic situations, for example) there seems to be no reason why the state should not permit such agreements. And if the people want to agree between themselves standards higher than those minima, even things which a state agency would not be allowed to regulate under public law (such as architectural details, keeping pets, the decibel level of stereo systems)[2], then why not?

In this chapter, we shall investigate the practice and ideas of achieving neighbourhood quality by private law rules in three countries: the United States, England, and the Netherlands. Achieving neighbourhood quality is more commonly done through land-use planning using public law: it is our intention to compare the public law way with the private law way, but not to make a judgement about which is preferable. This discussion focuses on the quality of residential areas, but the quality of business areas receives some attention too.

The sorts of private law rules that can, in principle, be used

Nuisance

If the actions of one person A interfere physically with the actions of another person B, this can be called nuisance. Examples are noise, smells, vibration. Under certain circumstances, this is regulated by private law: if B is harmed by the actions of A, B can go to the civil court to put that right. In some countries (including England and the United States) there is a special branch of law called nuisance law. In other countries (including the Netherlands) this is regulated under property law.

Easements

This is the right attached to one person's land to use another person's land in a particular way. An easement must confer a benefit on land (the dominant tenement or the benefited estate)[3] and burden other land (the servient tenement or the burdened estate). The major examples in English law are a right of way, a right of support, and a right to light. But there is a wide range of possibilities, such as that I have the right to enjoy the view of my neighbour's property in an unchanged state. An easement is a legal right: it runs with the land, and it runs in perpetuity.

> At the back of my house is a path running from the road behind several houses and stopping just after my plot. The land under that path is private property: the stretch running across the bottom of my back garden is my land. My neighbour, whose house is at the end of the path, has the right to use that piece of my land and I have the duty to permit that. The other neighbours do not have that right, for they have access to their gardens from the rear without having to use my land.

Covenants

This is a legal agreement entered into when the freehold on land is exchanged. One person (the covenantor) agrees to do something or to refrain from doing something on his land (the servient tenement) at the request of the owner of

other, named land (the dominant tenement) owned by the other person (the covenantee).[4] The servient tenement (the land thus burdened) can be either the land which is sold (the purchaser agrees to accept the burden), or other land owned by the seller (the seller agrees to accept the burden).

If a neighbourhood is developed by one party, that person can dispose of parcels of land under the condition that the purchaser will agree to do certain things and not do other things. The land thus purchased is a servient tenement. The developer can at the same time make the land thus purchased the dominant tenement over all other servient tenements on the estate. Then each resident can require each other resident to follow the terms of the covenant. If the developer can also make it obligatory that the new owners become members of a home owners' association, enforcing those terms is the task of that association, which makes it easier because it is less personal. Also, the home owners' association can be empowered to carry out tasks such as maintenance of common spaces. In that way, the developer can not only create neighbourhood quality, he can get the new owners to maintain it. Clearly, the developer will do that only if he expects that the future owners will pay more for the land under those conditions than without conditions. The purchaser is paying not only for the quality of the environment initially, but also for the expectation that the quality will remain.

If a covenant is to have that effect, then it must remain valid even if the first purchaser sells it to another. It must 'run with the land'. Not all covenants do: in particular it can be difficult to create positive covenants (the obligation to do something, as distinct from negative covenants, which impose the obligation to refrain from doing something) which remain valid even after a change of owner. And a covenant will not be effective if it is temporary or can be changed easily. For example, someone who is restricted by a covenant can apply to the court to have it lifted: the court might do that if conditions in the area have changed so much that the covenant is rendered meaningless. These matters are determined by the detail of the land law in the respective country.

Co-ownership

This is when two or more persons are entitled to simultaneous enjoyment of the same piece of real estate. Its relevance for neighbourhood quality is not that we are suggesting that everything in the neighbourhood be owned by all the users: that would a recipe for disaster. But it can be arranged that spaces which are shared and which are important for the neighbourhood quality be owned jointly by the users.

Legal vehicles

This refers to a legal, but not natural, person which owns and/or manages land on behalf of named others. For example, the possibility mentioned above, that all

the users of a neighbourhood be co-owners of the shared spaces, is not very realistic. But it is realistic that all those users set up a trust which performs that function and which is managed by a committee elected by all the users.

The Houston experience

Interest in this subject was awakened by Siegan's article in 1970 called unequivocally 'Non-zoning in Houston'. (I quote from this article extensively in the next few paragraphs.) So it is appropriate to look at the situation in Houston at the time he wrote and how it has changed since. The city had no zoning in that it 'has no ordinance that sets forth specific restrictions on the uses that may be established on any property ... [The city] is legally unconcerned whether any given tract is used for a mansion or for heavy industrial, or any other purpose' (Siegan 1970: 75). However, Houston did have the following public law land controls:

- a building code;
  This covered the usual technical matters, also specified distances between buildings.
- subdivision regulations;
  A subdivision 'plat' was required for all single-family construction and might be required for an apartment, commercial or industrial development. For those properties affected, building permits would not be issued unless the lots are part of a subdivision approved by the Commission. The regulations allowed for minimum lot widths and minimum lot areas, building lines, minimum dimensions for open courts and inside streets.
- an off-street parking ordinance for dwellings (but not for commercial and industrial uses);
  The traffic department controlled all means of entrance and exit to and from properties fronting on public streets. Driveways, parking areas and aisles were thus controlled for safety and traffic flow. If there were congestion problems at a particular location, the city could require the new business to install an auxiliary lane.

The existence of those regulations means that Houston was not an example of a free market in rights in land (Larson 1995), but of a free market in one partial right, that is the right to determine the use to which the land is put. Moreover,

> Houston has had, since 1940, a city planning department which otherwise functions in ways comparable to such departments in other large cities. It makes studies and recommendation for the location of streets, parks, public buildings, public utilities, waterways, examines plats of subdivision, etc.
>
> (Siegan 1970: 73)[5]

What was absent was zoning. The function of zoning was fulfilled to a great extent by private law covenants. The terms of the covenants were determined by the developer of a particular subdivision and often the mortgage lender as well, and they were agreed to by the first purchaser of the property. The covenant ran with the land, so subsequent owners also agreed to abide by the terms. Violations could be enforced by action of any of the owners within the subdivision. Often the owners set up a civic club to act on their behalf in this and other matters. Any change in the covenants required approval of all the owners. Frequently, the covenants contained controls not normally found in zoning ordinances (and which might be illegal if they were), such as architectural requirements, costs of construction, aesthetics, and maintenance of the exterior. Almost all of the covenants contained specific termination dates: so when the restrictions expire, so do virtually all controls over land use in these areas. However, most covenants contained the automatic extension provision: the covenants were to run with the land for a specified period of time, typically 25 to 30 years, and were renewed automatically at ten-year intervals ad infinitum, unless 51 per cent of the owners of lots (or frontage) decided to cancel or amend them before the end of the first of any subsequent ten-year period. (This provision was in any case required by the mortgage lenders, who want to maintain the value of their rights.) The imposition of restrictive covenants was not confined to residential properties: developers of industrial parks used them as well (but not for shopping centres, where the lease agreement fulfilled the same purpose).

Siegan compared the pattern of land use in Houston without zoning with what it might have been with zoning. The answer he gave was: the patterns are not very different. The reason is that without zoning 'the market' determines the land use, and 'it almost appears that the market has created its own zoning' (1970: 107). There is a tendency for uses to segregate themselves for economic reasons: and planners make zoning plans which replicate what the market would do. The main differences were, he surmised, that in Houston there were more apartment buildings, more areas adjoining major thoroughfares were being used for all varieties of commercial and multiple-family purposes, and there were more non-home uses in single-family areas behind the major thoroughfares.

It is, however, rather misleading to take Houston as an example of private law rules being used as an alternative to public law rules for land-use planning. For it is characteristic of private law rules that they are enforced by the party whose rights are being violated: an action is taken by a plaintiff against a defendant. In Houston, however, most enforcement of the covenants was carried out by the city itself. Moreover, it did this not on behalf of the private landowner (the landowner did not take the initiative), but the city acted in what it saw as the public interest. The covenants were privately drafted without any desire or belief that the city would ever have any role in their enforcement. Thereafter the city did that on its own initiative, as if it were the owner of property benefited by the

covenants. And it went further than that: the city would withhold certain permits when the use for which the permit was sought would violate covenants restricting the property to single family use. It is understandable that the city council did this, for one of the disadvantages of private law rules applied in this way is the very high transaction costs of enforcing the rules: if the city takes on this task, the transaction costs are much lower. Nevertheless, it seems to belie many of the claims for the superiority of private law rules over public law rules.

Writing more than thirty years later, Neuman (2003) reports that Houston still has no zoning. The situation described above has changed but little. There have been five serious attempts to introduce zoning to Houston since 1929, all of them voted down.[6] Yet, curiously, Houston – the nation's fourth largest city – has the nation's largest planning department. What is that department doing, if not making and enforcing zoning plans? In particular, is it doing anything to achieve and maintain a good quality in its neighbourhoods, or is it leaving that to the market actors (with a lot of public help in enforcing the covenants)?

That question is relevant, for – says Neuman (2003) – residents are becoming increasingly concerned about threats to the quality of their neighbourhood. 'How to control undesirable uses when the main legal instrument of control [zoning – DBN] was taboo?' The answer is, the city is doing that with neighbourhood based planning, which entails

> deed restriction programs [restrictive covenants – DBN], land assemblage in unconsolidated areas to foster development and redevelopment, urban design projects, and parks, playground and civic improvements. These are assisted in part by a neighbourhood matching grant program, an annual Neighbourhoods Connections conference, and a Leadership Institute to develop home grown community leaders.

This is, says Neuman, 'distant from the zoning formula as practised in most American cities' (2003). Yet it might be that the system of people achieving and maintaining their own neighbourhood quality using private law rules would collapse without those actions taken by the state agency and the big planning department.

Achieving neighbourhood quality in America

What are the public law instruments?

Zoning is carried out by the town government, except on 'unincorporated land' when it is carried out by the county (but not all choose to do that). Those local governments have powers for this delegated by the state level of government. Zoning regulates the use of private land, the density of structural development per unit of land, and the dimensions or bulk of buildings. Usually, a zoning plan is made which lays down those regulations per plot or per zoning district. Building

is not permitted unless the developer has first submitted an application: the application is tested against the zoning plan. It is not the case that the permit is automatically refused if the application does not conform to the plan, for there are a number of ways of using the plan flexibly. However, because most of those ways require a public hearing, the residents of an area have a say in whether the zoning plan is followed or not. Development has to conform to other public law regulations too, such as building codes, housing codes, fire codes, health codes. However, 'Zoning regulations are the most significant land-use controls in that they have a far greater effect on land values than other kinds of regulatory ordinances' (Ellickson 1973: 691).[7]

What are they used to achieve?

Zoning is often presented as a method for resolving conflicts among neighbouring landowners. That is, resolving 'externalities which are harmful to nonconsenting outsiders' (Ellickson 1973: 684) and internalizing harmful spillovers. e.g. extra traffic, noise, visual amenity. This goes further than common law nuisance: after the famous case of Euclid (1926) it was established that zoning could prohibit uses which were not strictly a nuisance, such as prohibitions on shops and apartments.[8] There can be for example rules about 'unneighbourly population densities' which are used to prevent unwanted localized concentrations of population, with associated noise, traffic, parking, and visual effects. And zoning regulations go further than that. In a famous court ruling in 1974, it was established that zoning could be used to create a neighbourhood 'where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people' (quoted in Cullingworth and Caves 1997: 76). So when a zoning law specifies 'single family homes', that might be different from a 'single household home': the people living there must be a family related by blood or marriage. For those reasons, it is better to see zoning as a method for achieving a wide range of neighbourhood qualities, not just for regulating external effects. And, most importantly, zoning is a method for providing 'long term security against change' (Cullingworth 1997: 56): it must not only achieve those qualities, it must maintain them as well.[9]

Clearly, zoning can have a large effect on property values and on the stability of those values. This is one of the reasons why changes (variances) to a zoning plan are often hotly contested.

Could those goals be achieved by private law instruments?

A lot of ingenuity has been expended in finding alternatives to zoning. To the extent that zoning is used to reduce nuisance, it is has been proposed that this function be fulfilled by a better nuisance law. This would hold the landowner carrying out the damaging activity responsible for any loss. The person suffering

the loss could ask for an injunction or for damages. Nuisance laws have the advantage that they can be used to tackle not just future nuisance (as zoning laws do) but existing nuisance also.[10]

To the extent that zoning is used not just to tackle externalities but to achieve wider neighbourhood qualities as well, nuisance law will not help. However, private and permanently binding contracts negotiated between landowners could fulfil this function. Such contracts would regulate the price and terms of a transfer of control over land use from the one landowner to the other. There would be a partial exchange of rights, by means such as covenants and easements.

The most commonly applied contract is the covenant as described above, although it has several weaknesses. One is that it can get out of date. The courts can terminate covenants when neighbourhood conditions have changed, either because of external changes or because many violations have incurred and not been enforced.[11] Under US law, covenants are not in perpetuity and will therefore expire: but this can be avoided by standard termination procedures, such as that at the end of the term all parties are deemed to have agreed to a continuation unless otherwise stated. And covenants can be expensive to enforce. The covenantees (owners of the benefited land) have to engage a lawyer, and some of those who would benefit from the enforcement can take a 'free ride' and refuse to share the costs. The way the City of Houston has tackled this problem has been described above.

Since Siegan (1970) and Ellickson (1973) there has been a vast increase in the number of common property regimes for homeowners, regulated by covenants, conditions and restrictions (CC&R's). They are clearly popular, but can have disadvantages too. Richardson (2002), who takes a fairly libertarian stance in land-use planning, has written of the privately regulated neighbourhood where he lives: 'There is no more dangerous tyranny than that of your neighbours in the form of a Homeownership Association Board'.

> In 1970, around 1 percent of Americans lived in a private community association: today the figure has reached 17 percent. There are now more than 200,000 private community associations in the US, some of them having many thousands of residents. Since 1970, about one third of the new housing units constructed in the US have been included within a private community association. The Community Associations Institute estimates that, nationwide, about 50 percent of new housing units in major metropolitan areas are today being built within the legal framework of private collective ownership.
>
> (Nelson 2004: 95)

There is another and complementary alternative to zoning which has been proposed but rarely applied. This is to create a legal vehicle for owning on behalf of the residents the 'collective property' in the neighbourhood. This collective

property could be the shared spaces, possibly also easements on the privately owned properties, even more widely 'neighbourhood qualities' which increase the value of those properties (Nelson 1977). We are familiar with one legal person owning a whole residential estate, the dwellings and the shared spaces, where the residents are tenants. What is proposed here is a new tenure system based on the idea of condominiums (owner-occupied apartments). With condominiums, the residents own a private right to their own space and they own jointly the shared spaces and structures. When applied to a neighbourhood, the shared spaces would be collective property of the residents.

The dangers of this type of privatization are well known, and are usually discussed in the context of rich people isolating themselves: 'the secession of the successful' (Nelson 2004: 119). But such legal vehicles can be used also by poorer people to give themselves more autonomy and to protect their neighbourhoods from invasions by the rich and powerful. It is for this reason that Doebele (1983) proposed neighbourhood ownership. In the US this is now practised with 'community land trusts'. These are 'nonprofit organisations that provide homeownership for underserved families by purchasing land, retaining title to the land, and selling only a ground lease interest in the home' (Fannie Mae, 2003 Community Land Trust Option). It can go further than that, with land trusts owning and managing not only housing land but also open spaces on behalf of the residents.[12]

So far our investigation of private law instruments as an alternative to the public law instruments has concerned neighbourhood quality in residential areas. In business areas in the United States there is a frequently used legal vehicle for maintaining and improving neighbourhood quality when this is under threat. These are the Business Improvement Districts (BIDs) (Houston 2003). If some of the businesses in a particular area are concerned that the neighbourhood quality is deteriorating, absolutely or relatively to other areas, they can apply to the municipality to declare their area a BID. If the municipality agrees, it designates the area formally, and new rules become binding on all the property owners there. The municipality then levies higher property taxes on those businesses, using the extra revenue to fund improvement and maintenance schemes. The municipality can set up a separate redevelopment agency to receive the money and carry out the works. This is not an example of an exclusively private law arrangement: that would not work in these circumstances, because it would not be possible to exclude free riders. It is, however, interesting as an example of the users of a neighbourhood taking the initiative to maintain or improve neighbourhood quality at their own expense.

Are those private law applications an adequate alternative to zoning?

Can such private law rules achieve what zoning is used to achieve, perhaps even more effectively? In seeking an answer we shall start with the experience in Houston, because this has no zoning and because it has been systematically

investigated. Siegan (1970) claims that the land use in Houston is similar to that in other cities, suggesting that working with covenants does indeed achieve what zoning aims to do. Feagin (1988) does not agree, and points to flooding, water pollution, major subsidence, sewage, and street maintenance problems. The connection between these problems and the non-zoning can be made by reference to Ellickson (1973), who recognizes that nuisance laws alone cannot tackle some external effects as effectively as current zoning laws do. This is where the nuisance is pervasive.[13] Then the private law rule of injunction is the only practicable solution: but public law solutions might be preferable.[14] If the nuisance is substantial for a few people and small for many, then the few people should be able to take action under private law and in addition the public law could be applied on behalf of all other people.[15]

This argument is valid also for attempts to replace zoning with covenants. Those latter can solve the problem of individuals causing external effects within the neighbourhood; but not the problem of the neighbourhood causing external effects in other neighbourhoods. Such effects can be overloading the sewerage system, creating excessive run-offs leading to flooding, deleting ground water leading to subsidence, industries polluting the air. The quality of one neighbourhood is not always independent of the quality of other neighbourhoods.

Achieving neighbourhood quality in England

What are the public law instruments?

The main instrument is undoubtedly development control: no 'development' is allowed without prior permission. Application is made to the local planning authority, which is either a district council (which falls within a county council) or a unitary council (which has the combined powers of a district and a county council).[16] The decision to grant or refuse an application is based on 'all material considerations' of which the content of the development plan is the primary consideration. There is a limited list of possible land-use designations. However, these public law instruments say very little about the neighbourhood quality in a new housing estate, for they usually do not specify any urban design requirements. Other public law instruments are the building regulations, ordinances for fire, for traffic, etc.

What are they used to achieve?

The development plan is used mainly to control the location of the housing development. The other regulations (traffic, etc.) affect the urban design, but not with a view to creating a good neighbourhood quality (which in English planning jargon falls under 'amenity'). If the local planning authority has this ambition, it tries to realize it during the development control process by using

the discretion which the public law rules give, in particular the power to grant permission subject to 'such conditions as they think fit'. The planning authority can in this way try to get the applicant to follow design guidelines for architectural and environmental quality. In addition, local planning authorities can impose 'section 106' obligations on applicants, although these are more often used to require the provision of facilities outside the neighbourhood than within it.

Could those goals be achieved by private law instruments?

It is useful to remember that big private landlords were carrying out effective land-use planning for residential estates on their land long before there were state agencies doing this. The instrument they used was the long building lease, and they used it not only to make money but also to create and maintain a good neighbourhood quality. How they did this is described by Booth (2003). It has become much less common, mainly because of two Acts of Parliament which broke open certain classes of private law contracts between ground landlord and ground lessee (the Leasehold Enfranchisement Acts of 1967 and of 1993). Those acts gave the lessee the right to purchase the freehold.[17]

Also to be mentioned is the use of private law by the planning authorities when they enter into planning agreements with developers: but those cases cannot be regarded as agreements freely entered into, as one party (the planning authority) has the bargaining strength of being able to refuse planning permission ('bargaining in the shadow of the law'). Such agreements were fairly common, but have now been largely replaced by public law planning obligations. (For more information see Cullingworth and Nadin 2002.) More relevant to our general argument is the use of agreements freely entered into between residents, and between housing developers and purchasers, for achieving and maintaining neighbourhood quality.

The current law of nuisance can have an effect on land use, as nuisance-generating uses will not locate near to nuisance-sensitive uses which could take them to court. And public law does not replace this private law: an activity can be an actionable nuisance although its perpetrator has obtained planning permissions for it (McAuslan 1975: 48). This is because planning law does not decide on the legal claims of neighbours between themselves. Corkindale (1998: 36–37) suggests another way of tackling nuisance:

> Users of land generating nuisance in the form of pollution could be required to purchase easements from neighbouring landowners, thereby internalizing the externalities. The neighbouring landowners would be compensated for the loss in the value of their land, and prospective purchasers of (that) land wishing to use it for a purpose which required a cessation of the nuisance generating activity would have to buy back the easement.

Pearce (1981) suggests that the law of trespass could be used if one person's property was invaded by dust from another property.

Restrictive covenants can be used and are used. They are not as effective as ground leases (McAuslan 1975: 302) and have the apparent weakness that only negative covenants are permitted, not positive covenants.[18] Someone buying a property accepts the restrictions placed upon it by the covenant, this covenant runs with the land, so the restrictions apply to subsequent owners too. However, restrictive covenants are not sufficient for managing shared spaces, which can make an important contribution to neighbourhood quality.[19] This limitation can be easily circumvented. For the developer, when creating the new scheme, sets up a vehicle which owns or leases the shared spaces and has the task of managing them. These are in effect amenity pressure groups with active powers. English law now regulates this with what is called a 'scheme of development'.

> The building scheme for a residential estate is the most common species within the wider genus, with each plot representing one house. Continuing restrictions maintain the tone of the estate, preventing further division, imposing building lines or regulating fences and roads ... A scheme requires an independent right for individual purchasers to enforce the estate rules without needing the support of the developer .. Reciprocity arises from purchasers knowing of and buying on the basis of mutual enforceability.
>
> (Sparkes 1999: 123)

This can be illustrated with the following rules from a scheme of development in the South East of England:
'Not to erect or suffer to be erected . . . any boundary or other wall, fence, hedge or other means of partition, other than the fences which at the date hereof have been approved. Not to erect or suffer to be erected . . . any building other than the existing detached dwellinghouse and garage. Not to make or permit or suffer to be made any external structural alternation to the said dwellinghouse and garage . . . without the consent in writing of the surveyor for the time being of the vendor. Not to place or keep or permit or suffer to be placed or kept upon any part of the property, any caravan house-on-wheels or other chattel intended or adapted for use as a dwelling or sleeping apartment or park, or otherwise leave or permit or suffer to be parked or otherwise left any motor car or other wheeled vehicle upon any part of the property . . . other than in the garage or any access way thereto. Not to hang out or expose or permit to be hung out or exposed upon any part of the property . . . so as to be visible from the adjoining highways . . . any laundry whether linen or other material or article of clothing or of furnishing . . . notice, bill, placard, poster

or other means of notification. Not to carry on or permit or suffer to be carried on . . . any trade, business, profession or vocation . . . other than as a single private dwelling house and private garage. Not to cause or permit or suffer any nuisance or annoyance to the owner or occupier of any adjoining or adjacent property.'

The residents, when asked why they accepted these restrictions, replied thast the rules gave them more certainty about their residential environment than public law rules would, with an explicit reference to the unpredictability of the English planning system. A group of the residents had gone so far as to buy the undeveloped land within view of their estate, in order to prevent it being built upon: once again, they had no faith that the planning system, which designated that land to remain open, would keep it so.

However, not everything can be regulated in advance, and that uncertainty gives your neighbour the possibility of tyrannizing you with unexpected demands. Pearce (1981) asks the question: suppose you think gnomes in your front garden are attractive and your neighbour does not?!

Grant (1998) is sympathetic to the idea of

> improving the mechanism of private law to enable private agreements to resolve land-use disputes at neighbour nuisance level . . . [This] would allow the state to withdraw from its current local land-use mediation role and obsession with loft extensions, granny annexes and running business from home . . . [E]xternalities in land-use and development control entail conflicts of interest between the damaging and the damaged party. When both of these parties are identifiable and there are no wider interests at stake, a clearer initial allocation of development rights . . . coupled to an enhanced negotiating and trading system, could greatly facilitate dispute resolution and economic efficiency.
>
> (Grant 1998: 73)

There are, however, two problems to consider, and he pointed them out ten years earlier (Grant 1988). One is that

> the courts should not be left to hammer out the necessary extensions to existing liability rules . . . There is no doubt that this redefinition could be done by legislation, but no doubt either that setting the boundaries would be as subjective a task as assessing the scope for planning controls.

The second problem concerns those with an interest, but no right, in a case between two parties. If that case is resolved in the civil courts, those with an interest (e.g. what is happening in my neighbourhood?) are excluded: if the case

is resolved by public law the relevant state agency can solicit the views of those with an interest and take those views into account. In that respect, the public law way takes the views of more people into account.

Pennington (2002) comes with a much more radical proposal, namely setting up 'proprietary communities'. These are not new: he gives the example of a shopping mall. The innovation is to apply them to neighbourhoods or even greater areas; but even this idea is not new, as Pennington points out by reference to Ebenezer Howard's idea that in a new town all land should be owned by a development board, as was realized in Letchworth.

> In a proprietary community, people enter into a voluntary contract to sacrifice complete control over decisions relating to their property to the principles of governance laid down in the proprietary contract . . . [It is] a mechanism by which externalities and other social aspects of living are internalized by ceding control to a central community landlord who resolves all environmental disputes out of court.
>
> (Pennington 2002: 93ff.)

This raises the old question: who plans the planners? Under Pennington's proposal, the 'planners' are a board elected by the property owners; under the present system the planners are officials working for the local council which – ideally – is answerable to the citizens. In the first case, the property owners have a financial stake in the outcome; but the 'franchise' is limited.

Are those private law applications an adequate alternative to local plans?

The question of 'pervasive' externalities needs answering not only in the US but in England too. Corkindale (1998) answers that in a way similar to Ellickson: with public law rules but not with land-use plans. His proposal is that

> the government defines in law what constitutes an acceptable and what an unacceptable externality for land-use planning purposes. The developer would be required to conform to a set of minimum environmental quality standards . . . The landowner has the right to develop . . . if he conforms to the standards.
>
> (Corkindale 1998: 43)

This is no more and no less that the application of locationally generic standards for testing prior approvals to develop. Corkindale recommends them – 'land-use quality standards' – 'because they would introduce greater openness and reduce or remove the . . . administrative discretion in British land-use planning' (1998: 45). A similar suggestion is made by Pearce (1981): that a state agency make a land-use plan as a guide to assist court-based decisions, by outlining the

nature of unneighbourly land use in particular localities. There could be a law, says Pearce, of public nuisance, whereby a public body takes up an action on behalf of a collectivity of private individuals. These suggestions are reminiscent of Ellickson's Nuisance Board (see above). And, as is the case with that proposed Board, the English suggestions would fulfil a double role: not only for dealing with pervasive nuisance, but also for helping the civil courts come to decisions in cases where the nuisance was limited in scope and was substantial.

Achieving neighbourhood quality in the Netherlands

What are the public law instruments?

The main instrument is a land-use plan (bestemmingsplan) in connection with the building permit. That permit is administered by the municipality and is not granted if the proposed building works would not conform with the land-use plan, with the national and municipal building ordinances, with any relevant regulations of the Monuments Act, and with certain aesthetic standards. The building ordinances are strictly applied, the monument regulations too if relevant. The aesthetic standards are tested by an independent board of experts using municipal guidelines. The requirements of the land-use plan can be detailed or very broad, and there are numerous possibilities widely used for granting exemptions from that plan. There are in addition public law rules about environmental nuisance (such as noise and emissions) which can be applied parallel to the land-use planning rules as a way of achieving neighbourhood quality.

What are they used to achieve?

Those public law rules are used to guide development along the lines established by the municipality: the Spatial Planning Act says nothing about the substance of what should be aimed for.[20] In practice, the planning agency (the municipality) often has high and detailed ambitions for the quality of housing areas (but less for business parks). The wish is to accommodate a range of activities at a fairly high density (land is scarce in the Netherlands), in such a way that the activities do not interfere with each other, that there is a diversity of housing types, and that the urban design is attractive.

Could those goals be achieved by private law instruments?

The irony is that in practice those goals usually are achieved by private law instruments. However, the private law instruments are used not by private parties but by the municipality, because it considers that the public law instruments are inadequate for realizing the municipality's high ambitions. The municipality does

that by first acquiring the land to be developed, often in close cooperation with building developers. Then the municipality services the land and sells it under private law conditions, in that way achieving the details of the desired neighbourhood quality. That does not allow that quality to be maintained in detail, however. So a few municipalities have gone further and disposed of the serviced land on long ground leases (for more details, see Needham 2003b).

Our interest here is different, namely: could private parties use private law negotiated and enforced between themselves to achieve the desired neighbourhood quality? This has attracted very little attention in the Netherlands, perhaps because people are satisfied with the way the public bodies (the municipalities) do this, perhaps because until relatively recently a large part of house building was by housing associations for rent. The exception is on industrial estates, where the municipality provides the building land but does not usually do this in such a way as to achieve, nor to maintain, high standards: there is dissatisfaction with the results (Louw et al. 2004).

The most effective way in which private law could be used to achieve neighbourhood quality is by ground leases (erfpachtrecht) and opstalrecht, which is another way of holding a building on someone else's land (Van Velten 2003: 402). A developer could supply land in this way and use his residual land ownership to create and maintain neighbourhood quality (as the big landed estates in England have done). Some municipalities have disposed of land in this way, but have not used it for that purpose (Needham 2003b). And nowadays no commercial developer would want to undertake that because of the long-term involvement.

There are various other ways in which private law could be used instead of public law, all included in the Civil Code. What in some countries is achieved by nuisance law falls in the Netherlands under 'neighbour law' (burenrecht). This covers not only what the owner of land may not do, so as to cause no harm to owners of other land, but also what the owner of land must tolerate from the owner of other land.[21] There is also a special kind of common property ownership (mandeligheid). This applies to landed property which benefits the property of more than one person: examples are party walls, estate roads, shared parking spaces. Ownership of the land which is benefited gives shared ownership of the common property, and the one cannot be separated from the other.

Easements (erfdienstbaarheden) can be used to create some aspects of neighbourhood quality. These run with the land ('droit de suite') and in that way give continuity. But they may be used only to require the burdened estate to refrain from doing something or to tolerate something.[22] Positive obligations are not possible. Landed covenants also are possible in Dutch law (*kwalitatieve verplichting*)[23]. They can be entered into at any time (not only when land is sold) and – unlike an easement – it is not necessary that there be a benefited estate. Like an easement, they may only restrict. That weakness of both easements and landed covenants can be remedied by a 'chain condition' (*kettingbeding*). This

can require the owner of land to enter into positive obligations. But the chain can be quite easily broken.

Neighbourhood quality cannot be maintained if it is not possible to oblige the residents or users of a residential area (or business park) to take positive actions. For example, Van Velten (2003: 391) says that easements and landed covenants could be used instead of public law if a legal person could be set up to supervise the observance of the rules: but it is not possible to require the residents to set up and become members of such a body. He regrets (2003: 444–445) that a home owners' association, such as plays an important role in the United States, is not possible under Dutch law. Van Velten Jr (2003) has suggested a solution to that for application to industrial estates and business parks. This is to use the legal construction of a condominium (appartementenrecht). The estate would be developed as a whole and registered as an apartment complex. The individual firms (the final users) would buy a plot or a completed building as if it were one apartment in the whole complex. The law on apartments regulates ownership and maintenance of the common parts well. Although this construction is rather clumsy, it has been applied to a residential area of 2,200 dwellings in Amsterdam (Mulder 2002).

Are those private law applications an adequate alternative to land-use plans?

Van Zundert (1980: 6) is critical of the current practice of using public law to 'regulate the relations between neighbours'. That should be a task for private law, he says. And it is possible also, as described above. The private developer in the Netherlands would buy land, service it, put in the infrastructure, dispose of the plots under an 'apartment right', and create an association of residents to own the freehold and manage the shared spaces. Under this 'apartment right', the association is run by, and can only be run by, the residents. The neighbourhood quality that was desired could be achieved in this way, and the association would maintain it. That legal construction would probably be more effective than the English or American covenants, because enforcing the agreements would be the responsibility not of the neighbours but of the association, which would also own and have the full responsibility for the shared spaces. The importance of such a body is so clear to the residents that they would see the need to participate actively in it. Such a construction is an example of Pennington's 'proprietary community'.

That such a construction is almost unknown in the Netherlands is probably because most Dutch people are satisfied with the way in which the municipalities create neighbourhood quality (although they are not so satisfied with the way that municipalities maintain that quality). However, this does not apply to industrial estates and business parks, and the new construction could be applied there with benefit.

Changing neighbourhood quality

So far we have been considering possibilities for creating and maintaining neighbourhood quality. It can be desirable also to change neighbourhood quality. This can arise if the buildings or infrastructure have become physically obsolete and/or if changing economic conditions have made them economically obsolete: they would have a higher value if changed. Then it can happen that the neighbourhood as a whole would have a higher value if changed, and that the increase in value would be greater than the costs of bringing about the change. This applies not only to residential neighbourhoods, but also to commercial centres and business parks.

Such situations are tackled, if they are tackled at all, by land-use planning using public law rules. The reason is that the coordination necessary to get all the owners to agree voluntarily to the change would be impossible, or too costly, to achieve. In addition, there is the possibility that some of the owners would 'hold out', hoping to get a price for their cooperation which was much higher than the value of their property. If nothing happened, that would be a missed opportunity. So a state agency gets involved, because with its public law powers it can if necessary apply planning permits, compulsory purchase, levies and subsidies. But is that inevitable? With the appropriate private law rules and vehicles, could not the property owners bring that about themselves?

Nelson's suggestion for making neighbourhood quality a private property right (1977) would, he argues, make it possible for the existing residents to act together to manage such a change. Private land re-adjustment is conceivable, and takes place sometimes.[24] More common is when a semi-private agency takes the initiative, such as a housing association: that association has freehold powers over a whole neighbourhood (except for the public spaces); its tenants have only user rights.

It is significant that all these examples or suggestions are for residential neighbourhoods: the property values in commercial centres or business parks are probably too high to allow such cooperation, even though the potential gains might be very much higher.[25] The experience is that in such areas, where the web of interdependencies is so closely woven and unless the initial assignments of rights is fortuitous, the redistribution of gains and losses ('owner equity') is too difficult to achieve through mutual bargaining. There might be a potential net gain, but before that can be realized, those who would lose would have to be persuaded to take part, and that would mean being compensated by those who would gain. The transaction costs of realizing this by voluntary cooperation are too high. It is then that public law rules are indispensable, such as flexible zoning ordinances, planning agreements, infrastructure contributions. Basically, they are used to redistribute from the gainers for the benefit of the whole scheme. And they work only because public law rules give the state agency a power base from which to negotiate 'within the shadow of the law', allowing what Verhage (1998) has called 'instigated cooperation'.

Conclusions

Effectiveness

This chapter investigates alternative ways of achieving and maintaining neighbourhood quality. The most common way of doing that is with public law rules, in particular land-use planning. Could the ambitions that we try to realize in that way be achieved equally well, or perhaps better, by private law rules? The answer, drawing on thinking and practice in three countries, is mixed.

If the ambition is to prevent one activity causing a nuisance to another, actions under nuisance law (perhaps in a revised version) could be effective if those suffering the nuisance are few and the nuisance is substantial. If the nuisance is pervasive, such private law actions will be ineffective or will not be undertaken.

If the ambition is to create and maintain a neighbourhood (for housing or for business) with a desired amenity, covenants are a tried and trusted way of doing that. It might be that the present law on covenants has weaknesses in this respect, but that law can be strengthened. There is one very important way in which private law rules can be more effective than public law rules, and that is in regulating the details of neighbourhood quality. A state agency will not want to impose on the residents of a neighbourhood that all houses must be painted white, or that no cars may be parked in the driveway, or that all front gardens should have a manicured lawn, for there will be some people who would regard that as an unwarranted restriction on their freedom. However, if people want to subject themselves to that restriction voluntarily when they buy the property, because that is what they want from their neighbourhood, then neighbourhoods which are run as clubs allow that.

In neither America nor England do the advocates of private law think that this alone can achieve the desired neighbourhood quality effectively. It is not just that it cannot deal with pervasive nuisance, it is also that the transaction costs of resolving everything through the courts would be very high. Houston is evidence of this.[26] So it would be the task of a state agency to set minimum standards to guide the courts, and to set up semi-public bodies to administer the rules.

Changing neighbourhood quality using just private law rules is nearly impossible, unless the freehold rights in the neighbourhood are all owned by one party. This could be the municipality, which had granted ground leases while maintaining the freehold rights (Bourassa and Hong 2003). It could also be a private landlord, who administered the whole neighbourhood as his estate. Or it could be a trust or proprietary community, such as that set up by Ebenezer Howard in Letchworth or that set up by the residents of Dudley Street in Boston (www.dsni.org).

Economic efficiency

There are various arguments that achieving neighbourhood quality through private law rules will use economic resources more efficiently than through

public law rules. One is the straightforward argument that under private law rules people can get better the things that they want: as long as that has no undesirable side-effects, it increases allocative efficiency.[27] Another is that public law rules, especially in land-use planning, work through prohibiting, and that is a blunt and wasteful instrument. If, for example, the land-use plan says 'nothing higher than three storeys' and neighbours would not object to a fourth storey, or the neighbours could be compensated for that extra storey with an amount less than the gain from building it, then prohibition prevents an economic net gain from being realized. The argument that in such conditions private laws rules necessarily result in higher economic efficiency I do not find convincing.[28]

Distributional effects

Achieving desired neighbourhood qualities through private law rules is what Buchanan has called 'forming a club'. People should be free to form and join clubs, also not to admit those who do not want to follow the rules (subject of course to the usual recognition of equal rights). As one of the Marx brothers said when his application to join a club was blackballed: 'I wouldn't want to be a member of any club that would accept me.'

Of course there can be undesirable distributional effects, for rich people have more time and money to form and run clubs than poor people. If the only way of getting housing with the desired neighbourhood qualities is through a private law scheme (for there is no zoning or its equivalent), then poor people might get a poor residential environment. And there might be many people who do not want the responsibility of regulating their own neighbourhood quality, preferring to let a state agency do that. Another possibility is that the people living in one neighbourhood cannot agree on the neighbourhood qualities that they want, or that they positively want to live in a neighbourhood with a mix of residents wanting a mix of neighbourhood qualities. For these reasons, there should always be appropriate public law rules (such as zoning), even if only as a default possibility. The irony is that, even when public law rules such as zoning are available, this often does not prevent poor people getting a considerably worse neighbourhood quality than rich people. In exceptional cases, those poor people have organized themselves into a club to improve their situation.

The other distributional effect to be considered is residential segregation. Neighbourhood quality achieved under private law allows in principle the provision of a wide range of different qualities. People will choose a neighbourhood with the qualities they want, which will lead to a geographical segregation by taste (Tiebout 1956). Is that undesirable? It is if that is also a segregation between the rich and the poor, between the powerful and the powerless and, at the same time, if the neighbourhoods are big. There is sufficient evidence that the 'geography of opportunities' is important especially for poorer people

(Forrest and Kearns 2001) and that land-use planning can affect it (Turok et al. 1999).

If private law rules are to be used to change neighbourhood quality, we have to be realistic and conclude that this would require one private person or agency holding strong proprietary rights at the expense of the residents or users of the neighbourhood. That distribution of power has to be very sensitively used.

CHAPTER 8
APPLICATION: REGIONAL LAND-USE PLANNING

> Before I built a wall I'd ask to know
> What I was walling in or walling out,
> And to whom I was like to give offence.
> Something there is that doesn't love a wall
> (Robert Frost, 'Mending Wall', from *North of Boston*, 1915)

> Only connect . . . Live in fragments no longer.
> (E.M. Forster, *Howard's End*, 1910, ch. 22)

> The ripest fruit hangs where not one, but only two, can reach.
> (William Plomer, libretto for the opera *Gloriana*, 1953)

We have 'ambitions for the quality of the land use' not only at the scale of the neighbourhood, but also at the larger scale of the city or the region. In this chapter we investigate the possibilities of realizing the ambitions at this scale by applying private law rules.[1]

What is land-use quality at the scale of the region?

At this scale, it is not so much the immediate physical environment which is the concern, but the result produced by activities in different locations within the region interacting with each other. If all the workers live in one location and all the workplaces are in another, this will result in many long work journeys, which are undesirable because of the amount of time lost, the congestion, the transport infrastructure, the traffic fumes, etc. If attractive countryside and valuable farmland are being built upon, while there is abandoned and developable land elsewhere, this is undesirable because of the loss of amenity in one location and the under-use in another. If houses are built in very dispersed locations and at low densities, the experience of open countryside that many people value is reduced, and public transport to serve those houses is uneconomical. If people move out of town centres because competition from commercial uses makes space too expensive, the support for schools and other community services in and around the centre declines and they close.

In such cases, there is little possibility of creating 'club goods' which would realize those ambitions through private law. At the scale of the neighbourhood, we focused on the possibility of structuring the interactions between suppliers of the built environment (developers) and the demanders (the final users whether households or firms). At the scale of the region, the final users have much less direct influence. They might be involved as, for example, enjoyers of the countryside or daily commuters, but there are so many such 'consumers' and each 'consumes' so little, that it is difficult to structure markets in such a way that the consumers could exert influence on the outcome.[2] So we focus instead on the 'suppliers' of the physical environment, those who take decisions about what activities to develop where, such as the developers of housing, shops, offices and industrial buildings, but also farmers, mining companies, foresters, etc. Can their decisions be influenced by changing the private law rules?

That is difficult, for the simple reason that very often the financial effects of those decisions for the developers are enormous. If one develops and the other does not, the first makes a lot of money and the second nothing. How can they decide that between themselves, using private law rules? If that is decided by public law rules, the regulations must discriminate between locations and therefore between the owners of rights in different locations. Land-use planning can make some people rich while others remain poor. Carrying out that planning with private law rules as a full or partial substitute for public law rules implies restructuring markets in rights and then regulating the actors in those markets less. Can that be done in such a way that the actors voluntarily accept the locational discrimination and the financial consequences?

The sorts of private law rules that can, in principle, be used

Various ways have been suggested for land-use planning at the regional scale using private law rules and in such a way that the locational variation in financial effects is minimized. Only one of these ways – re-assigning rights in land – relies entirely on private law: we describe this first. The other ways require the application of public law rules so as to create new market conditions, after which private law rules would determine the outcome.

The re-assignment of rights in land

The most uncontroversial way of doing this is for the person or agency which wants to see partial rights used in a particular way – for example, no building in a certain location – to acquire those rights at the market value. Private trusts do this quite frequently, wealthy persons too occasionally. They buy rights – either freehold or an easement – over land in order to preserve it from change. In the

United States, Trusts for Public Land are quite common, in England, English Heritage does this. The money comes from donations, legacies, etc.

State agencies may be empowered to do this too. For example, as early as 1938 the Green Belt (London and Home Counties) Act ruled that the owner of the land 'may enter into a covenant with the local authority restrictive of the user of the land' and the local authority may pay the owner 'any sum as they think fit and upon and subject to such terms and conditions as they may determine as considerations or compensation for a covenant entered into with the owner' (article 3).[3]

More radical is for the law-making body to decide that a right which has been exercised by the owner of the land is actually a presumptive right, and that it belongs to someone else. The suggestion made by Mishan (1967) that all citizens be given a 'right to amenity' would mean that anyone destroying amenity could be taken to court by any member of the public. The doctrine of public trust in Anglo-American property law could perhaps be applied here (Blomley 2004: 64). This would give the private citizen the right to take action against anyone who destroyed particular environmental qualities, even action against the state. The suggestion by Bromley (1991) that certain environmental rights belong to future generations and should therefore be treated by our generation as inalienable would have a similar effect. If such changes, once introduced, are to work through private law, that would require those whose rights were endangered (the plaintiffs) to take action against those responsible (the defendants) such as building developers. In the case of the right to amenity, it would not be sensible to rely on groups of citizens taking developers to court, except on very big schemes. And with Bromley's suggestion, future generations are not yet here to defend their rights: there is what he calls a 'missing market'. Different arrangements are necessary (see below, 'legal vehicles').

Creating markets in environmental bads

This type of measure begins by specifying a type of action which is socially useful, perhaps even desirable, but only in moderation and/or only in certain locations. Restrictions should be applied because of the environmental damage that such actions can cause. Examples are mining, large-scale house building, factory farming. A state agency creates a market for such activities in three stages. First the rules are set about who may potentially carry out the activity. Second restrictions are placed on the extent of the activity in total (this creates scarcity, which is a necessity for any market). Third, rules are laid down by which those with a potential right to carry out the activity can buy the right to do that in reality (environmental trading markets – Alexander 2004).

We give an example of how this might be applied in regional planning. Suppose that it was desired to restrict the extraction of limestone in the Peak District National Park, England. The first step is determining who should have

the potential right to do that. In this case it could be those who already have mining rights, or all those who own land under which limestone can be quarried. The second step is determining the maximum amount that may be extracted. This could be by area or by weight, expressed as so much every so many years. The third step is to modify the law, if necessary, so as to recognize the right to extract limestone as a right that may be traded. The suppliers are those with a potential right, the demanders are those who want to exercise that right. Then the market can begin. Those who do not mine can sell the right to do so, and in that way receive financial compensation.

Such environmental trading markets can be used to restrict the amount of 'environmental bads' in a region in such a way that those people who are restricted do not suffer financial loss (as they would by public law restrictions). Could that be done in such a way that, in addition, those environmental bads took place only in some locations and not in others? That too is an important part of regional planning. The answer is Yes!, as the example of transferable development rights shows.

Transferable development rights

The first step is to determine who is eligible to develop housing, office space, or whatever. This can be anyone with potential building land in the region. The second step is to determine how much such development is permissible within the region. The total amount of permitted development is divided equally between all those in the region with potential building land: but that right may be exercised only in certain designated areas within the region. If landowners in those designated areas want to carry out more development than has been allocated to them, they may buy development rights from those in the rest of the region. Rights are transferred from 'sending regions' to 'receiving regions'. The third step is to set up the rules by which development rights can be transferred from 'sending' to 'receiving areas'. The procedures as applied in some states of America are described in Schnidman (1978) and a recent evaluation is to be found in Lane (1998) and Alexander (2004). The method has been applied in Italy too (Micelli 2002).4 The same principle could be applied to influence the location of 'environmental bads' within the region, such as mining and pig farms.

The user pays principle

'The price of a natural resource should include not only the costs of extracting or harvesting the resource, but also any extraction-associated externalities and user-cost elements' (Corkindale 1998: 38). Then

> the government defines, in law, what constitutes an acceptable and what an unacceptable, externality for land-use planning purposes. The developer

> would be required to conform to a set of minimum environmental quality standards . . . The landowner has the right to develop . . . if he conforms to the standards.
>
> (Corkindale 1998: 43)

In the form proposed by Corkindale, this is a public law rule: it would change the rules for the granting of permits. In another form, it could become a private law rule: all the people living in a certain area have the right that someone using natural resources on his own land in that area takes full account of all the costs, direct and indirect, of doing that. In that private law form, the user-pays principle is an example of a presumptive right being taken from the developer and re-assigned to the citizens, perhaps represented by some legal vehicle.

New legal vehicles

If people hold rights in land which have been created and structured so as to make it possible to use them to achieve the goals of land-use planning, then those people must be able to protect those rights effectively. Even at the scale of the neighbourhood this can be difficult, because actions which harm the exercise of those rights can be pervasive – that is, widespread and no single person suffers much harm (see Chapter 7). At the scale of the region, the difficulties are proportionately greater. This is, after all, one of the reasons why regional planning is usually carried out – if it is carried out – by public law rules. This problem can be overcome by vesting the rights in a legal person which acts on behalf of the many private persons.[5]

We mentioned earlier the possibility of using private law to protect the interests of future generations. This could be realized in the following way. Someone – it could be a private person, a charitable organization, or a state agency – would acquire the rights to use land in a particular location in a particular way, for example the right to extract certain resources in danger of depletion. Those rights would be vested in a trust under the condition that they were not to be used for, say, fifty years. Trustees would be appointed to ensure that the conditions were followed. After fifty years, the trustees would offer the suspended rights for sale, under conditions specified in the trust.

We have seen (Chapter 7) that Pennington (2002) suggests setting up 'proprietary communities' at the neighbourhood level. He says that this could be done at higher levels also. This too could be a vehicle for exercising partial rights transferred to it from landowners in a region. Presumably the financial gains from exercising those rights would be redistributed among the members of the community. The remarks made at the end of Chapter 7 apply here too: is it socially healthy that a private body exercise proprietary powers over such a large area? Is it not better that such powers be in the hands of state agencies accountable to the public?

Regional land-use planning in America

What are the public law instruments?

Regional planning, in order to be fully effective, must be translated into zoning plans coupled with the powers for granting or refusing permits. And there lies the difficulty in the United States, for the general rule is that zoning is applied by the town or, on unincorporated lands, by the county – that is, at a scale smaller than the region. Constitutionally, there is no obstacle to the state government itself exercising zoning powers, for those powers have been given to the state ('Dillon's rule' – see Burke 2002: 5ff.). However, all states have delegated them to local governments, who resist fiercely attempts to take them back (Blaesser and Weinstein 1989: 8). Nevertheless, some states do, in the interests of regional planning, temper the power of the local governments to exercise zoning powers. Hawaii has state-wide zoning: but that is an exception. Some other states issue guidelines which local plans are required, or expected, to follow. The states of New Jersey and Florida have made state plans, against which local plans are tested: if the local plans do not conform, the state can use its own capital expenditure or the granting of funds to put pressure on the local governments. An increasing number of states are pursuing 'growth management' or 'smart growth' (Stein 1993; for an overview of the regulations in various states see APA 1999), which involves setting constraints within which local governments must use their land-use planning powers and making infrastructural investments which influence development rather than follow it.[6]

Another way in which the state government can pursue regional planning is by setting up regional bodies with limited zoning powers. This can be a regional body with the power to make zoning plans and issue permits (examples are the Adirondack Park Agency Authority, the New Jersey Pinelands Commission, and the Tahoe Regional Planning Agency). Less radical is when the state government sets up a regional authority with the power to check and if necessary reject the zoning plan of a town (if rejected, that plan has no legal authority) or to review and regulate developments of regional impact. Both kinds of intervention by the state government (it can also be by several state governments in cooperation) are rare and are found only in regions with a fragile environment which it is desired to protect from development.

There are many regional authorities (metropolitan planning organizations – MPOs) with powers and responsibilities for transport planning and for water and which have been set up to manage funds from federal programmes. They have no powers to regulate development, but they can steer it with infrastructure: moreover, local applications for state or federal funding might require the approval of a metropolitan planning organization. Finally, towns with regulatory powers in a region can collaborate ('ad hoc regionalism' – Porter and Wallis 2002): if they want to, they can formalize that collaboration in a contract

('compact based regional agreements') based on the Joint Powers Act: those powers 'facilitate lasting agreements, but are hard to sustain' (Foster 2001).

What are they used to achieve?

It is perhaps because of the limited public law powers for regional planning that 'ambitions for the quality of the land use' are not systematically made at the scale of the region. More common are ad hoc and sectoral responses to problems with a locational dimension and which cannot be tackled effectively at the scale of the separate town or county. Such problems are 'protecting America's farms and farmland' (Daniels and Bowers 1997), efficiency of infrastructure services, robust economic growth,[7] environmental sustainability and ecological vulnerability, lack of land for good quality affordable housing, urban sprawl. When regional planning is systematically pursued, using some variant of growth management, the aim is a more comprehensive land-use planning (Janssen-Jansen 2004): that is, indicating where development may take place and where not, making provision for affordable housing, protecting valuable natural resources, investing in infrastructural services, strengthening the economy, and so on.

Could those goals be achieved by private law instruments?

When asking this question, we are not implying that the goals are in fact being met by the public law instruments made available for regional land-use planning, nor are we asking whether private law instruments would be more effective. Rather, we are investigating the effectiveness of possible private law instruments.

The private law instrument most commonly used is buying land, or just development rights on that land (a 'conservation easement' is acquired – Daniels and Bowers 1997: 145ff.) so as to protect valuable land and natural resources from change or development. Only a few of the goals of regional planning can be reached in this way: but they are achieved effectively. The agency acquiring the right can be public[8] or a private trust (such as the American Farmland Trusts).[9] Transferable development rights are also used to steer development, although the scale is usually less than that of the region. In spite of those practices, it is clear that few of the ambitions expressed for land use at the regional scale could be achieved by applying private law rules, and this possibility is rarely suggested.

Regional land-use planning in England

What are the public law instruments?

In order to meet their ambitions for land use at the scale of the city, city region, or county, non-metropolitan counties make structure plans and metropolitan counties make unitary development plans. The function of both is the same,

namely to 'state in broad terms the general policies and proposals of strategic importance for the development and use of land in the areas, taking into account national and regional policies' (Planning Policy Guidance note no. 12, 1999: para.3.7). The most important practical effect of these plans is to guide the granting of planning permissions.

Since 1997 when the Labour government came into power, more attention has been given to regional governance, and hence to regional planning. The main instrument is now the regional planning guidance (RPG) made by Regional Development Agencies and other statutory and non-statutory stakeholders. Regional planning guidelines have to be taken into account when development plans (including structure plans, unitary development plans and local plans) are made and, therefore, they influence the granting of planning permissions indirectly. They can also be taken into account in appeals against refusal of planning permission or against the conditions imposed on a planning permission (Moore 2002: 100). Regional planning guidelines

> provide a broad development strategy for the region over a fifteen to twenty year period and identify the scale and distribution of provision for new housing and priorities for the environment, transport, infrastructure, economic development, agriculture, minerals and waste treatment and disposal.
>
> (PPG 11, 2000: para. 2.3)

What are they used to achieve?

In order to answer this question, it is useful to go beyond the list of topics which such plans (structure plans) and policies (regional planning guidances) treat, and certainly beyond the broad statement that these must provide a general framework for the use of land. I take as examples two plans at this scale, the North Yorkshire County Structure Plan (as amended in 1995) and the Strategy for the Cambridge Sub-region (part of the Cambridgeshire and Peterborough Structure Plan 2003). What they are trying to achieve is – from my experience – similar to other plans made in England at this scale.

Both plans indicate the preferred locations where housing, industry and employment and retailing should be built, sometimes specifying the nature of that development (e.g. affordable housing, no manufacturing industry). Both want development to take place with a certain form – compact and surrounded by a green belt, clustered, etc. Both want natural and man-made heritage to be protected. Both want development to take place where it can use existing transport infrastructure, preferably public transport. The North Yorkshire County Structure Plan wants to be able to accommodate activities such as mineral extraction, oil and gas, waste disposal, and leisure, as long as they do not cause environmental damage. Also, that plan wants to protect agricultural land.

Could those goals be achieved by private law instruments?

At first sight: No. But let us take a second sight by looking behind those goals to discover the reasons why they are chosen. We find the sorts of considerations that have we identified earlier: taking account of externalities both positive and negative, protecting underpriced or unpriced environmental goods, realizing missed opportunities. Could those effects not be incorporated by applying the 'user-pays-principle' as advocated by, among others, Corkindale (1998: 38)? This is unlikely, because of the enormity of the bookkeeping that would be required. Moreover, the plans are ambitious: they want there to be 'balanced development of housing and employment', they want a 'co-ordinated approach which maximizes and integrates the different sources of investment', and those goals can be realized only by relating the location of one activity to the location of other activities. In addition, the various places in the region each have their own significance which cannot be rendered in money, and the regional planning takes account of such 'genii loci'.

Moreover, as Grant (1988) asks, why restrict rights to landowners? Some externalities might affect any citizen, and their internalization through a system of private law could therefore be achieved only by creating property rights not tied to specific land parcels. Who would exercise those rights? A 'proprietary community' as advocated by Pennington (2002)? Once again we reject this answer, for reasons of accountability. Grant (1988: 73) is quite clear in his conclusions: private law rules 'are not, of course, the appropriate instruments for resolving locational issues relating to new growth'.

In practice, the only examples that we find of private law rules being used to realize the goals of regional planning are when rights in land are acquired in order to protect land from development. Wealthy people have done this for their own pleasure and also in order that others too might share that pleasure, such as the protection by the Cadbury family of Kinver Edge to the west of Birmingham. Bodies like English Heritage do it on a large scale. And state agencies do it, buying either the freehold or an easement (as the London County Council did on land in the Green Belt, starting in 1938). The rights thus acquired are not used, they are simply 'retired'.

Regional land-use planning in the Netherlands

What are the public law instruments?

There are twelve provinces and each has the power to make a regional spatial plan (streekplan) for part or the whole of its area. All provinces do this, mostly for the whole of their area. A regional spatial plan is 'noted' by the national government, but does not have to be approved by that government.[10] The regional plan is not binding on anyone besides the province itself, and that latter power has

little direct effect because the province does not itself develop very much. The main effect of a regional plan is that it can influence the actions of others who do develop or control development of the land. In particular, a municipality's land-use plan (bestemmingsplan) is not legally valid without the approval of the province.[11] The regional plan and other policies of the province influence also decisions about land re-adjustment in agricultural areas, about nature protection areas, about flood protection measures, about road building, etc. There is a continual tension between municipalities and the provinces, for while the provinces want to pursue regional planning, many municipalities are concerned only with what happens in and around their own area.

In seven city regions there are in addition regional governments with statutory powers to influence land use. Elsewhere, adjacent municipalities can cooperate under a special act: yet such formal cooperation often has but a short life because each municipality pursues its own interests. Regional planning is most effective when the provinces together with national government steer development by providing finance for infrastructure, redevelopment schemes, town expansions, rural revitalization, etc., and when municipalities can make binding agreements between themselves which include the financial arrangements.[12]

What are they used to achieve?

In 1998, the Netherlands Scientific Council for Government Policy (here I quote from the English summary, 1999) described the 'basic principles of national spatial planning' in the Netherlands as:

- concentration of urbanization (that urban development should take place in or around existing towns and cities)
- spatial cohesion (that there should be a good geographical relation between the various activities)
- spatial differentiation (that there should be clear differences between different areas, e.g. between town and country)
- spatial hierarchy (a range of urban centres, with the highest grade facilities in the biggest centres)
- spatial justice (people should have access to good facilities and services wherever they live).

These describe well the basic principles not just of national, but also of regional, planning policy. Translated into practical policies at that scale, Dutch regional planning aims to achieve a particular geographical distribution of new urban development (if it is not compact, then it is also not sprawl); that there should be employment, schools, etc. near to where people live; that the distinction between town and country remain, in particular that vulnerable natural areas be

protected or strengthened; that the centres of larger towns and cities retain their economic, social and political functions; and that the smaller settlements remain viable.

Could those goals be achieved by private law instruments?

This question can be asked without implying anything about whether the goals are being achieved by public law instruments. Nevertheless, and although it is clear that the goals are often not being met, it is striking that the Dutch have rarely asked themselves whether private law could provide an alternative. There are, as would be expected, many examples of private trusts buying land to protect it from development and of state agencies buying farming land, or particular rights in such land, to protect it from the worst excesses of intensive farming.

> The private trusts buy the freehold. The state agencies either buy the freehold, or enter into a private law agreement (beheersovereenkomst) with the farmer, that the latter will mitigate her farming practices. Neither private trusts nor state agencies buy easements, although that would be cheaper than freehold and would give more long-term certainty than the agreements which bind only the farmer who signs it and that only temporarily (Needham 2005).

Recently, some provinces have set up a very limited market in 'environmental bads', which they call the ruimte-voor-ruimte-regeling.

> Literally, the 'space-for-space-rule'. If the owner of a farm, where pigs and cattle are being reared intensively and where this is causing environmental problems, ends his business, the national government will compensate for that. But that does not include money for demolishing the stalls. The farmer is able to buy the right to build housing in a different location, on condition that some of the development gain is used to pay for the demolition of the cattle sheds.

An experiment has just been started in the province of Limburg to see whether transferable development rights could be used so that some of the profits from land development were put to conserving open spaces (Bruil et al. 2004). And for decades the Dutch have practised land re-adjustment on a very large scale in agricultural areas, which is a kind of exchange of land rights under public law (and – it should be added in the Dutch case – with enormous amounts of public financing: Needham forthcoming).

Conclusions

It is difficult to influence land use at the scale of the region by creating and structuring rights in land. For that reason, we do not evaluate such an approach in the same way that we did for achieving neighbourhood quality by private law

rules, that is in terms of effectiveness, efficiency and distributional effects. If the aims of land-use planning at the regional scale go no higher than wanting to resolve conflicts (Cullingworth and Nadin 2002: 2), then we can ask: why are we not satisfied with the way the market resolves conflicts over land use? It might be because the rights which are exchanged in the market are structured in such a way that some peoples' interests are not adequately taken into account. The obvious example is that building on open land might destroy the interest of some people in keeping the view of that land open. Then we run up against the practical problem that that damage is too pervasive for a market solution. And if we choose more ambitious aims for regional planning, as the Dutch certainly do, then it is almost impossible to conceive of those aims being achieved by private law rules.

If it is decided nevertheless to make less use of public law rules for regional planning, the consequence has to be accepted that the current ambitions – at least in England and the Netherlands – will have to be lowered.[13] If we choose not to do that and to retain ambitious regional planning by public law rules, then we should face up to the issue which dogs regional planning by public law and which could be solved by private law rules if regional planning in that way were feasible: the fact that regional planning usually has enormous financial consequences, favouring some and penalizing others in a seemingly arbitrary way.

CHAPTER 9
CONCLUSIONS: THE RULES WE MAKE FOR USING LAND

> We cannot escape any more to the sands or the waves and pretend they are our destiny. We have annihilated time and space, we have furrowed the desert and spanned the sea, only to find at the end of every vista our own unattractive features. What remains for us, whither shall we turn? To the city which we have not yet built, to the unborn polity, to the new heroism.
>
> (E.M. Forster, *Two Cheers for Democracy*, 1965, London: Penguin, 273)

Looking back: the reasons for writing this book

Land-use planning is a way by which a state agency can achieve various social goals. That can interfere seriously with the way in which people may use their rights in land. And it can have significant economic effects. Those consequences of planning gave the first reason for writing this book: can land-use planning be justified, in spite of those criticisms, by strong, clear and testable arguments? My conclusion is that it can. Land-use planning can be soundly justified, using the same arguments from law and economics which some others use to attack it.

The argument from *law* takes as its starting point the various and sometimes conflicting interests which different people can have in the same piece of land. Some of those interests are directly protected by law, in the sense that a person whose interest is violated can appeal to the courts for protection. Those people have a *right* in that land. Other interests are not protected in that way, either because the law maker has decided that they are not important enough (such as my interest in the colour of my neighbour's front door), or because protection in that way would be impracticable (such as the interest that so many people have in keeping a national park as open countryside). In such instances, the law maker might decide to protect that *interest* indirectly, by charging a state agency with the task on behalf of us all.

This way of looking at rights in land puts into perspective the argument that land-use planning is an unwarranted infringement in those rights. Different people can have conflicting interests in the same piece of land: the fact that the law makes of only some of those interests a right does not necessarily mean that the other interests are not recognized by the law. So the law maker can decide

to limit the exercise of those interests which it *has* recognized as a right, in order to protect those interests which it has *not*. Land-use planning is one of those limitations. It is often carried out to protect interests in land which have been recognized as legitimate but not given the status of rights.

The conclusion that rights in land, and especially the right of ownership, are not absolute does not give a *carte blanche* for limiting or ignoring such rights. A study of those rights in different countries and at different times reveals two things. One is that there is more variety and change than is compatible with the idea that property rights are absolute or 'natural'. The other is that there is also much similarity: clearly property rights have an important social function, and for that reason should be respected.

The argument from *economics* takes as its starting point the wish to use scarce resources well, in particular the scarce resource of land. Those who say that this would be better realized by people interacting freely in the market than by state agencies carrying out land-use planning base their argument, ultimately, on the assumption that economics can make statements which encompass all aspects of the welfare of society. The criterion of economic efficiency can, according to them, be adapted to include all the different sorts of effects caused by using land in different ways – distributional effects, ecological effects, inter-generational effects, etc. As a result, the conditions which, it is assumed, will maximize economic efficiency will in addition be the best for society. I think, on the contrary, that economics is a limited language. When it is over-extended, it makes statements that are tautological or non-predictive. We must not allow ourselves to be overawed by it. Nevertheless, it can say very useful things about the efficiency with which land and buildings are used and, therefore, about land-use planning. In particular, economics can predict the consequences for the use of scarce resources of alternative ways of using land and buildings. But it cannot say what should be done with those predictions when decisions about land use have to be made.

The conclusion is: arguments from law and economics can be used to give a sound justification for land-use planning, and when others argue from law and from economics for less or no land-use planning, those arguments can usually be refuted or put into perspective.

The second reason for writing this book was to improve the practice of land-use planning. I have tried to do that by using arguments not so much from law and from economics separately, as from the discipline known as 'law and economics'. This takes a pragmatic approach to property rights and a technological approach to economics. For the discipline recognizes that property rights can be created and structured in many different ways, and it asks: what will be the economic consequences of a property right with a particular content?

However, from those predictions alone we cannot deduce how land-use planning should be practised better. The reason lies in the limitations of the language of economics. It might be so that under property right A scarce resources

will be used more efficiently than under property right B, but that is insufficient reason for choosing A. Practice must be guided by wider considerations. We have added two: effectiveness in achieving democratically chosen goals, and distributional effects (who gains and who loses?), including the effects for sustainability: does our generation gain at the expense of future generations?

Looking forward: improvements to the practice of land-use planning

Applying the legal language to land-use planning allows us to distinguish two ways in which the exercise of rights in land is influenced by legal rules. The way that is more familiar to most planners is when a state agency imposes restrictions on that exercise, such as the rule that development is not allowed without a permit. This action is based on public (or administrative) law: if the owner of the right does not follow the rule, the public agency initiates actions to enforce it. The way that is less familiar to planners, but which is in fact much older, is when the exercise by one person of a property right harms another person, and that other person can take the initiative to get the court to stop the harm or to require that compensation be paid. This is based on private (or civil) law. Private law creates and structures rights in land and in that way influences land use. It follows that private law rules can be changed purposefully so as to change land use in a particular way. And, because land use comes about by people exercising their rights in land under both sets of rules – public law and private law – we need to look at the combined effect of those two sorts. If, for example, private law rules are changed, the effect of that change depends on how it interacts with public law rules.

The better understanding of rights in land – which I hope this book has given – can be used to seek improvements to land-use planning in the following way. The rules about how people may use land – rules under private law and under public law – have certain effects which can be predicted using ideas from law and economics. We have argued that the rules should be evaluated against three criteria: effectiveness in realizing democratically chosen goals, economic efficiency, and distributional effects. So we predict the effects that the rules would have on realizing those three criteria.[1] If we were to do that for all of the goals which land-use planning is used to pursue, it would be an enormous task. In this book we have done that for just two sorts of goals: those included in achieving neighbourhood quality (Chapter 7) and those included in regional land-use planning (Chapter 8). The conclusions which I set out below must be qualified by the recognition that they are based primarily on those two selected applications.

The test of effectiveness

This is the test: would the ambitions which people currently have for land use and which are adopted by a state agency be met better if more use were made

of private law and less of public law? In order to answer this, we have studied how ambitions for neighbourhood quality and for land use at the scale of the region are being pursued and met in three countries. At the scale of the neighbourhood, there seems to be reasonable success. At the scale of the region, the picture is not so clear. In the United States in particular, many people have ambitions for land use at that scale which are not being met.

In some respects this is not a fair test. Ends (ambitions for land-use planning) and means (property rules, both public and private) become attuned to each other in a country with a long history of land-use planning. Nevertheless we can ask the question: would the ambitions – at both scales – be met better by more use of private law and less use of public law?

As regards *neighbourhood quality*, it is certainly plausible that the particular wishes of some residents and users could be satisfied better with private law rules than by the public law rules of land-use plans in combination with permits. And practice bears that out: many people choose to live in neighbourhoods with a home owners' association. We can make the very practical recommendation that Dutch private law should be changed so as to make such schemes easier to set up. This must be coupled with the following recommendation: the possibility of achieving neighbourhood quality by public law rules should not be taken away, for it can be useful in default situations.

It is clear also that there is one aspect of neighbourhood quality which is *not* well met by the use of public law rules: namely the wish to be able to exert a continuing influence on that quality, either maintaining the original quality or adapting it to new circumstances. In none of the three countries is that wish satisfied by the application of public law rules, neither in housing nor in industrial areas. The result is that such areas often deteriorate, and the only way of correcting for that is by rigorous intervention by a state agency spending huge amounts of public money. It would be better to give, under private law, those involved in such areas the possibility and the stimulus to organize themselves as stewards of their own surroundings.

However, our investigation has shown also that there are other aspects of neighbourhood quality – such as those affected by pervasive nuisance – which cannot be provided and guaranteed by private law rules alone. There is a case for more use of private law to replace some uses of public law; there is no case for saying that private law can replace public law entirely.

As regards ambitions for land use at the *scale of the region*, the conclusions are different. With one important exception, there is no possibility at that scale of letting private law alone be used to sort out questions of nuisance and neighbourliness. The exception is when one landowner can cause nuisance to many others by developing his land in such a way that others derive less pleasure from it. Those others can set up a trust or some such and finance it so that it can buy a conservation easement from that landowner and thus prevent the change. There is another way in which private law could be allowed to realize some of

the ambitions for land use at this scale, namely by trading in 'environmental bads'. It is first necessary that the law maker sets up markets in such 'bads', which could include mineral extraction, forestry, intensive animal husbandry, industrial estates, large-scale housing estates. This cannot be done without the application of public law rules to give a locational dimension to those markets: a market is created in rights to mine, to build, etc.: but those rights may be exercised only in certain designated areas within the region. Transferable development rights are an example.

Once again, there is a case for more use of private law to replace some uses of public law, but there is no case for saying that private law can replace public law entirely. And once again, we remind ourselves that there are other possible goals of land-use planning than those covered by neighbourhood quality and by regional planning, and that for those other goals separate tests of effectiveness are necessary (see e.g. Blomley 2004).

The test of economic efficiency

Would the efficiency with which scarce resources (in particular land) are used be improved if more use were made of private law and less of public law? I am sceptical of the argument that private law rules (letting people regulate each other) *automatically* result in more economic efficiency than public law rules (a state agency regulates peoples' actions). But we can draw some incidental conclusions. One is that the application of public law rules often entails very high transaction costs: those might be lower if people sorted out their differences between themselves.[2] Another is that public law rules are often of necessity blunt instruments: public officials are required to apply rules which cannot take account of all contingencies. The result can be – in economists' terms – sub-optimal. Another conclusion is that many public law rules do not stimulate those subject to them to look for innovative solutions. The rule is: if you do this you get your permit, if you want to do something else you don't, even if that 'something else' would be a good solution.

The test of distributional effects

The way that public law is used to realize ambitions for land use has certain distributional effects which are indisputably bad. One of these arises out of the planning procedures, especially for big developments. These procedures are so long and expensive that those who are rich and powerful have the advantage over the rest. In some countries (including the Netherlands) state agencies fall into the category of 'rich and powerful': they can put a lot of money into getting their schemes accepted.

The other reason why land-use planning by public law rules often produces undesirable distributional effects is that it necessarily discriminates between

different locations, but it does not compensate for the financial consequences. Mr A gets planning permission, Mrs B does not: the difference is because Mr A has land in a location which is designated for that use, while Mrs B has the bad luck that her land is elsewhere. It is small comfort to explain to Mrs B that the locational difference is important for the public interest.

Would the distributional effects be better with more private law and less public law? The transaction costs might be lower: but private parties might want to take expensive litigation against each other, and that also favours the rich and powerful. The financial effects of locational discrimination would be more acceptable if there were markets in environmental bads, such as transferable development rights. On the other hand, when land-use decisions are made purely under private law rules there can be certain distributional effects which receive no attention, such as between neighbourhoods (leading to exclusionary zoning) and between generations (leading to the unsustainable depletion of scarce resources).

Structuring the market and regulating the market

We have learned a language for talking about land use and land-use planning. With that language we can see that 'the market' must be given the central place in any study of land use and land-use planning. We say this not only because the majority of decisions about land and buildings are made through the market, but also because it is almost impossible that market interactions could be excluded, even if that were desired.

Placing the market central does not mean that I think that the market works well. The problem is not so much what are called 'failures' in the markets for land and buildings, the problem is more 'failures in the market actors'.

> It is striking how many important people in big firms do not believe that the market will achieve a good result, for they try to protect themselves from 'the discipline of the market' by making secret deals with competitors. And where the discipline of the market is weak because the customer is a state agency, both public and private parties often use public money without regard to the public interest. Where the market actors are private individual demanders (consumers), the failure lies in their being so often unable or unwilling to take into account the effects of their actions. This is understandable: the effect of one person building a summer cottage in the woods is not harmful, whereas the effect of very many people doing that is; and how can that one person take that into account?

Nevertheless, we take the market – in this case markets in land and buildings – as the starting point, because it is unthinkable that all those individual decisions could be excluded or prohibited. Moreover, we as society, when

considering how the very many things that we want – cars, furniture, food, life assurance, and the rest – should be produced and distributed, take the market as the starting point. Why should we not do that with the production of land use also?

We as society have ambitions for the land use in a particular location. Can those be achieved by the market? We have learned that 'the one and only market' does not exist, that markets are structured by the rights that are exchanged in them, that rights are created by the law maker, and that markets can be structured purposefully so that they achieve what we the public want. So the question becomes: can the market in rights in land be so structured that our ambitions for land use are achieved?

I have concluded that it is exceedingly unlikely that the ambitions which we have for land use could be met solely by creating rights in land and 'letting the market get on with it'. It follows that unless we lower our ambitions, we have to accept that the state will continue to regulate the way we use our rights in land.

I regret that in some respects, for a market solution has many attractions. This is so particularly when it concerns rights in land, to which people are so sensitive, for such rights can give them security in the society. Nevertheless, if we had to choose between realizing our ambitions for land use on the one hand, and not regulating it on the other, most of us would choose a position in the middle. That is not just my stance: people in most countries accept a limitation of their rights in land through land-use planning for the benefits which that planning brings.

Care when regulating the market in rights in land

My final conclusion is, therefore, that the state should take very great care when regulating the way in which we use our rights in land. The general principles which should apply to all actions of a state agency should be carefully followed when land use is regulated. Each of the three countries we have studied has such principles. In the United States, these are the principles of 'due process' arising out of the Fourteenth Amendment to the Constitution.

> No State shall ... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In England, the codification is less, and John Major when he was Prime Minister produced 'A guide to good regulation' (1993).

> 1 Identify the issue . . . Keep the regulation in proportion to the problem.
> 2 Keep it simple . . . Go for goal-based regulation.
> 3 Provide flexibility for the future . . . set the objective rather than the detailed ways of making sure the regulation is kept to.

4 Keep it short.
5 Try to anticipate the effects on competition or trade.
6 Minimize costs of compliance.
7 Integrate with previous regulations.
8 Make sure the regulation can be effectively managed and enforced.
9 Make sure that the regulation will work and that you will know if it does not.
10 Allow enough time.

The Dutch have 'unwritten rules of responsible public administration'.

- Be objective, unbiased, and unprejudiced.
- Achieve a balance when taking decisions.
- Base decisions on careful preparation.
- Respect the law and any proscribed procedures.
- Gain the respect of the citizen.
- Fair play.
- Treat all persons equally.
- All decisions must be carefully motivated.
- Don't use powers provided for one purpose to achieve other purposes.
- Arbitrariness is not acceptable.

These rules have never been formalized, so there is no accepted statement of them. Nevertheless, the courts have taken them into account when settling claims against state agencies. This list is taken from Van den Heuvel 1998: 145–147.

It is not only that such principles are important because rights in land are sensitive. In addition there is a particular cause for concern because state agencies sometimes get intimately involved with private actors in realizing development projects – project planning and pro-active planning. Why they do that is understandable: they have high ambitions for the land use in a particular location, they cannot realize that by public law rules alone, so they apply private law rules to which they get access by buying, selling and financing land and buildings. But by doing so, state agencies can quickly transgress the rules of 'responsible public administration'. They favour some developers rather than others. Because of the commercial interests, they keep financial information secret. Because they themselves have financial interests in the project, they can face the dilemma of acting in the public interest or in their own interest. Their commercial partners will expect that the state agency interpret the law flexibly in their shared interest. When a state agency, which is charged with realizing in a particular location the land use which a democratically elected body has chosen, enters into a corporatistic relationship with land owners and property developers, it is not in a good position to respect the rights in land held by others.

Perhaps the procedural justice required under the Human Rights Act will oblige state agencies to act more openly, in any case in European countries where the Act is valid. The criticism of English practice made by Booth (2003: 183) applies to the United States and the Netherlands too:

> The belief in an over-arching public interest which would inform the decision to grant or refuse planning permission has been eroded. In its place has come the dual ethos of development control as the enabler of development, and negotiation as the means by which local authorities could achieve the facilities that they no longer had the money to pay for. For a profession that still adheres to the principle of public interest, the change is demoralizing and has contributed to a loss of direction.

I hope that this book helps to restore that sense of direction.

In order to stimulate argument on this and other points in the book, I end with the words with which Nozick (1974: xii) began his book: 'There is room for words on subjects other than last words'.

NOTES

CHAPTER 1

1 'What our generation has forgotten is that the system of individual property is the most important guarantee of freedom, not only for those who own property, but scarcely less for those who do not' (Hayek 1944: 80). And see Ellickson (1993: 1352): 'individual property, by insulating owners from expropriations by neighbours and state officials, provides an economic security that may embolden owners to risk thumbing their noses at the rest of the world'.

2 'Spatial planning, which basically comes down to the specific allocation of individual and public property rights in space, and public investments in infrastructure, are a prerequisite for individual investors to realize their aims' (Terhorst and Van der Ven 1997: 68).

3 This is sometimes discussed under the name of 'the social dilemma'. We want a different rule for ourselves than for all other people.

4 It is interesting that law and economics has been widely applied to environmental policy (see e.g. Kolstad 2000), but hardly at all to land-use planning, in spite of the obvious relevance. A recent contribution to filling this gap is made by Webster and Lai (2003).

5 I apologize to American readers for using the term 'state' to refer to 'the public sector', or 'the public administration', or 'the government'. Clearly I do not mean it to refer to the state government as distinct from the local or the federal government.

6 Planners often do not want to take the trouble to learn that language. As McAuslan (1975: xxvi) says: 'For planning students, the law is something that exists but is not worth spending very much time on. A few basic rules must be learned, but the legal bases of planning need not be understood'. And see Brennan (1981): 'After all, if a policeman must know the Constitution, then why not a planner?'

7 Other activities of the public administration affect rights in land too, e.g. nuisance laws, public health ordinances. Much of the discussion in this book applies to those activities too, not just to land-use planning narrowly defined.

8 In this I follow Bromley (1991), who bases his argument on Hohfeld (1913; 1917). And see also Becker (1977: 7). Van Zundert (1980: 17) uses the French formulation: 'La loi seule constitute la propriété'. This is worked out further in Chapter 3.

9 An interest in how land is used and which is not recognized by a law as a right is called by Blomley (2004) a 'claim' on property. I prefer the more neutral term 'interest'.

10 Booth (2003) places this in the context of British planning legislation by going on:

> the concept of the interest in land] lay at the centre of the attempt to define individual property rights within a feudal system of tenure... The question that such a formula gives rise to ... is what kind of interest the state has actually acquired by legislating to prevent development taking place without a valid permission.
>
> (184–185)

11 Unless the transaction costs of bargaining between the various holders of rights are zero, which is seldom the case. See further Chapter 4.
12 Some economists go so far as to say that it is not things which are bought and sold, but rights.
13 The other reason requires an argument from economics, which is given in Chapter 4.
14 It follows that it is not helpful to talk about public actions 'distorting' the market, as Webster and Lai (2003: 66) do. For there is no perfect form which the market could have before the state comes and distorts it, for there is no market without the state.
15 A review of the arguments as they affect land-use planning is to be found in Jacobs (2004).
16 Of course, I might as a citizen have different ideas of what those ambitions should be, and as a citizen I can express those ideas. But here I am writing as an academic and do not want to propagate my own views of what land-use planning should be trying to achieve. And if I write with knowledge of economic theory, then I try to avoid the criticism made by Little (1957: 274) of some economists: that they try to get their opinions accepted by a 'propaganda use of language' and by 'trying to put something over by means of implicit persuasive definitions'. My stance is nicely expressed by Richard Posner (1992), a judge and academic who has written widely on law and economics:

> If the government and the taxpayer and the voter all know – thanks to cost-benefit analysis – that a project will save 16 sea otters at a cost of 1 million US dollars apiece, and the government goes ahead, I would have no basis for criticism.

In other words (Posner 2001): 'agencies should implement the goals of the principals'.
17 There is a school of thought that says that planners should concern themselves only with processes and not with content. Then planners would limit themselves to setting up and managing the processes by which the 'stakeholders' themselves decide upon the content of the plan. The assumption is that, because the content has been determined by the stakeholders themselves, the plan will, as it were, implement itself. I do not share that assumption.
18 An alternative way of regarding (ecological) sustainability is that all forms of life on earth have an intrinsic value, and that people should do nothing which damages other life forms. In that case, sustainability cannot be included as a distributional effect. That is not my position in this book.

CHAPTER 2

1 Early versions of this chapter were written in close association with Dipl. Ing. Martin Lindemann, whose contribution in that way to this final version is gratefully acknowledged.
2 But not always: see Neuman (1998), 'Does planning need the plan?'.

3 As Denman (Denman and Prodano 1972: 123) says: 'What matters to the practical world is the answer to the question of who has the power of decision making and action over the use of land resources'. He answers his own question in a later book (Denman 1978: 83) with:

> Planners do not plan the use of land and resources within the competence of their own executive powers. As planners, their authority is over the use of powers lying in the hands of others. They plan the control of proprietary powers over land and resources, not the use and discharge of that power. . . The development plan is a pattern which those in whose hands lies the power to use and develop land have to follow should they ever decide to use the power in their possession.

4 The alternative is to take decisions based on experience – e.g. this has always worked in the past – or on hunch or, as the ancient Romans used to do, by reading the entrails of chickens or the flight of birds. The public has a right to expect better of state agencies acting on their behalf!
5 It can happen that just one or a few of those individual decision makers is able to have a significant effect on the land use in a particular location, such as the landlord of social housing in an existing urban area, or a few property owners who together own all the land in a part of the town centre. In that case, the state agency can try to influence just those decisions specifically: we return to this situation later.
6 Of course, other forms of public policy do aim to do that. Examples are the laws of inheritance, land reform to redistribute legal control over land, regulating squatting – the right to possession – agricultural policy about the right of a tenant farmer to the fruits of the land.
7 To quote Denman again (1978: 39): 'Land nationalisation or expropriation arises from the necessity to substitute, for the owner who is opposed to the planner's ideas, an owner who is compliable.'
8 This tension between general and individual norms is discussed by Mastop (1984: 155–158) as it applies to land-use planning.
9 Coyle (1993: 19) reacts against this type of regulation with the words: 'Ordering the uses of land orders the users'.
10 In this respect, British statutory town and country planning does not meet the requirements of the rule of law, for the decision whether or not an action will be prohibited is not predictable in advance, being open to the discretion of the state administration.
11 This is often called the 'command and control' method: but that is misleading. For nobody is commanded to do anything, nor are your actions controlled (the obvious exception being compulsory purchase). Rather, *if* you choose to do something, *then* certain rules apply.
12 This analogy was made explicitly in the famous court ruling on the Euclid case, 1926. The text is quoted in Kayden (2004: 35).
13 Denman (1978: 46ff.) discusses such measures (prohibitions and incentives) in terms of 'the imperium of the state which governs directly or indirectly the use of property power'. And he asks the question: 'How does government manoeuvre the voluntary response of the holders of property power in line with its policies?' His answer is: (i) indirect. That is, actions which encourage voluntary responses along lines favoured by the government; and the counterpart of discouraging responses; (What we have called incentives); (ii)

direct. These he subdivides according to the manner in which express controls (prohibitions, in our terms) are imposed upon the *use* of property power (his emphasis). This can be by statute law or by an official with discretion to adjudicate upon cases and give a decision.

14 Contrary to the general complaisance among land-use planners about the way in which rights in landed property are structured is the attention paid to this by economics. 'Institutions play an important role in allowing markets to function to allocate resources. . . . Properly defined, property rights can make a big difference in whether a market will allocate goods and bads efficiently' (Kolstad 2000: 99: and see the book by Eggertsson 1990). This is the subject of law and economics, discussed in Chapters 5 and 6.

15 In the English legal system, public law and administrative law do not mean precisely the same – see Harlow and Rawlings 1997.

16 The distinction is easier to make for countries with a Napoleonic (and therefore Roman Law) tradition. 'Roman Law ... ensured that the state distinguished between public and private affairs, which in turn paved the way for a separate body of administrative [= public – B.N.] law and a separate system of administrative courts' (Booth 1996: 69).

17 Denman (1978: 99):

> It would make better sense, a surer justice and a greater freedom if the state were to keep to the business of protecting private rights of ownership and to do so in exchange for the willing participation of the holders of property rights in land in co-operative planning with the planning authorities.

Denman gives as examples of what this could mean: 'the shifting and straightening of their boundaries, the partition and patching of parcels and plots'. This is a sort of land readjustment, but no more. It is unlikely that state agencies with high ambitions for the land use in their jurisprudence could realize those ambitions in that way only.

18 This argument is made convincingly by Lindblom (2001).

19 We have to remember that all those rules have to be created. Even Common Law rules, although they are not explicitly created, have to be recognized by the courts before they have any force. Creating such rules is what has been called 'institutional design'. It is in this sense that we must interpret Alexander's statement (2002b) that much of what a land-use planner does is institutional design. The combination of the two statements – that rights in land are the result of the law maker deciding what activities will be protected; that the decision about which activities to protect should be made pragmatically, that is in order that certain practical goals can be achieved – leads to what Bromley (2004) calls 'volitional pragmatism' with respect to property rights.

20 These three levels are sometimes called macro, meso and micro (Hoogerwerf 1995; Alexander 2002b). This division of rules into three levels is similar to that made by Ostrom, 1990: 50–55: (i) constitutional choice rules (the rules governing the making of collective choice rules); (ii) collective choice rules (the rules governing the process by which policy decisions are made); (iii) operational rules affecting daily activities.The term we use for all the rules which apply to one location – the local user-rights regime – is taken from Buitelaar 2003.

CHAPTER 3

1 Early versions of this chapter were written in close association with Dipl. Ing. Martin Lindemann, whose contribution in that way to this final version is gratefully acknowledged.
2 The answer is: No! I do, however, have the right to sell my blood. And see Munzer 1990: ch. 3.
3 For a fascinating analysis of such unwritten agreements see Ellickson's book *Order without Law* (1991).
4 Denman (1978: 5): 'There are neighbours and parties of many kinds related to each other by positivities of contract and of estate and by bonds in great variety. One man's property is another man's obligation.' And Cooter and Ulen (2004: 78): 'Property confers a zone of privacy in which owners can exercise their will over things without being answerable to others.'
5 When I say that a right in land or any other sort of property is a social creation I do not want to imply that it is easy to change it, nor that the content of the right is not subject to constraints. As regards the first point, changing rights is usually a slow process, especially when the right has such a weight as a right in land has. As regards the second point, we shall see later in this chapter that many countries define property rights similarly: there are clearly social and economic forces shaping the content that is given to the right.
6 This is what Hobbes (1588–1697) called 'the state of nature', being 'what people would do in the absence of civil government, when military strength alone established ownership claims' (Cooter and Ulen 2004: 79). The state of nature, says Hobbes, 'commands every man, as a thing necessary, to obtain peace; to conveigh certain rights from each to other . . . [this] is called a contract' (*De Cive*, ch. 3, para. 1).

> If a covenant be made wherein neither of the parties perform presently, but trust one another . . . upon any reasonable suspicion, it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void. . . . [In] a civil estate, where there is a power set up to constrain those that would otherwise violate their faith, the fear is no more reasonable; and for that cause he which by the convent is to perform first is obliged so to do.
>
> (*Leviathan*, ch. 14)

It is the 'civil estate' which makes a relationship into a right/duty.
7 In this way, clear land-use planning increases personal security, by making clear what can be expected from people exercising their rights in land (Booth 1996: 71).
8 Countries which treat land ownership in the Continental tradition treated land previously in a feudal way but chose deliberately to change. Teijmant (1988) describes that change as follows. In feudal times, property was a shared right. That was not appropriate to an industrial society. So property was made an exclusive claim on a thing. Industrial societies discovered later that too great an emphasis on an exclusive claim stood in the way of certain social ideals. So social obligations were imposed on the owner of the property right.
9 Denman expresses it so: 'The subject of ownership is property': it is not property which is owned, but ownership which creates property' (1978: 26); 'Ownership is in the rights and is not the origin of them' (Denman and Prodano 1972: 20–21). And see Cooter and Ulen (2004: 78): 'Property gives owners liberty over things'.

10 'The domain of demarcated uses of a resource can be partitioned among several people' (Alchian and Demsetz 1973).
11 An example is the 'economic right of ownership' as distinct from the 'legal right of ownership', which in the course of the 1950s came to be recognized in Dutch law as a result of court cases over fiscal practices (Huijgen 1995).
12 Ellickson (1993) theorizes about how rights in land have evolved.
13 The complication in English law is notorious. American law (in so far as it is possible to speak of one land law for the whole of the United States, for this is a branch of legislation reserved for the separate states) is more recent and more codified: a useful overview of property rights in land is given in Jaffe and Sirmans (1989: 100).
14 The Dutch definition of ownership is derived from this: 'The most comprehensive right that a person can have over an object' (Civil Code, Book 5, article 1). The German Civil Code (Book 3, title 1, para. 903) says that 'the owner of a thing can apply it as he wishes and can exclude all other from it, as long as the law or the rights of others do not prevent this'.
15 See, for example, item (b) in Kruse's list. And Barzel (1997: 6) says: 'the original owners of commodities may transfer only subsets of the commodities' attributes while retaining the rest'. The 'subsets' are what Denman (1978: 103ff.) calls derivative rights, derived in the first instance from the full right of ownership and, possibly in the second instance, derived from derivative rights.
16 Contract law binds the parties to the contract, but no-one else. It follows that the right acquired by one of the parties cannot usually be transferred by that person to someone else. Rights entered into under land law often 'run with the land': they are attached to the land, not to a named person. It follows that everyone who acquires that right is bound to the terms of it.
17 The well known statement that this extends to the heavens (*ad coelum*) is no longer correct, for it had to be abandoned when air travel became possible. 'In the early twentieth century, US courts took from private landowners their air rights above a certain elevation and re-appropriated to the public bundle of rights air space above that location' (Jacobs 1998: xi).
18 This matter is particularly important for the question of who owns mineral deposits under the land. Dutch law regulates this pragmatically with: 'The rights of the owner to use the land includes the right both above and below the surface. Others may use the space above and below the surface if this is so high or so deep under the surface that the owner has no material interest in preventing this.' (Civil Code, book 5, article 21). And in the Netherlands, the right to extract minerals is reserved for the state.
19 Sometimes, however, that distinction is difficult to make. What about game, or fish, or rivers, or underground water, for example? They 'belong to the land', but they move around! The English 'Game Laws' of 1671 and 1691 ruled that it was illegal for the owner of land with a value of less than £100 to kill game found on his land, because that game had probably gone there from a larger estate! (Information from the annotated edition to Henry Fielding's *The History of Tom Jones, a Foundling* (first published 1749), edited by R.P.C. Mutter, Harmondsworth: Penguin, 1966, note to book 3 chapter 10). American law uses the concept of 'fugitive property' for such things (Cooter and Ulen 2004: 120). Sometimes it is ruled that ownership of such property is 'tied' to the land on which it is found, sometimes that ownership goes to the person with first possession irrespective of whether she had any rights on the land where it was found ('first in time, first in right'): and see further in Chapter 6.
20 However, the law in a particular country might restrict certain types of ownership to certain types of owner (e.g. stipulating that agricultural land may be owned by

collectivities only) and the law might forbid certain types of owner from holding certain types of property (e.g. that a municipality may not lease land from a private landlord). And see the section in Chapter 5, 'Public law rules about property rights which a state agency may not hold and about property rights which a private legal person may not hold.'

21 Bromley is not alone in this. See e.g. Ellickson 1993: 1381.

22 Cooter and Ulen (2004: 142) give the example of pasture lands in the mountains of Iceland.

23 An alternative but comparable typology is given by Ellickson (1993: 1320ff.).

24 Even in the United States, where private property has priority, large cities devote in the order of 25 per cent of their developed land to highways and street rights of way and, in addition, close to 10 per cent to public spaces (Ellickson 1993: n342). And one third of all land in the United States is federal land (Platt 1996).

25 We do not include the obligations voluntarily entered into by contract law, in so far as they do not 'attach to the land'.

26 For example, 'An owner is required to roof the buildings on his land in such a way that water does not run off onto someone else's land.' 'An owner is required to ensure that no water or rubbish on his land comes into the gutter of someone else's land.' (Dutch Civil Code, book 5, articles 53 and 53);

27 Denman and Prodano (1972: 30–31) calls (a), (b) and (c) respectively: restrictions arising from the contiguity or proximity of one (piece of land) with or to another; restrictions imposed on a superior unit in the interests of an inferior unit, derived from it; restrictions imposed on an inferior unit in the interests of a superior unit, derived from it.

28 Denman and Prodano (1972: 135):

> The rights of property owners over the land resources . . . are the creation of the law . . . What I can do with my own in relation to my neighbour is sanctioned by the law of persons . . . These reciprocities lie within the sanctions of private law or the law of persons.

29 This is the interpretation of Booth (2002), developed further in Booth (2003). According to this interpretation, planning permissions in British law do not fall under restrictions of the type (d), but under type (e): a right has been taken away by the state. It should be added that when the British state nationalized development rights, it was only a small part of that right which passed to the state. The owner of the freehold interest in the land did not own the right to develop it. But the state, as owner of that right, could not exercise it. And after the financial aspects of the 1947 Act were repealed in 1953, the right to financial gain by exercising the development right passed back to the owner of the freehold interest.

30 This we have seen already, in the discussion about the minimum set of rights which counts as 'legal ownership'. If the set of rights is reduced below that minimum, then ownership has in effect been taken away. This is called 'inverse condemnation' in American legal parlance. What that minimum is, is continually being determined by case law.

31 Of course, it is not as simple as that. But in principle, the loss of value caused by 'down zoning' must be compensated.

32 This is referred to as the *Loosduine lantaarnpaalarrest*, after the court case where this rule was established in 1904. The principle is known in Germany too, as the following illustrates. The owner of a building which was a protected monument

wanted to demolish it, because he could not use it profitably and he had the obligation to maintain it. The relevant state agency refused demolition permission. The owner appealed against this decision, saying that he could no longer exercise any meaningful right as owner of the building. He won the case. (Beschluss 2 März 1999 – Az.1 BvL 7/91. Urteil 25 Oktober 2001 – Az.1 A 11012/01.OVG.)

33 Doebele (1983) calls this 'the form of land tenure'.

CHAPTER 4

1 The sources quoted make a different distinction, namely between markets, hierarchies and networks. I regard these are *structures* rather than *coordinating mechanisms* (Needham and De Kam 2004).
2 Imposed rules are a coordination mechanism within private firms too. In that case, the rules are not from public law but the firm's own rules (Williamson 1975).
3 First published in 1920, I quote from the fourth edition of 1932.
4 In Pigou's terms, there was a market failure when 'marginal private net product' diverges from 'marginal social net product'; corrections should be applied to bring the marginal private net product nearer to the marginal social net product.
5 Note that public goods in this sense are not necessarily goods produced by a public or state agency.
6 For example, in England there had been in 1840 the Select Committee on the Health of Towns and in 1844–5 the Royal Commission on the State of Large Towns.
7 I shall quote from the 1988 editions of Coase's works. If you want to study Coase further, read him in the original. He writes most attractively.
8 'The court attempts to "balance the equities" to determine the relative costs to the defendant and society of abating the activity in comparison with the harm to the plaintiff if the activity continues' (Platt 1996: 98). And note the connection with the discussion of nuisance laws in Chapter 3.
9 Coase's way of looking at property rights is rather different from that in Chapter 3. Barzel (1997: 3) makes the distinction between economic property rights (the ability to enjoy a piece of property) and legal property rights (what the state assigns to a person). Alexander (2004) makes a similar distinction by talking about the *proprietary* way of looking at property and the *commodity* way. Most authors, however, Coase included, do not make that distinction.
10 'The nature of the firm', reprinted in Coase (1988).
11 Buitelaar (2004) operationalizes the concept of transaction costs for application to empirical research into development processes.
12 In land-use planning, this is sometimes referred to as a missed opportunity: it is missed because market parties on their own cannot realize it because the coordination costs are too high – e.g. Harrison 1977: 71–74.
13 See in particular Lai 1994.
14 Ogus (1994) calls this 'private interest theories of regulation', as distinct from public interest theories.
15 This assumption was criticized by Lipsey and Lancaster (1956) in their famous 'theory of the second best':

> Given that one of the Paretian optimum conditions cannot be met, then an optimum situation can be achieved only by departing from the other Paretian conditions. The optimum situation finally attained may be termed a second best optimum . . . It is important to note that in general nothing can be said about the

direction of the magnitude of the secondary departures from optimum conditions made necessary by the original non-fulfilment of one condition.

16 And see Lindblom (2001: 170) for the importance of this, which he calls the 'prior determination'.
17 Little himself (1957: 275) proposes the following.

> I have proposed that welfare economics be based on the following sufficient criterion for a desirable economic change: an economic change is desirable if (a) it would result in a good redistribution of wealth, and if (b) the potential losers could not profitably bribe the potential gainers to oppose the change. Two value judgements are presupposed by this criterion. The first is that an individual becomes better off if he is enabled to reach a position higher up on his order of choice. The second is that the community is better off if one individual becomes better off, and none worse off.

18 '[Economists] would claim that as scientists we can only assume that if the current distribution of wealth and rights were not acceptable it would be changed via political action' (Bromley 1991: 35).
19 Ogus (1994: 54) calls these alternatively 'community values' which he describes as 'expanding the social, intellectual and physical environment in which [individual persons] live'.
20 Bromley (2001) says the following about taking account of the interests of future generations in this way. 'Relying on the realm of calculation to diminish (to discount, both literally and figuratively) the standing of future persons violates behavioural norms located in the realm of sentiment.' 'The affinity for discounting simply results from a lack of imagination.'
21 'The concept of rational egotism has predictive value only if one defines utility strictly in terms of definitive material interests rather than indeterminate psychological rewards'. (Rubin 1991, quoted by Ogus 1994: 74).
22 In this I follow the advice of Ogus (1994: 48) who suggests that 'the policy makers should attempt to predict the distributional consequences of proposed measure and adopt a form of regulation which will lead to outcomes consistent with what is perceived to be fair or just'.
23 'Implied terms, fiduciary obligations, forms of organisation' (Ogus 1994: 17–18).
24 'The one great principle of the English law is, to make business for itself' (Dickens, *Bleak House*, ch. 39).
25 Bromley (1991: 55) points out that the examples of bargaining favoured by many textbooks are of rather cosy situations where two equal partners, both firms, strike a bargain. In reality, one party might have far more strength, economically and politically, than the other.
26 Another example is provided by the Dutch regulations for agricultural tenancies. These are private law agreements, and disagreements can be resolved in the civil courts. However, there are also public boards (de Grondkamer, de Pachtkamer) which are empowered to resolve disagreements. Most parties use these latter, as it is cheaper and quicker (Slangen *et al.* 2003: ix). And see Chapter 7 about private covenants used in Houston: those covenants are enforced not by the civil courts but by the local authority.
27 It would be less confusing to call public goods 'collective goods'.
28 Goods or resources where consumption is rivalrous and non-excludable are discussed later in this chapter under the term 'resources in the public domain'.

29 However, see Coase (1974), in which he provides evidence that in the past lighthouses, always considered as the providers of public goods *par excellence*, have been provided privately.
30 For some years I lived on the edge of Ladbroke Square, London. From that position I had the right, on payment of an annual fee, to join the private club of those entitled to use the private Ladbroke Square Gardens. If the state were to withdraw totally from providing parks, leaving that to private clubs, then many poorer people would no longer have access to parks. If a public good is provided publicly, there is no restriction on who may use it.
31 We call them physical effects, to make clear that we are talking about 'technological externalities' as distinct from 'pecuniary externalities' (Ogus 1994: 37).

CHAPTER 5

1 And see Fuchs (2003: 1), 'the influence of government on actor's . . . performance through modifications in the structure and quality of property rights', and Ogus (1994: 257), 'Clearly, the legislature, and to some extent the judiciary, can attempt to achieve public interest goals . . . by changing the private law'.
2 This classification is based on the discussion in Chapter 3, the 'four fundamental questions of property law' as raised by Cooter and Ulen (2004: 77), Ellickson (1993: sections IV, V, VI), and Stake (2000).
3 See e.g. Ellickson (1993: 1320): 'Land rules within a close-knit group evolve so as to minimize its members' costs.' Also Webster and Lai 2003: 7. For a critique of such theories see Hodgson 1993: 'Economics and evolution: bringing life back into economics'.
4 Of course, if a philanthropist wants to donate a park for public use, or to pay for a public square to be cleaned, or to subsidize an open-air concert, then we are all grateful.
5 This has received a lot of attention in the Netherlands, where in some big cities the municipality or other state agency owns the majority of the land: the powers which are given by those rights in land can be more effective for pursuing public policy than the public law powers. There is need for rules to curb state agencies abusing their private law powers in those circumstances. In the Netherlands, the doctrine of the 'tweewegenleer' has been developed for these circumstances. For a treatment in English see Needham 2003b. And see Van Zundert 1980.
6 'A natural monopoly occurs when it is less costly to society for production to be carried out by one firm than by several or many, because of economies of scale' (Ogus 1994: 30).
7 Cooter and Ulen (2004: 108; and see Chapter 4):

> Being rivalrous, private goods must be used and consumed by individuals, not enjoyed equally by everyone. Efficiency requires the use and consumption of each private good by the party who values it the most . . . Once the state recognizes private property rights, the owner of the private good can exclude others from using or consuming those rights, except by the owner's consent. The owner's power to exclude channels the use or consumption of private goods into voluntary exchange, which fosters the efficient use of those goods.

8 The Dutch call this the *gedoogplicht*, the obligation passively to accept something.
9 *Égalité devant les charges publiques* is the name of the doctrine in Dutch administrative law. An alternative is the 'fairness test' proposed by Michelman

(1967). It is not unfair for an individual to bear a loss caused by a government regulation if he should be able to see that, in the long term, failures to compensate people in his position will be in the best interests of people in his situation.

10 This is another example – the Dutch call it *belemmeringenwet privaatrecht* – of the application of the principle of *égalité devant les charges publiques*.

11 Some of the reasons additional to the two discussed here are for national defence, for measures against flooding, to counter health or fire risk.

12 It is, however, not always necessary that the state becomes the owner of the landed property concerned. We have seen above that an owner of property can be required to accept certain limitations on the exercise of his rights in order to allow a state agency to carry out certain public tasks. We gave as examples accepting a pipeline under your land or a street sign on the wall of your house.

13 It should be used only as 'the last resort', the *ultimum remedium*.

14 But that was not the case under the English legislation of 1947, under which land could be purchased compulsorily at existing use value. The correction to that in 1954 was insufficient and a 'dual land market' arose. That legislation was changed in 1957.

15 If you distinguish between different categories of 'the public' there can be distributional effects: such as from those who pay high taxes to those who pay low taxes. But that is not exceptionable, as it applies to most purchases by a state agency.

CHAPTER 6

1 As Bromley nicely puts it (1998: 24): 'Proudhon was only half right: private property is not always theft, but a lot of theft has ended up as private property.' For a discussion of the moral and political issues that arise when land was colonized so recently that the pain is still felt by the descendants of the colonized, see Blomley (2004: ch. 4).

2 There is a ruling also that movable goods which belong to no-one become the property of the person who claims them (Civil Code, book 5, article 4).

3 A fascinating example of this is the leasehold enfranchisement passed in Britain in 1967 and 1993. See Young (1993).

4 Note: in this last example, we are still working within private law, and we are making the assumption that the home owners have a right to clean air. For the home owners must have something to bargain with.

5 He gives as an example where decomposition became excessive the use of agricultural land in medieval England, where the Enclosure Acts re-assembled many of the separate interests.

6 For example, in Dutch law the interests of the tenant of retail space are protected more strongly than the interests of the tenant of office space. The reason is that the first is financially more dependent on location than the second, so terminating the lease would damage the former more than the latter.

7 In France, the main principle of inheritance is equal shares for heirs. This was introduced after the Revolution in order to hinder the building up of landed estates (Acosta and Renard 1993: 6). In Germany (Dieterich *et al.* 1993: 7–8) in the north of the country, one of the heirs inherits all the land and property and has the right to buy out the other heirs; in the south of the country heirs inherit equal portions of a parcel of land.

8 This can be seen if we compare land ownerships around a German city with land

ownerships around a Dutch city. The fragmentation is much greater in Germany. The reason lies in the German inheritance laws compared with those in the Netherlands (see Dieterich *et al.* 1993: 8). A very clear result is that large-scale housing developments are much easier to realize in the Netherlands than in Germany (Verhage 2002: ch. 2).

9 Under English land law, the distinction between a freehold and a leasehold interest in land is that the first is for an indeterminate period, the second for a limited duration.

10 The ground leases granted by Dutch municipalities since the 1980s must include the clause that at termination the lessee receives payment equal to the value of the building. In Dutch law, at the end of an 'operational lease' the lessee has the right to acquire full ownership at a price agreed beforehand, and at the end of a 'financial lease' full ownership transfers to the lessee without any extra payment (Van Velten 2003).

CHAPTER 7

1 Except that there are some wishes that the law does not allow them to enforce, such as that people of certain racial groups would be excluded.

2 These examples are taken from US practice.

3 Under US law, there can be an easement 'in gross', where no specific land is benefited, but the public 'at large'.

4 In Dutch law, there does not have to be a 'dominant settlement'. Nor can the agreement be made only when land is exchanged: it can be made at any time.

5 The City Planning Department was, however, small. In 1980, ten years after Seagan had written his article, the city planning budget of Houston was on a per capita basis one fifth of that for Dallas and one ninth of that for Austin (Feagin 1988: 162).

6 Some of these attempts have been described in detail in Feagin (1988: 156ff.).

7 A clear summary of these regulations is given in Platt (1996: 233ff.).

8 Fischel (2004: 52):

> many businesses and most apartments would never have been found to be nuisances in the common law. In upholding zoning laws, the state and federal courts jettisoned the nuisance analogy, though not without some agonizing about what we now call exclusionary zoning.

9 It is striking that zoning is used more to avoid negative externalities than to internalize positive externalities, thus realizing development opportunities which might otherwise be missed. For example, if all the land is owned by one developer, he can realize those positive externalities by 'merging' or 'scoping' (e.g. by putting in the centre of the development land uses which raise the land values of adjacent properties). 'The entrepreneur places improvements such as golf course, lakes and community centres near the centre of his holding: ownership of the surrounding land allows the developer to internalize the increases in adjacent land values that result from the improvement' (Ellickson 1973: 712).

10 In order for the common law of nuisance to work effectively in this way, it might be necessary to change it. Ellickson (1973) has worked out how that might be done. One proposal is for 'inverse compensation'. This would correct for the fact that tackling nuisance by an injunction can be too extreme: it should be possible for the court when imposing an injunction to require the plaintiff to compensate the

defendant for the defendant's loss caused by that injunction. Ellickson proposes not only improved laws but also a Nuisance Board to administer them. This would clarify entitlements and adjudicate cases and in those ways lower administrative costs. Ellickson adds the rather endearing – but quite correct – remark that it would be good if local nuisance could be avoided by good manners. This is in line with his interest in achieving 'Order without law' (1991).

11 'The courts could then hold that the area has changed and no longer had the character and environment envisioned when the restrictions were imposed' (Siegan 1970: 80).

12 For a fascinating example, see the Dudley Street Neighbourhood Initiative in Boston (http://www.dsni.org).

13 More than 'several dozen parties' are adversely affected (Elllickson 1973: 761).

14 Injunctions are a blunt instrument. The damaged party can get the court to stop the damaging party carrying out that activity: it is all or nothing.

15 The public law solutions proposed by Ellickson are, interestingly, not zoning, but fines and mandatory minimum standards. Both would be administered by his proposed Nuisance Board. And neither would make it impossible for persons able to show *substantial* injury from the pervasive nuisance from taking a *private* nuisance action. New private law rules supplemented by new public law rules would work better, according to Ellickson, than zoning. 'Although the administrative costs of the proposed combination of remedies might be greater than in a system relying heavily on zoning controls, that difference is likely to be more than compensated for by allocative efficiencies' (Ellickson 1973: 780).

16 More important planning applications can be 'called in' by the Secretary of State for the Environment.

17 In taking note of this, we should remember also that this is not an example of the residents determining and maintaining neighbourhood quality themselves: the use of the ground leases gives the ground landlord this power.

18 Positive covenants can be imposed on the first purchaser, but they cannot be passed on to subsequent owners unless there is 'mutual benefit and burden' (Dixon 2002: ch. 8).

19 Moreover, where freehold flats are concerned, it is essential for maintaining the value of the property that shared spaces be managed, and for that negative covenants are not effective.

20 Section 10 of the Act says:

> A local land-use plan [*bestemmingsplan*] should be made which indicates, so far as this is necessary for a good land use [*een goede ruimtelijke ordening*], the purposes for which the land in the plan area should be used and also, in so far as is considered necessary for those designations, further specifications about the use of the land and about the buildings upon it.
>
> The Environment Act (*wet Milieubeheer*) does, however, set the norms against which an application for an environmental permit has to be judged.

21 The rules apply to neighbouring parcels of land, but sometimes more widely too.

22 Van Velten (2003: 390–391) suggests that the recent change in public law, whereby permission is no longer required for minor works, might prompt people to use easements more widely in order to maintain the quality that they want in their area.

23 I translate this with 'landed covenant' because the adjective 'kwalitatief' means in legal jargon that the obligation is borne by the owner of the land, not only by the person who entered into the agreement in the first place.
24 An interesting example of land re-adjustment carried out by one party and in secret is the Euston Centre in London (see Marriott 1967: ch. 11).
25 The Business Improvement Districts mentioned above are used to maintain and improve the quality in a neighbourhood, but not to change it radically.
26 And see Walters and Kent (2000) for the experience with managing high-rise multiple ownership property in Hong Kong. At the moment, that is done by private law rules: but the result is unsatisfactory. The authors propose changing the law so as to reduce the transaction costs.
27 A recent survey found that the experience of American developers was that subdivision regulations (public law) prevented them from building what in their opinion the customer wanted, namely higher-density single family housing and more multifamily units (Ben-Joseph 2003).
28 The argument behind this conclusion is given in Chapter 4.

CHAPTER 8

1 I am grateful to Edwin Buitelaar for help with the section about England in this chapter.
2 This is similar to the situation of 'pervasive nuisance' discussed in Chapter 7.
3 In the United States it is possible that the development right be acquired compulsorily, separately from the freehold right (Blaesser and Weinstein 1989: 85ff.): compulsory purchase, however, is not an example of a private law rule.
4 Pennington (2002: 83) suggests auctioning development rights. 'The local authority would allocate sites for potential development and then sell the rights to the highest bidder.' However, it would work only when the right to development is already owned by the state. That is so in Great Britain, where development rights were nationalized in 1947; it would need a different legal basis in countries without that prior acquisition.
5 For example, Dwyer and Hodge (1992) propose setting up Conservation, Amenity and Recreation Trusts (CARTs).
6 For a legal analysis of the relationship between state and local government as it affects land-use planning, see Norton (2003).
7 'We can't build an economy based on people driving several hours to and from work each day' (Soule 2004).
8 According to Daniels and Bowers (1997: 145), forty-six states have passed legislation to allow states or local governments to acquire development rights to private property.
9 As stated in Chapter 7, under American law an easement can be created without the necessity to specify the land which is benefited.
10 Nevertheless, the national government has ways of putting a province under pressure if the latter adopts a regional plan which is at variance with important parts of national policy.
11 If the 'fundamental revision' to the spatial planning act which is now (2005) being drawn up by the cabinet is adopted by the parliament, this approval will no longer be required: but the province will retain powers to influence the content of a municipality's land-use plan.
12 For more information in English see Needham (1999); for a description of changes to be introduced in the new spatial planning act see Needham (2004a).

13 The ambitions are not the same in those two countries. In England, the preservation of open spaces and heritage of all sorts has a much higher priority than in the Netherlands; in that latter country the ambition is higher that urban development be integrated.

CHAPTER 9

1 We must not forget that practice – actual or potential – is not determined by the availability of instruments which make some things possible and others not. Practice depends also on agencies which want to apply those instruments in particular ways (Buitelaar 2004).
2 But we should not ignore the transaction costs of using private law. Hazeu (2000: 73) points out that in the United States there are ten times more advocates per head of population than in the Netherlands.

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> He was always at work, reading, correcting proofs, verifying references (a vain pursuit upon which his ostensible reverence for authority and disinclination to say anything definite on his own responsibility led him to waste an abundance of time).
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