

**Integration of Environmental  
Considerations  
into  
Legal Decision Making**

**Dr Murray Raff**

B Juris LLB(Hons) Ph D

Faculty of Law, University of Melbourne

# Introduction

- World Commission on Environment and Development affirmed the need to integrate environmental considerations into all levels of decision making -

“The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making.”

*Brundtland Report, 106*

# Introduction

This includes legal decision making -

“Sustainability requires ... changes in the legal and institutional frameworks that will enforce the common interest.”

“... necessary changes in the legal framework start from the proposition that an environment adequate for health and well-being is essential for all human beings - including future generations.”

“Such a view places the right to use public and private resources in its proper social context ...” *Brundtland Report*, 107

# Overview

Three legal areas for reform to help integrate environmental considerations into legal institutions in market economies -

- 1 *Constitutional* environmental rights
- 2 Codification of *Civil Law* to institutionalise civil environmental protections
- 3 Environmental responsibilities which pervade private *Title to Land*

# 1 *Constitutional* environmental rights

- Environmental issues can also be human rights issues - pollution and rights to health
- Rights for nature
  - “The natural ecosystem and its sound functioning are to be protected.” Art 31 Thür.
- Rights for animals
- Rights to environmental information

# 1 *Constitutional* environmental rights

- Limitations on economic power
  - “a socially and ecologically obligated market economy” Art 38 Thüringen *Constitution*
- Recognition of limitations on rights of private property
  - “Property creates obligations. Its use shall at the same time serve the common good.”  
Art 14(2) German *Constitution*

## 2 Codification of *Civil Law* and environmental protections

- Environmental Law Code
- Revise principles of the Civil Law, eg -
  - structure *precautionary action* into private transactions through civil law
  - contracts breaching principles of *ESD* liable to be set aside (unconscionable *re* future generations) at suit of a party to it

## 2 Codification of *Civil Law* and environmental protections

- Such transformations of Civil Law would -
  - internalise the need for scientific environmental assessments into private transactions
  - weighting of insurance risks would change
  - financiers would take a more supervisory interest in the activities of their mortgagors
- Common Law Method has to be rethought in view of unprecedented eco-problems

### 3 Environmental responsibility pervading *Title to Land*

- As noted,
  - “Property creates obligations. Its use shall at the same time serve the common good.” Art 14(2)  
*German Constitution*
- Recognition of responsibility also follows from the nature of land title registration
- Relative international harmony of laws facilitates recognition of responsibility

# Jurisdictions and Systems

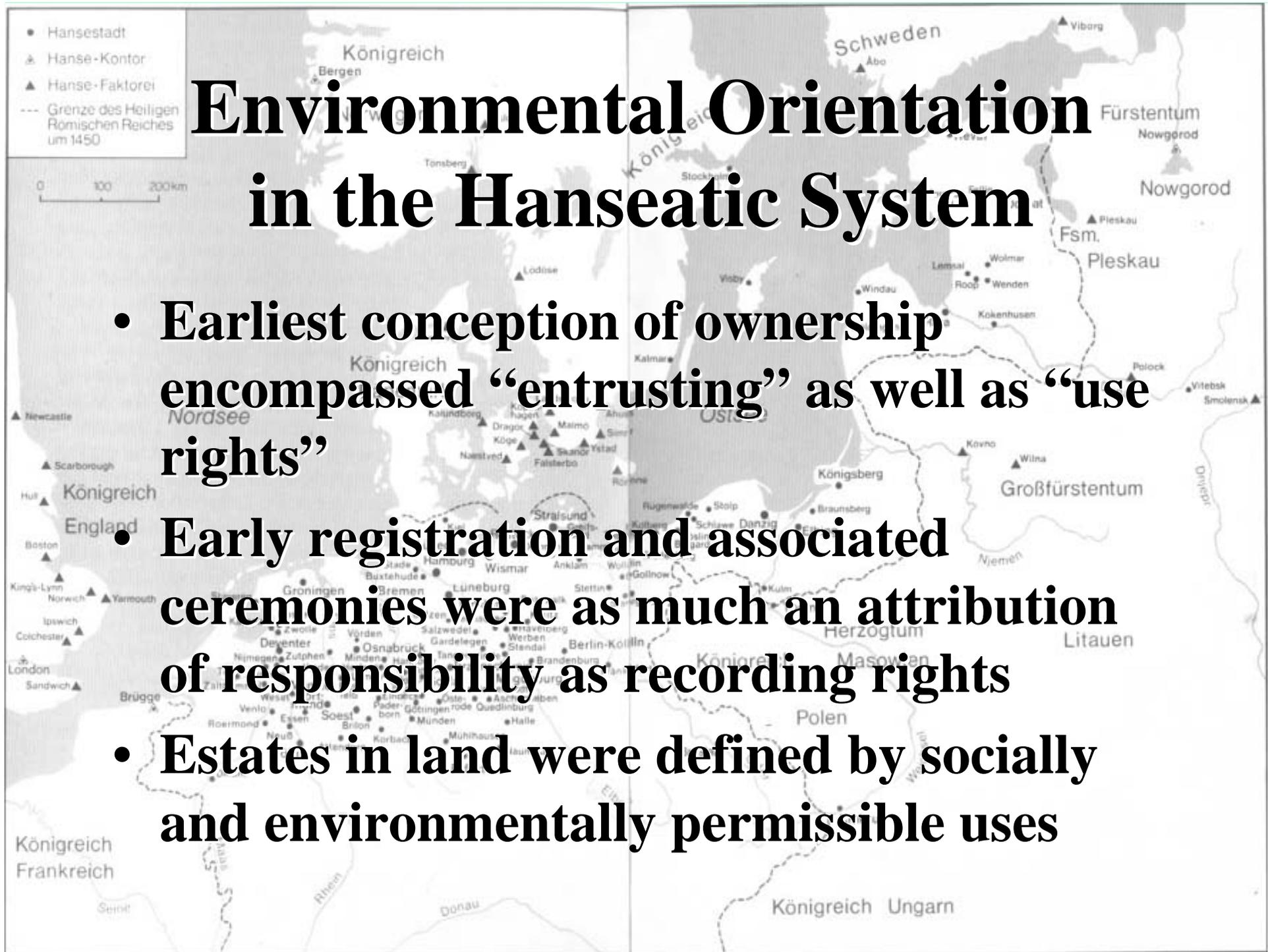


- Red = Torrens
- Diag. = Mixed

Blue = Germanic System  
Green = Scandinavian

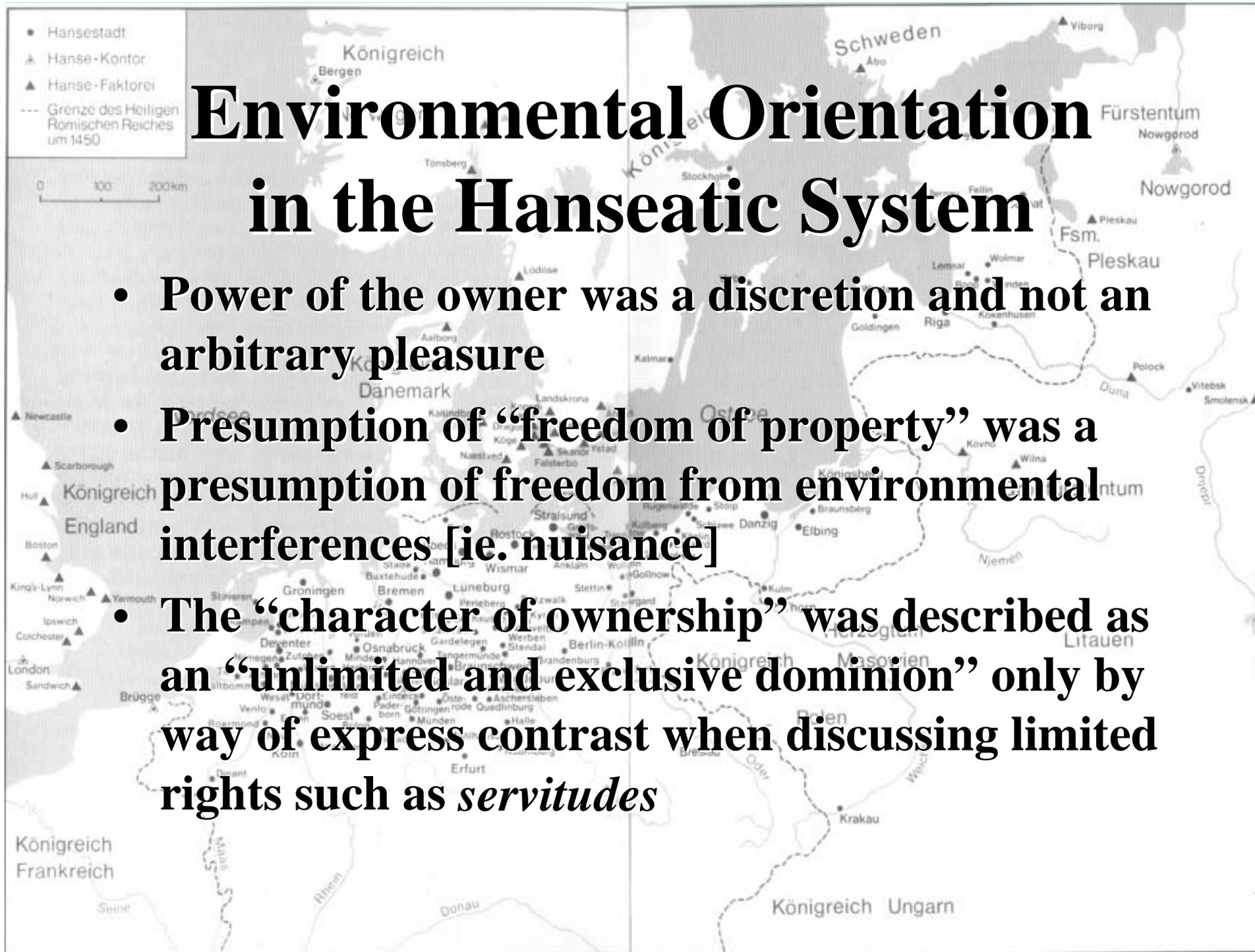
# Environmental Orientation in the Hanseatic System

- **Earliest conception of ownership encompassed “entrusting” as well as “use rights”**
- **Early registration and associated ceremonies were as much an attribution of responsibility as recording rights**
- **Estates in land were defined by socially and environmentally permissible uses**



# Environmental Orientation in the Hanseatic System

- Power of the owner was a discretion and not an arbitrary pleasure
- Presumption of “freedom of property” was a presumption of freedom from environmental interferences [ie. nuisance]
- The “character of ownership” was described as an “unlimited and exclusive dominion” only by way of express contrast when discussing limited rights such as *servitudes*



### 3 Environmental responsibility pervading *Title to Land*

- a) **An estate or interest in land under a conclusive title registration system is subject to at least one obligation - to register it at the risk of losing it.**
- b) **The conclusive register is maintained for the wider social benefit.**
- c) **The obligation to register is thus a social obligation.**

### 3 Environmental responsibility pervading *Title to Land*

- d) Registered title systems have a modified concept of legal property in land -**
- registration is both the precondition for, and conclusive evidence of legal property**
- the concept of property is subject to a social obligation, at least to register**

### 3 Environmental responsibility pervading *Title to Land*

- e) **Social obligation is never static, and is in part formed by the needs of society.**
- f) **Environmental responsibility is widely regarded as an urgent requirement in private resource use decisions.**
- Properly understood, the concept of private property in registered systems is already pervaded by social and environmental responsibility. This must be recognised.**