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24

Bram Akkermans

Sustainable Property Law

Reckoning, Resilience, and Reform

eleven

Maastricht Law Series

The law of property provides the building blocks for our market economy and is a manifestation of our post French and American Revolution thinking on how we want to organise ourselves. That organisational structure has not always been fair or equal around the world. European property law systems have been exported around the globe, yet outside of Europe things have been possible, such as owning another person (slavery) or extracting wealth from land at all costs. This was unthinkable on the European continent. These differences have led to an increasingly unequal division of property between people, countries and even continents. Some can extract a lot of wealth and pollute the planet from their property, whilst others have nothing. An unsustainable use of the planet's resources where we live outside of our planetary boundaries is the result.
This short book argues that this is not the way forward. Our law must be resilient in a transformative manner and European systems need to accept their role in how this has come to be. Based on that, we need to rethink how we can reform our law of property so that it allows us to live within our planetary boundaries.

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Bram Akkermans is Professor of Property Law at Maastricht University. He specialises in sustainability and property law and combines property theory with property doctrine to explore how property law can accommodate sustainability. He is also Director of Studies of Dutch-language undergraduate programmes at the Maastricht Law Faculty.

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Introduction

It is often held by private lawyers that the law is neutral and that it is made in such a way that we can give it shape and adapt it to various societal circumstances. This applies especially to the law of property, also known as the law of things – whatever these things may be – that provides us building blocks of our market economy. Think in this respect of freedom of ownership – especially private ownership – free circulation of goods and as much party autonomy as we can fathom. Add to this a strong dose of welfare maximization and almost exclusive focus on the Gross Domestic Product – or GDP – and we have a – be it simplified and somewhat gruesome – picture of our neoliberal society.

We have not arrived at this overnight; property law has been around in most of its current form for hundreds and sometimes thousands of years. In a different time and in a different legal system, Roman law awarded much of the same positions as current-day property rights with real actions, thus allowing these to be invoked against everyone else. After a long period of feudalism, a sophisticated property law system in itself, the French and American Revolutions promised us liberty, equality, brotherhood and the pursuit of happiness.

Property played a crucial role in this: so much that one of Thomas Jefferson's first drafts actually spoke of life, liberty and property – following John Locke – before the pursuit of happiness was inserted. Its meaning, however, is to be read very much as the achievement of personal happiness through the accrual of personal wealth: property rights in other words.[1]

Long after these revolutionary changes the holding of vast amounts of property, *i.e.* land, was a criterion to participate in elections and therefore decided how the land was to be governed. From that perspective there is not much revolutionary about these changes. Thomas Piketty shows us in his book *Capital and Ideology* how former feudal landlords, assuming they were not decapitated, returned and took up most of their old lands, deciding the course of their country for their lifetime and the lifetime of their heirs on the basis of these property holdings. Only towards the end of the 19th century was this monopoly of ancient land holding families broken by election reform.[2]

By then, most of the damage was done. As the great TV show Downton Abbey shows us, of course servants had to be fired and land had to be sold to survive and maintain a certain standard of living. But property, and the power that comes with it, was established. A well-managed estate meant that power in the local and sometimes even regional, national and even international community was preserved.

1 John Locke, Two Treatises of Government, ed. Thomas Hollis (London: A. Millar et al., 1764), p. 123 *et seq*.

2 Thomas Piketty, Capital and Ideology (Cambridge MA: Belknap Press, 2020).

For many, much of this wealth came from overseas, where the negative externalities of property rights – very often property in other people who laboured on foreign land for the benefit of the European landowner – were restricted to that part of the ocean. In Europe, for a long while the wealth kept coming in. Locally, that meant that estates grew, were maintained, and many laboured in post-feudal relations for the local wealthy landlord from which land had to be leased.

With the European reforms at the end of the 19th century, private property fell open to more and more groups of people. Small ownership to begin with, but ever since the second World War, also others than the old land holding estate have been able to accrue property. Michael Heller and James Salzman have called this the magnetic principle of property.[3] If you have some, it turns out to be relatively easy to get more. And with the help of clever lawyers, we have managed to provide the code with which more and more objects of property law, such as derivatives, but also data, can be sold and thus more wealth can be collected.[4]

In the past decades crisis after crisis has brought a negative side to the forefront that remained previously hidden for many. The liberal use of our property law, and by that I mean the employment of property rules for the accrual of wealth and capital, has generally brought us prosperity and wealth beyond imagination in the centuries before, but has also led to a situation that can hardly be maintained. First, natural disasters such as hurricane Katrina in 2005, massive forest fires in the last decade and extreme temperatures due to climate change show how some are better suited than others to cope with the challenges these brings. Second, the global financial crisis of 2008, which followed a subprime mortgage, and therefore property crisis in 2007, affected some much more than others and, finally, the global health pandemic caused by COVID-19 has shown that even though the virus itself hardly discriminated, once more, there are those that are more harshly affected than others. To have property, and especially a lot of property, can make you almost immune for the negative externalities in times of crises. The awareness that not everyone is in such a position is growing rapidly in this decade.

That brings us, in my view, to a crossroad where we need to decide how to move forward. Do we continue with our current application of property law, thus likely increasing wealth, but also continuing to negatively affect climate change by how we use our property and continuing to accept inequality in who is able to hold and accrue property, or – and it is clear by now which road I choose – do we seek to reconfigure our property law to incorporate change?

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3 Michael Heller and James Salzman, Mine. How the Hidden Rules of Ownership Control Our Lives (New York: Double Day, 2021), p. 80 *et seq*.

4 See Katharina Pistor, The Code of Capital. How the law creates wealth and inequality (Princeton: Princeton University Press, 2019).

When I was a TPR (*Tijdschrift voor Privaatrecht*) visiting professor at the KU Leuven in Belgium, I argued for a revaluation of property law; the idea, in short, is to provide new values to our system of law and to make necessary changes to property law on the basis of these values.[5] Today, I build on this in three parts: in part one (the reckoning) I further build on what I have just argued to illustrate the unsustainable manner in which we currently deal with property. In part two I turn to a possible answer in the form of resilience of property; an approach that allows us to analye what property law should do. In part three I come to the normative question of reform and present a (progressive) research agenda.

5 See Bram Akkermans, Duurzaam Goederenrecht. Naar een herijking van ons goederenrechtelijk stelsel?, Tijdschrift voor Privaatrecht (2018), p. 1437 *et seq*.

Part 1 Reckoning[6]

Our current property law is not neutral. It is not, in other words, without underlying values. Economic efficiency and profit or welfare maximization can be found at the basis of how current-day property law is applied.[7] Recently, much more attention has been given to the sometimes disastrous effects of this extreme application of property rules. Three examples from the global literature are worth mentioning.

First, economic historian Thomas Piketty shows in his books *Capital in the 21st century*, but especially in his *Capital and Ideology*, how property rights – which form an essential part of capital – have become almost unbelievably unequally distributed since the second World War.[8] Second, Katharina Pistor has illustrated how law has managed to 'code' assets in such a way that wealth can actually be created as if property law were alchemy. The dephysicallization of property, in other words, which has been lauded by many as an essential part of the fourth Industrial Revolution, has also gotten us into major problems. There is a strong dissonance between the rules of property, which were once designed for land, and the new reality of intangible objects as a great source of wealth and income. Third, even in respect to land itself, the exclusivity of ownership – beautifully illustrated by artist and activist Nick Hayes – comes with exclusion from the rest of society as well.[9] This is not a new problem, think of gated communities, but a global financial crisis or global pandemic has shown that these crises do not affect the super rich.

Moreover, many of these wealthy property owners have accumulated their patrimony over the past centuries.[10] Especially these – often families – have accumulated wealth before the French Revolution. When most of us learn about the French Revolution in school, we learn about the abolition of the feudal system of land holding and how *liberté, egalité et fraternité* led to land ownership of the formal vassals. That is true, of course, to some extent, but we are not taught how large feudal landowners fled and received large parts of their land back upon their return. We are also hardly taught how landownership or land-tax obligations remained essential for a right to vote and therefore how the aristocratic landowners determined the course of law and politics for the vast duration of the

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6 '1. The action or process of calculating or estimating something. (2) The vending or punishing of past mistakes or misdeeds.'

7 See Bram Akkermans, Sustainable Property Law: towards a revaluation of our system of property law, in Bram Akkermans and Gijs van Dijck (Eds.), Sustainability and Private Law (The Hague: Eleven International Publishers, 2019), p. 37 *et seq*.

8 Thomas Piketty, Capital in the 21st Century (Hardvard: Harvard University Press 2013), Thomas Piketty, Capital and Ideology (Cambridge MA: Belknap Press, 2020).

9 Nick Hayes, The Book of Tresspass (London: Bloomsbury Circus, 2020).

10 See Nick Hayes, The Book of Trespass (London: Bloomsbury Circus, 2020), Simon Winchester, Land, How the Hunger for Ownership Shaped the Modern World (London: Harper Collins, 2021).

19th century. Their wealth, Piketty shows us, was not only in the land they occupied and rented out to their former vassals, but especially in investments in the colonies.

There, they did not only own land, *i.e.* plantations, but also the people that worked on the land. These Europeans exported their legal system to their colonies but made significant adaptations. It led to a European property law regime specifically modified to the situation in the colonies; justifying extraction from anything – person or land – a European could own. A property regime, in other words, inconceivable in Europe, but perfectly acceptable in the colonies. It meant, above all, protection of private property 'European style' and a constant transfer of wealth from the colonies to the old world. Occupants found on the land before European settlement were not considered to exercise private property rights over the land in the proper manner. Exclusion, usually by placing demarcations on the edges of the land with fences, was considered essential to exercise property rights in a civil manner. Indigenous tribes were therefore displaced from their land as soon as they were in the way of economic development.[11]

Of course, this changed over time, but most of the damage was already done. Perhaps one of the best illustrations of this is South African law. Land remains unequally distributed with a very large portion of the land held by a small group of white landowners. Changing this without setting aside the concept of private property rights is almost impossible. Redistribution of land means expropriation, but of course also compensation for the private landowner. New legislation to enable expropriation without compensation promises progress on paper but is widely considered to create more problems than it solves.[12]

When, in other words, societal priorities change and equality becomes much more important, a fair and equal distribution of property does not automatically follow. We now know that even when private property of land became open to all, most land was already in private ownership of others, and many have not been able to accumulate property themselves. Even more so, Michael Heller and James Salzman call this the magnetic principle of property law: if you already have some, it is easier to get more. If you have none, this classical system of property law creates problems of access. In laymen terms: between the haves and the have-nots, property rights almost automatically connect to the haves.

We also know that in 2022 access to property law is unequally restricted for certain groups. Those who have suffered the most from this classical system of property that I am describing, *e.g.* people that descend from slaves, or that were subjected to *apartheid* because they were black or coloured. But also women, because for the longest time only

11 See Simon Winchester, Land, How the Hunger for Ownership Shaped the Modern World (London: Harper Collins, 2021), Howard Mansfield, The Habit of Turning the World Upside Down (Peterborough NH: Nathan Publishing, 2018).

12 See Björn Hoops, Expropriation without compensation: a yawning gap in the justification of expropriation?, 19 South African Law Journal (2019), p. 261 *et seq*.

men were able to hold property rights. The American Declaration of Independence states that all men are created equal, but not so for access to property.[13]

The metaphor sometimes used in the Black Lives Matter movement is that of the game of Monopoly. For 400 rounds only some of us have been allowed to play, have accrued the streets and build houses and with the magnetic principle of property in operation, converted many of these houses into hotels to achieve an even higher income. After 400 rounds we say that all of a sudden everyone else is able to join in the fun. But all the streets, houses and hotels are taken and no matter how hard and fast these new players play, they will no longer catch up with the settled players.

As a final step in my reasoning, this small group of property owners, therefore, is under great responsibility to take care of their property. By estimation more than 80% of the world's natural resources are in private ownership. How we treat these resources, both in our factual treatment as well as the legal reality – or 'code', to use Pistor's terminology – we place upon this to make even more wealth, is of essential importance for our survival. In 2022, the answer to this lies in sustainability – taking care of our own needs without compromising the ability for future generations to take care of their needs.[14] This is where – after Jill Robbie – sustainability becomes a key organizational principle.[15] Putting most property in the hands of the few to the exclusion of others is not sustainable. Extracting wealth from our property, often to the exhaustion of the resource is not sustainable either.

It is important to accept that this is our reality. We may not all experience this on a day-to-day basis, but the classical system of property law that we are so familiar with has – despite its advantages for some – negative externalities for others that we should not be proud of. The ideals of the French and American Revolutions that have found their way into all our constitutional documents and doctrine have not become a reality. This calls not just for acceptance that things have gone wrong, but for a reckoning of the negative consequences of private property law.

13 More criticism on this is – of course – possible. A reference from pop-culture: Angelica Schuyler – of Dutch decent – sings about this in the musical Hamilton, when she talks about speaking with Thomas Jefferson to include women in the sequel. See Lin-Manuel Miranda and Jeremy Carter, Hamilton: The Revolution (New York: Little Brown Book Group, 2016).

14 World Commission on Economic Development (WCED), Our Common Future, (Oxford: Oxford University Press, 1987), para 27.

15 Jill Robbie, Moving Beyond Boundaries in the Pursuit of Sustainable Property Law, in Bram Akkermans and Gijs van Dijck (Eds.), Sustainability and Private Law (The Hague: Eleven International Publishers, 2019), p. 59.

Part 2 Resilience

Before I come to if and how this reckoning should translate into property reform, I turn to the question whether our current rules of property should be able to accommodate these challenges. Should systems of law not be able to respond more flexibly to the negative effect they help create and – in particular – how should systems of law respond to such a challenge?

The term 'resilience' is more and more used to describe what systems – so also legal systems – should be able to do in the face of change. Elsabe van der Sijde has recently offered a comprehensive overview of approaches to resilience. She distinguishes equilibrist resilience, which is a conception of resilience in which the stability of a system is the central focal point. Resilience is then measured in terms of how much pressure a system can have while still being able to return to its original state (engineering resilience), or before the whole system moves towards another stable state (ecological resilience). But Van der Sijde also distinguishes transformative resilience. Such a notion of resilience should be 'understood as the capability of individuals, social groups or social-ecological systems … not only to live with changes, disturbances, adversities or disasters but also to adapt, innovate and transform into new more desirable configurations'.[16] It is this transformative understanding of resilience that gives it a normative, rather than descriptive, objective.

Lisen Schultz, the acting deputy science director for the Stockholm Resilience Centre describes resilience as 'a capacity to persist, adapt or transform in the face of change in a way that maintains the basic identity of a system'.

In my view, this notion of resilience is very well suited to be applied to property and to the challenges that I have tried to address. It would be a rather shallow conception of a legal system if all we would expect it to do is constantly return to its original state. In that approach, no legal system would be capable of adaptation to modern-day circumstances.[17] After all, stability does not automatically mean static, not even in property law.

Moreover, there is a question of scale. Resilience is closely connected to systems and systems can exist at different scales. There is a global climate that is changing, but there are also local (eco)systems. A choice of focus means locking in on a certain level, but not

16 Elsabe van der Sijde, What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of the Covid-19 pandemic, in Zsa-Zsa Boggenpoel *et al.* (Eds.), Property and Pandemics: Property Responses to Covid-19 (2021), p. 352 *et seq.*, who cites: P. Harrison *et al.*, 'Urban resilience thinking for municipalities'(2014), A contribution to the Department of Science and Technology's (DST's) Grand Challenge on Global Change 17 available at http://wiredspace.wits.ac.za/jspui/bitstream/10539/17082/1/URreport_1901MR.pdf, note 23 at 2.

17 See, in the same sense, Elsabe van der Sijde, What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of the Covid-19 pandemic, in Zsa-Zsa Boggenpoel *et al.* (Eds.), Property and Pandemics: Property Responses to Covid-19 (2021), p. 354-358.

without recognition of the greater context of other levels. Schultz explains how sometimes 'a farm will need to transform in order to maintain the resilience of the landscape'.

Resilience is a concept worth exploring in this context but needs further clarification before it can be applied. Van de Sijde asks any property lawyer wishing to apply resilience to answer three questions: (1) resilience from what? (2) resilience from whom? And (3) resilience to what end(s)? Van der Sijde is very insightful with her call for clarity for the underlying ideas and values that must underlie our systems. Without such a normative underlying framework resilience is a very empty container concept. To take the reckoning I have addressed and turn it into reform, I must answer Van der Sijde's questions:

(1) Property law needs to be resilient to help us answer the challenge brought forward by global challenges such as climate change, biodiversity loss and inequality. It must therefore not only be resilient from systematic considerations that seek to protect the status quo at all costs, but also be resilient to the challenge of climate change. The latter part is explicitly transformative in nature.
(2) Property law needs to be resilient from those that argue for the protection of the status quo of the system at all (or most) costs. Private property rights are a cornerstone of our system of property law and in fact of our society, but if we only argue for maintaining exclusivity, extraction and exclusion that comes with this, we will not be able to transform our property law.
(3) Property law needs to be resilient in a transformative sense to be able to accommodate change so that instead of restricting what can and needs to be done, it facilitates what can and needs to be done.

Resilience is not automation; as Van der Sijde points out so accurately, law does not automatically change, it needs human intervention. In doing this the choices we make, regardless of our perspective, are always founded on underlying values. Our law needs, in my terminology, reform and that reform needs to be transformative. By this I mean that transformation is the objective and reform is the way in which we get there.[18] A reform must therefore be methodical and must happen with a clear aim.

18 See https://blog.zealise.com/zealise_blog/2018/04/transformation-or-reformation.html.

Part 3 Reform

The Social Imaginary

Transformation to resilient property law for climate change means that there are, in my view, two types of reform on the table: (1) reform of the underlying values of our system, (2) but also reform in the way in which property is used (or human flourishing theory in operation).

When it comes to the underlying values, I have already done some work at that as a special visiting professor at the KU Leuven in Belgium. I have tried to emphasize that the rules of property law in any system are not neutral. In fact, they are given purpose and meaning by the underlying philosophical and economic foundations. Utilitarianism and neoliberalism have given shape to a system of property law for which, as I have just argued in part 1, reckoning is needed. Changing the philosophical and economic foundations of property law, places our system in a completely new perspective. But the question remains how we choose which philosophical and economic foundation.

For this I suggest we need to step even more outside of the realm of legal scholarship and borrow from other disciplines. We already do so to some extent when diving into moral philosophy and economic theory, but legal scholars have been doing that for centuries already. I find the direction we are looking for in sociology and in particular in the concept of the social imaginary.[19] There, it is defined as:

> 'a patterned convocation of the social whole through which people express their social existence – for example the figure of the globe, of the nation, or even of the abstracted order (or disorder) of our time.'[20]

The social imaginary is what gives 'grounding' to our ideology and thus steers the approaches we take. For a resilient property law to function properly a social ideology that imagines a global sustainable society is necessary. Not only should all nations subscribe to this, but every one of us – all global citizens if you will – must imagine a sustainable planet. Journalist Eric Holthaus offers us a perspective what this would mean in his book *The Future Earth*.[21] It is a bleak picture that emphasizes, based on the most recent

19 See Bram Akkermans, Sustainable Ownership - New Obligations Towards Achieving a Sustainable Society, 10 European Property Law Journal 2-3 (2021), p. 1 *et seq.*

20 Paul James, The Social Imaginary in Theory and Practice, in Chris Hudson and Erin K. Wilson (Eds.), Revisiting the Global Imaginary: Theories, Ideologies, Subjectivities (London: Palgrave-McMillan, 2019), p. 34. Charles Taylor describes the imaginary as 'the way that we collectively imagine, even pre-theoretically, our social life in the contemporary Western world. Charles Taylor, A Secular Age (Boston: Harvard University Press, 2007), p. 146.

21 Eric Holthaus, The Future Earth. A radical vision for what's possible in the age of warming (New York: HarperOne, 2020).

reports of the Intergovernmental Panel on Climate Change (IPCC), that considerable sacrifices must be made by almost everyone.

The surface of planet Earth comprises about 70% water, which means that 30% is land. Of that 30% land-surface the vast majority is estimated to be in private ownership.[22] That is a very substantial amount of ownership of land that has been used in such an extractive manner that negative effects of climate change are visible to all of us in the form of droughts and floods, extreme cold and extreme heat, and increased occurrence of intense natural disasters.[23]

Imagining a world in which we meet our own needs without compromizing the ability of future generations to meet their own needs gives guidance towards planetary flourishing. Imagining a planet that flourishes means living within our planetary boundaries.[24] Planetary boundaries provide a safe operating space for humanity. If crossed, the chance of maintaining life as we know it significantly diminishes and we move closer to dangerous levels and what are known as tipping points when the earth's climate dramatically changes in a short period of time.[25]

This framework inspires three levels of property law I have already identified in earlier work. First of all, there is the level of technical rules. This is where doctrinal rules of property law exist. Second, there is the organizational level of property law. At this level there are constitutional questions, such as the relationship between public and private law, and fundamental organizational principles of property law, such as *numerus clausus* and transparency.

Third, there is the level of property theory. This level provides the underlying theoretical framework of property law. For the past century this has been a utilitarian theory of property law for most Western property systems.

There is hierarchy between these levels with the doctrinal rules at the bottom, followed by constitutional property, and property theory. The social imaginary is the highest level in this hierarchy, providing a framework for development for all the lower levels. A renewed, or better revalued, social imaginary can steer the necessary reform of property law at all levels.

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22 See David Grinlinton and Prue Taylor (Eds.), Property Rights and Sustainability. The Evolution of Property Rights to Meet Ecological Challenges (Leiden / Boston: Martinus Nijhoff Publishers, 2011), Ugo Mattei and Alessandra Quarta, The Turning Point in Private Law. Ecology, Technology and the Commons (Northampton: Edward Elgar, 2018), p. 21 *et seq*.

23 See the most recent report on climate change of the Intergovernmental Panel on Climate Change, The sixth Assessment Report (AR6) Climate Change 2021, available at www.ipcc.ch.

24 See Rakhyun Kim and Louis Kotzé, Governing the complexity of planetary boundaries: a state-of-the-art analysis of social science scholarship, in Duncan French and Louis Kotzé, Research Handbook on Law, Governance and Planetary Boundaries (Northampton: Edward Elgar, 2021), p. 45 *et seq*.

25 Rakhyun Kim and Louis Kotzé, Governing the complexity of planetary boundaries: a state-of-the-art analysis of social science scholarship, in Duncan French and Louis Kotzé, Research Handbook on Law, Governance and Planetary Boundaries (Northampton: Edward Elgar, 2021), p. 45. An example of a tipping point is problems with the Atlantic ocean current system, see https://www.independent.co.uk/climate-change/news/atlantic-ocean-current-tipping-point-b1897600.html.

Planetary Flourishing

Planetary flourishing, living within the planetary boundaries, means holding property rights with responsibility and in a context that is not solely focused on personal gain. For some decades already, critical scholars have warned how our current approach brings us in an unsustainable position. In 1990 already Murray Bookchin wrote:

> 'To speak of "limits to growth" under a capitalistic market economy is as meaningless as to speak of limits of warfare under a warrior society. The moral pieties, that are voiced today by many well-meaning environmentalists, are as naive as the moral pieties of multinationals are manipulative. Capitalism can no more be "persuaded" to limit growth than a human being can be "persuaded" to stop breathing. Attempts to "green" capitalism, to make it "ecological", are doomed by the very nature of the system as a system of endless growth.'[26]

This applies to classical property law too.[27] The focus on responsibility of holding rights in property law is not a new idea. Article 14 of the German basic law, for example, famously states that ownership obliges and is supposed to be used for the benefit of all.[28] What is meant by the common good has also been subject to a lot of research and debate.[29] The innovation lies in the normative framework brought by the planetary flourishing imaginary. This version of the common good provides clear limits in the form of the planetary boundaries and natural science research that support these.

Such a property theory rests on a social thesis, a further elaboration on the social imaginary if you will. Using Gregory Alexander's work on this, amended to include planetary boundaries that would lead to the following formulation:

> 'in order for me to be a certain kind of person – a free person with the basic capabilities necessary for human flourishing – I must be in, belong to, and support a certain kind of society – a society that supports a certain kind of political, social, and moral culture and that maintains a decent background material structure *and that recognizes that in doing so we need to keep within the planetary boundaries so that not only we but also the planet can flourish*'[30]

26 Murray Bookchin, Remaking Society: Pathways to a Green Future (Boston: South End Press, 1990), p. 93-94.

27 On classical property law see Sjef van Erp, From 'classical' to modern European property law, in Essays in Honour of Konstantinos D. Kerameus/Festschrift für Konstantinos D. Kerameus, Vol. I (Athens-Brussels: Ant. A Sakkoulas – Bruylant, 2009), p. 1517 *et seq*.

28 Art. 14 Grundgesetz states: '(1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.
(2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen. (…).'

29 See Stephen Mulhall and Adam Swift, Liberals & Communitarians, second edition (Malden MA: Blackwell Publishing, 1996).

30 Amended from Gregory Alexander, Property and Human Flourishing (Oxford: Oxford University Press, 2018), p. 55.

Planetary flourishing therefore is not only the boundaries within which we can operate, but also the objective of our decision-making. Governance of our planet, and that includes property law to a considerable degree, requires us to make those decisions that allow us to flourish as human beings, but also allows the planet to flourish. That combination, perhaps best summarized as a sustainable development approach to property, provides us with a sound basis to re-construct our property law.

Communities

The next step in the planetary flourishing framework is the construction of the context in which we hold our rights. Communities are the central concept in this philosophical foundation that I am constructing. A community is a group of people that are connected in one way or another. Alexander explains to us that this may be the organization in which we work or which we volunteer for, the street or town we live in, but also the family or families we belong to.[31] Communities may be, in other words linear, but also may be intergenerational. The scope depends on the criteria we use to establish whether something can be a community. This is a much-debated issue in the social sciences. Alexander offers a shared set of values as the defining criterion. Others, such as Alasdair MacIntyre, argue that the community lies in common practices.[32]

MacIntryre's approach seems more realistic. After all, we may fiercely disagree, for example politically, with our neighbours or family members, but still be in a community together as our children play together on the street or we sit together for a Christmas meal. Other examples include sharing public transport or sharing public services like the post office. The common practices we have mean that we have a sense of belonging and therefore a context in which we function as human beings.[33]

Belonging is a concept that increasingly receives more attention. Research professor, storyteller and best-selling author Brené Brown has focused much on belonging as the answer to our human need for connection with others.[34] True belonging, Brené Brown teaches us, means being part of something that requires us to be who we are.[35] Her research focus shows us how we do not derive strength from our individualism, but rather from our collective ability to plan, communicate and work together. Our neurological

31 Gregory Alexander, Property and Human Flourishing (Oxford: Oxford University Press, 2018), p. 74 *et seq*.

32 I owe thanks to my colleague dr. Alexandru-Daniel On for this observation. Alasdair MacIntyre, After Virtue (London: Duckworth, 1981), p. 218.

33 See on this, Bram Akkermans, Sustainable Ownership - new obligations towards achieving a sustainable society, 10 European Property Law Journal 2-3 (2021), p. 1 *et seq*.

34 Brené Brown, Braving the Wilderness. The quest for true belonging and the courage to stand alone (New York: Random House, 2017) and Brené Brown, Dare to Lead. Brave work. Tough conversations. Whole hearts (London: Vermilion, 2018).

35 Brené Brown, Braving the Wilderness. The quest for true belonging and the courage to stand alone (New York: Random House, 2017), p. 159-160.

composition supports interdependence over independence.[36] Connection, and therefore community, is the essential ingredient we need to flourish as a human being.

Brené Brown is not alone in arguing the need for community. Communitarianism has long been recognized in philosophy, with famous scholars such as Michael Sandel, Charles Taylor and Alisdair MacIntyre as some of its most famous proponents.[37] What Brown contributes is the mainstreaming of criteria for a community: we seek to connect with others and therefore we form communities ourselves, based on our common practices, values or anything else that we share together.

What if our social imaginary is a world in which we all belong together. A world in which we stay within the planetary boundaries to ensure our own flourishing, but also the ability of future generations to flourish – a planetary flourishing framework in other words – then we must recognize we are all connected as citizens of planet Earth and that – besides our local, regional and perhaps national communities, we all belong to a planetary community as well. The common practice we share of saving the planet from its current crisis provides enough basis to form a community. This is a global community to which each and everyone of us belongs.

Obligations of Property Rights

Construing such a community is important as it is our communities that provide the context in which we hold our rights. In fact, in human flourishing theory – now modified to planetary flourishing – we also hold obligations towards our fellow community members by nature of the rights we hold. This is a complex and perhaps the most controversial aspect of human flourishing theory as it directly opposes the traditional (neo)liberal conception of property rights. In this Aristotelian approach, a property right does not grant the holder an unlimited set of powers to extract from the land and to exclude all others from its use, but rather allows the right to be used for human flourishing of the self first, and the flourishing of the others around him.

Obligations, in other words, exist regarding how the right is to be used. These obligations are moral in nature but can relatively easily be framed into legal obligations. Two easy examples to illustrate this. First, a trust can be used to transform moral obligations into legal obligations in an intergenerational community. By last will or trust deed, future generations can be obliged to exercise their property right in a certain manner, such as the continuation of a company founded by the grandparents. Second, company law, especially the law of foundations or other lawful associations, can be used to manage objects in a certain manner. Examples can be a charitable foundation of money offering

36 Brené Brown, Dare to Lead. Brave work. Tough conversations. Whole hearts (London: Vermilion, 2018), p. 42.

37 See Stephen Mulhall and Adam Swift, Liberals & Communitarians, second edition (Malden MA: Blackwell Publishing, 1996).

scholarships or a cooperative farm where land is shared between shareholders or certificate holders.

These are specific examples embodying a practice that has been going on for centuries. There are other examples of obligations towards community members that have existed for a very long time. In his book *The Edges of the Field*, Harvard law professor Joseph Singer describes how all world religions describe obligations to give to the poor. As the title suggests, when harvesting the land, the obligation is to leave the edges of the field for those that need it more than you.[38] In that context there is a Roman Catholic doctrine of *superflua*. *Superflua* means that once you have accrued more property that you need, you are under an obligation to allow your community members to benefit from that. That does not mean you should give your property rights away, nor that any entity can come and take it away from you, but that you should – for example – let others work for you so that they can benefit from your excessive property too.[39]

Reform of Property Law

Obligations in the planetary flourishing framework therefore provide private law duties that we should take. Rather than relying on the State to tell us what we should and should not do, for example through the doctrine of abuse of rights, this private law framework creates positive duties for all of us.[40] The more property you have, the more obligations you will have. The less you have or no property at all, the more you will be able to benefit from the obligations of others. Together, a community can therefore flourish because all its members flourish.

As a final point, that does not mean the State should not actively contribute to this planetary flourishing. A great example of this is offered by the *numerus clausus* of property rights.[41] The *numerus clausus* is a fundamental principle of property law that is a gatekeeper for access. Private parties make agreements that they desire to have third party effect. Such third-party effect is only granted if the content of the party agreement corresponds to a pre-defined type of property rights. Access to property law, in other words, is only granted if the menu of available options if followed.[42] In the absence of new legislation or, in some legal systems, case law no new types of property rights can be created.

38 Joseph Singer, The Edges of the Field. Lessons on the obligations of ownership (Boston: Beacon Press, 2000).

39 See, on this, J.H. Gilissen, Eigendomsrecht en eigendomsplichten (Tilburg: W. Bergmans, 1946), p. 260-263.

40 There is much to be said about the role of public law in sustainability, but this objective of this contribution is to explore the private law aspects in the form of a proposal for reform of private law property law.

41 See, on this, Bram Akkermans, The Numerus Clausus of Property Rights in European Property Law (Antwerp: Intersentia, 2008).

42 A great example is offered by the new Belgian Civil Code in Art. 3.3 that states that 'Only the legislator may create property rights'.

In that respect the State, that also provides rules in our global community, can offer help to provide the community members with the right tools. I am not suggesting to completely overhaul the *numerus clausus*; our current concept of ownership can perfectly be used in a regenerative rather than extractive manner and can almost as easily be shared as it can be used to exclude others.[43]

However, the State may contribute by creating new types of property rights that can assist us in achieving our social imaginary of planetary flourishing. Conservation servitudes, which impose positive duties on the owner of the servient land, are an obvious example.[44] Greenhouse gas emission rights are also a good example. Through EU law intervention a complicated system of emission rights has been enacted that provides for a European-wide market on which these emission rights can be traded.[45] Each allocated time-period less rights are available, thus reducing the number of greenhouse gas emissions to combat climate change. The property law classification of these rights is a subject of debate. Under the classical property law rules in civil law systems these rights have not become property rights but rather objects of property rights. In other words, one can 'own' an emission right but the right itself is not a property right as a servitude or a usufruct. Some systems around the world – where such systems also exist – do recognize emission rights as fully fledged property rights.[46] Considering the importance of these rights, it may be time to elevate these to fully fledged property rights.

In his valedictory lecture, finally, Professor Sjef van Erp proposed the inclusion of a non-user rights.[47] In the context of sustainable development, this is a very fruitful idea. Not only by the electricity you save from solar panels, as Van Erp suggests, but by using your property rights in a certain non-polluting manner. I am thinking in this respect, about carbon farming where farmers transition into storing carbon dioxide through crops or even types of geo-engineering that allow us to take greenhouse gases out of the atmosphere.[48] The potential for non-user property rights in sustainable property law should be further explored.

43 This is a matter of the underlying values of the system of property law. See, on this, Bram Akkermans, Sustainable Property Law: towards a revaluation of our system of property law, in Bram Akkermans and Gijs van Dijck (Eds.) Sustainability and Private Law (The Hague: Eleven International Publishers, 2019), p. 37 *et seq.*, and Bram Akkermans and Karel van Melle, Regeneratieve Eigendom – naar een hernieuwde benadering, in Benjamin Verheye, Björn Hoops, Elsabe van der Sijde and Bram Akkermans (Eds.), Duurzaamheid en privaatrecht (Knokke: Die Keure, 2022), forthcoming.

44 See, on this, Vincent Sagaert and Siel Demeyere (Eds.), Contract and Property from an environmental perspective (Antwerp: Intersentia, 2020), p. 34-35.

45 See https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en.

46 See Qing Pei, Lanlan Liu and David Zhang, Carbon emission rights as a new property right: rescue CDM developers in China from 2021, 13 International Environmental Agreements: Politics, Law and Economics (2013), p. 307 *et seq.*

47 Sjef van Erp, All good things come to an end, but access remains (Oisterwijk: Wolf Legal Publishers, 2021), p. 30-31.

48 Also known as direct air capture. See, for example, a scheme proposed by Klaus Lackner at Arizona State University. See Klaus Lackner and Habib Azarabadi, Buying down the Costs of Direct Air Capture, Ind. Eng. Chem. Res. 2021, 60, 22, 8196-8208, https://doi.org/10.1021/acs.iecr.0c04839.

Conclusions

Reform of property law is needed for two main reasons. First of all, we must take responsibility for our western European systems of property law and the effects these have had in other parts of the world. They have contributed to an unequal distribution of property and mass negative effects on the planetary climate system both in and outside of Europe. Even though climate change mitigating action has been taken in rich western countries, the externalities of the classical property law in other parts of the world remain largely unresolved. Moreover, existing, much more planetary friendly systems of land use have been pushed aside in favour of classical rules of property law.

This reckoning makes us rethink the basic characteristics of our property law. The purpose of property law should not as such be the accrual of wealth combined with economic growth, but rather a system in which we remain within our planetary boundaries. Resilience is the key pivot-term here to allow us to switch from the classical utilitarian and neoliberal approach towards a reimagining of a system of property law in a world that remains within its boundaries. Transformative resilience, in other words, offers us perspective to move forward with our whole system of property law and reform (or re-engineer or re-wire if you will).

We can reform our system of property law on the basis of planetary flourishing theory. This requires us to zoom out so that we do not only see the individual, but also the community in which each of us holds our property rights. Sometimes this community is small, or intergenerational, but sometimes it is global. The use of land as a sustainable resource is largely governed by rules of private law. Private law property law must therefore play an important role in sustainable use of this. That means using rights within the planetary boundaries; regenerative rather than extractive, sharing rather than exclusive; and with obligations rather than only with exclusive powers.

Our social imaginary is that of planetary flourishing and reimagining a world like this enables us to steer property theory, the organization of property law as well as, ultimately, our rules of property law. That is our research agenda for the coming decades, and I hope and plan to play an important role in this.

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