

# Sustainable Ownership - New Obligations Towards Achieving a Sustainable Society

Citation for published version (APA):

Akkermans, B. (2021). Sustainable Ownership - New Obligations Towards Achieving a Sustainable Society. *European Property Law Journal*, 10(2/3), 277-303. <https://doi.org/10.1515/eplj-2021-0014>

## Document status and date:

Published: 01/12/2021

## DOI:

[10.1515/eplj-2021-0014](https://doi.org/10.1515/eplj-2021-0014)

## Document Version:

Publisher's PDF, also known as Version of record

## Document license:

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# Sustainable Ownership – new obligations towards achieving a sustainable society

<https://doi.org/10.1515/eplj-2021-0014>

## 1. Introduction

Since 2015 there has been global consensus on seventeen sustainable development goals to achieve a more sustainable world.<sup>1</sup> Sustainability is the objective, meaning a system that is diverse and productive in such a way that it is regenerative.<sup>2</sup> For this to be achieved, we must substantially change the way in which we have organized our society.<sup>3</sup> This means, and this is part of the UN sustainable development agenda, that we must all contribute to effect change.

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1 UN Resolution of 25 September 2015, 70/1 Transforming our world: the 2030 Agenda for Sustainable Development, to be found at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).

2 There is a long-standing debate about the definition as well as the meaning of sustainability. A common definition, which will be used throughout this contribution, is that of the Brundtland report, on which the author elaborates below. See, on this debate, John Blewitt, *Understanding Sustainable Development*, 2nd edition (London, New York: Routledge, 2015), p. 8 *et seq.* On the concept of regeneration see Marjory Kelly, *Owning our Future: the emerging ownership revolution* (Oakland: Berrett-Koehler Publishers Inc, 2012).

3 Dealing with sustainability is not without controversy and there are certainly many people who do not wish to engage with sustainable development in the manner the author proposes in this contribution. My aim with this contribution is to persuade that this is not only necessary but also can be achieved in property law. Throughout this contribution therefore, the terms ‘we’ and ‘ours’ are used to refer to those individuals that seek to incorporate sustainability into property law.

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**Note:** I owe gratitude to Jaap Hage, Alexandru-Daniel On, Elsabe van der Sijde and two anonymous reviewers for their insightful comments on an earlier version of this paper. Any errors or mistakes, of course, remain my own.

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That includes our rules of private law, which are a fundamental element of our market economy, and especially also our rules of property law.<sup>4</sup> Freedom of ownership and the free circulation of goods ensure that we are able to identify individual property rights that can be held by everyone and which can be traded on the open market.<sup>5</sup> It is often held that this system and the conception of the right of ownership was – although based on older conceptions of property – developed after the fall of feudalism in the 18th century, with the ideals of a liberal objective and the aim of personal development and wealth for everyone.<sup>6</sup>

Liberal economic thinking resulted in a liberal conception of the right of ownership, where the owner is at liberty to do with his object as he or she wishes. This especially means extracting from the land that which is part of the land, for example in the form of minerals or the harvesting of crops. Although the overall objective of liberalism is to benefit society as a whole, the way in which liberal foundations have often turned out is to take wealth from the land for the sole benefit of the owner.<sup>7</sup>

From a sustainability perspective this approach does not always make sense. Concretely, the owner is making decisions for his own benefit and, with profit maximisation on his mind, may exhaust the resources of his object of ownership.<sup>8</sup>

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**4** Cf and Thomas Merrill and Henry Smith, *The Architecture of Property*, in Hanoch Dagan and Benjamin Zipursky (Eds.), *Research Handbook on Private Law Theory* (Northampton, Edward Elgar, 2020), p. 134 *et seq.*, Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), p. 1 *et seq.*

**5** See Richard Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973), p. 10 *et seq.*, Henry Smith, *Property as the Law of Things*, 125 *Harvard Law Review* (2011–2012) 1691 *et seq.*

**6** This basis of property law is not without controversy and – as it is not the main subject of this contribution, is explored elsewhere. See Thomas Piketty, *Capital and Ideology* (Cambridge MA: Belknap Press, 2020), p. 126 *et seq.*, James Gordley, *Myths of the French Civil Code*, in 42 *American Journal of Comparative Law* 3 (1994), p. 459 *et seq.*, Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), p. 1 *et seq.*

**7** Cf Hanoch Dagan, *Autonomy and Property*, in Hanoch Dagan and Benjamin Zipursky (Eds.), *Research Handbook on Private Law Theory* (Northampton, Edward Elgar, 2020), p. 185 *et seq.*, Marjorie Kelly, *Owning our Future. The Emerging Ownership Revolution* (Oakland: Berrett-Koehler Publishers Inc, 2012), p. 53 *et seq.*, Bram Akkermans, *Sustainable Property Law: towards a revaluation of our system of property law*, in Bram Akkermans and Gijs van Dijck (Eds.) *Private law and Sustainability* (The Hague: Eleven International Publishers, 2019), p. 37 *et seq.*

**8** However, there are also those that argue that already now this is very different. See Garrett Hardin, *The Tragedy of the Commons*, 162:3859 *Science* (1968) 1243, Robert Ellickson, *The Affirmative Duties of Property Owners*, 3 *Brigham-Kanner Property Rights Conference Journal* (2014), 43 *et seq.*, Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). On the latter see Claudia Williamson, *The Two Sides of de Soto: Property Rights, Land Titling, and Development*, in Emily Chamlee-Wright (Ed.), *The Annual Proceedings of the Wealth and Well-Being of Nations* (Wisconsin: Beloit College, 2010). In support of this argument see Elinor Ostrom, *Governing the Commons* (Cambridge: Cambridge Uni-

Sustainability requires the owner to take not only his own interests into account, but also the interests of those around him or those that come after him.

A landowner does not own land in isolation but is part of a community. This can be, for example, a local community of neighbours, a group of fellow entrepreneurs, or a bond between past, present and future owners (such as a family).<sup>9</sup> A community consists of links between its members. In terms of property law, this means that through the entitlement to land, people can be connected to others. Some of these connections are already known in the form of obligations. For example, the owner of a higher piece of land, has a responsibility towards an owner of a lower piece of land in terms of the water that runs from his land to the lower land. In turn, the owner of a lower piece of land may have a responsibility towards the owner of a higher piece of land to support buildings. Other examples may include the responsibility of an owner on whose land a river runs, towards occupants further downstream on the river, or relations between direct neighbours.

Thinking about this is not new, but the attention that this way of reasoning is receiving in the context of the discussion on sustainability, brings old ideas, combined with new insights to the forefront.<sup>10</sup> The role of law, and especially private law in this however, has not received the attention it deserves.<sup>11</sup> Attention is needed because of the fundamental role private law, and especially property law, plays in the organization of our society. The central point of the law of property, and therefore also of this paper, is the right of ownership. Sustainable ownership, I will argue, means reconceptualising our fundamental philosophy at the basis of our right of ownership.<sup>12</sup> The result of such reconceptualization is that the focus of

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versity Press, 1990) Daniel Cole, *Pollution & Property. Comparing Ownership Institutions for Environmental Protection* (Cambridge: Cambridge University Press, 2002), Nick Hayes, *The Book of Trespass* (London: Bloomsbury Circus, 2020).

<sup>9</sup> See on communities, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 75.

<sup>10</sup> See, for example, Encyclical Letter *Laudato Si'* of the Holy Father Francis on the care for our common home (24 May 2015), available at [http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si.html](http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html) and the sources cited by the Pope, especially of his predecessors. See also John Blewitt, *Understanding Sustainable Development*, 2nd edition (London, New York: Routledge, 2015), p. 39 *et seq.*

<sup>11</sup> See, by way of exception, Ugo Mattei and Fritjof Capra, *The Ecology of Law: Toward a legal system in tune with nature and community* (Oakland CA: Berrett-Koehler Publishers, 2015), Alessandra Quarta and Ugo Mattei, *The Turning Point in Private Law* (Northampton: Edward Elgar, 2018), Bram Akkermans and Gijs van Dijck (Eds.) *Private law and Sustainability* (The Hague: Eleven International Publishers, 2019).

<sup>12</sup> See, on this reconceptualisation, Bram Akkermans, *Sustainable Property Law: towards a reevaluation of our system of property law*, in Bram Akkermans and Gijs van Dijck (Eds.) *Private law and Sustainability* (The Hague: Eleven International Publishers, 2019), p. 37 *et seq.*

ownership is not only on what the owner may do, but also what obligations he or she owes to his community. For that, the author argues, the foundation of our right of ownership should not be found in utilitarianism, but instead in human flourishing.<sup>13</sup>

## 2. Sustainable property law

At the centre of the law of property is a set of property rights. These rights are entitlements to things (land, goods, and many other things) that have effect against third parties, most often against everyone (*erga omnes*).<sup>14</sup> The list of available property rights is therefore limited, by legislation or otherwise, and the existence of the right is made known through some form of publicity (where the thing as well as the holder of the right is also made known).<sup>15</sup> Other rules of property law provide the operating system in which these rights are created, transferred or acquired, and lost.<sup>16</sup>

The focus in property law is mostly on the owner himself and what he or she may do with his object of ownership.<sup>17</sup> The property right, after all, is the centre

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**13** To that end the author seeks to explore what providing such a human flourishing basis would bring to property law, rather than to critically engage with the value of human flourishing theory *per se*. See Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), p. 80 *et seq.*, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019).

**14** In contrast to this stands the more common law inspired Hohfeldian analysis of property rights, which focuses more on a relational view in respect to a thing. See Hohfeld, W.N., 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, (26) 1917, 710 *et seq.* Henry Smith, *Property as the Law of Things*, 125 *Harvard Law Review* (2011–2012) 1691 *et seq.* Such analysis also finds ground in civil law systems, see Shalev Ginossar, *Droit réel, propriété et créance – élaboration d'un système rationnel des droits patrimoniaux*, (Paris: LGDJ, 1960).

**15** Also known as the principle of *numerus clausus* and the principle of transparency (publicity and specificity). See on these principles, 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), 1517 *et seq.*, see also, Bram Akkermans, *Numerus Clausus*, in Michele Graziadei and Lionel Smith (Eds.), *Comparative Property Law. Research Handbooks in Comparative Law* (Northampton: Edward Elgar, 2017), p. 100 *et seq.*

**16** On the term operating system see Henry Smith, *Standardization in Property Law*, in Kenneth Ayotte and Henry Smith (Eds.), *Research Handbook on the Economics of Property Law* (Northampton: Edward Elgar, 2011), p. 148 *et seq.*, see Sjef van Erp and Bram Akkermans, *Preface*, in Sjef van Erp and Bram Akkermans, *Text, Cases and Materials on Property Law*, *Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2012), p. vi *et seq.*

**17** Of course there are aspects of property law that focus on others than the owner, such as in the law of nuisance.

point of the law of property. Sustainability, however, requires a focus on other aspects than the particular private interest. Sustainability means to take into consideration, always, the greater good, i.e. a sustainable system, and consider what is our role and what is our responsibility in achieving this. This seems, at times, almost a fundamentally opposite starting point.

Upon closer consideration, however, there are many instances where these objectives overlap. Some elements of property law, especially where a person other than the owner holds an object, are directly related to sustainability. The holder of a right of usufruct in civil law systems, for example, takes care of the object in the form of maintenance and insurance so that when it returns to the owner, the object is at least of the same value.<sup>18</sup> A similar obligation exists for the holder of right of *emphyteusis* (long lease) who holds land for a longer duration of time.

Sustainable property law means that we have to reconsider and re-value our property system. Property law is designed to be able to accommodate changes, and many changes can (and have been) made, without fundamentally changing our central property concepts. For example, although not without problems, we apply our property rules to banking and other virtual concepts.<sup>19</sup> Sustainability is more than just an idea, it is a design principle that requires us to reconsider our rules and the way in which these are applied.<sup>20</sup> The reconsideration of property law in this perspective does not therefore require us to make a completely new system with completely new rules. Closely connected to sustainability, which is the aim, is sustainable development, which is the method we use or the steps we take to achieve that aim.<sup>21</sup>

Sustainable development is usually defined as taking care of our own needs, without compromising the ability of future generations to meet their own needs (the Brundtland definition).<sup>22</sup> What does change is that the objectives of a sus-

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**18** 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.) *Private law and Sustainability* (The Hague: Eleven International Publishers, 2019), p. 37 *et seq.* Common law systems employ a similar doctrine in the context of leases, known as the doctrine of waste. See, on this, John A Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 *Missouri Law Review* 4 (2007), p. 1209 *et seq.*

**19** See Ewan McKendrick, *Goode on Commercial Law*, fifth edition (London: Penguin Books Ltd, 2017).

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

**21** See, John Blewitt, *Understanding Sustainable Development*, 2nd edition (London, New York: Routledge, 2015), p. 8 *et seq.*

**22** The Brundtland report states in paragraph 27 sustainable development means ‘meeting the needs of the present without compromising the ability of future generations to meet their own

tainable property law are necessarily different from the objectives of our current systems. A classical system of property law is aimed at providing individual property rights for the accrual of wealth, and also to provide secure capital to allow a landowner to raise funding (through, for example, mortgages or securities) for development.<sup>23</sup> Utilitarianism, especially welfare maximisation, combined with (neo-)liberal thinking, encourages us to apply our property rules in a very individualistic manner.<sup>24</sup> Many argue that a utilitarian perception of what an owner (or holder of another property rights) is and what he or she may do with his right lies at the core of our current system.<sup>25</sup> Welfare maximisation, i.e. the idea that any profit that comes from the property right is for the right-holder and can be extracted as much as possible within the confines of the right itself, is the primary objective of a right holder of a property right. Besides this philosophical foundation, there is an economic foundation in the form of a liberalist or neo-liberalist conception that property rights are there to provide individual wealth. By respecting and – where necessary – allocating (in the form of privatisation) property rights, the free market can play out and provide welfare for all parties involved.

Both the philosophical and economic foundation that underlies the law of property needs to change to provide the context for a sustainable property law. There are many theories that can support such change, usually brought together under the heading of progressive property law.<sup>26</sup> Among these it is Human Flour-

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

<sup>23</sup> See Sjeff 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), 1517 *et seq.*

<sup>24</sup> This contribution does not provide a full comprehensive account of utilitarian property theory. For a good overview see Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge, Cambridge University Press, 2012), p. 11 *et seq.*

<sup>25</sup> A counter argument is of course possible. The rules of property law were not designed with a particular philosophy in mind. The rules can therefore equally be interpreted from a Kantian or Aristotelian perspective. What the author means to convey here is that the way in which we have applied and shaped our system of property law in modern times is not without values. See, on this, Gregory Alexander, *Property's Ends: The Publicness of Private Law Values*, Cornell Law School Research Paper 14–13, available at <http://ssrn.com/abstract=2414119>.

<sup>26</sup> Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler, *A Statement of Progressive Property*, 94 *Cornell Law Review* (2009), p. 743. See for an overview of progressive property law Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: Cambridge University Press, 2021).

ishing theory that provides a clear way forward.<sup>27</sup> Human flourishing theory, that shifts our focus on well-being, for ourselves and for our community, from the individual to a wider perspective. It also brings in a pluralistic conception of the values that underly our property system.<sup>28</sup> Most of all, it brings with it the realisation that we are all members of a set of communities and that this membership brings with it obligations to participate and to support the network and structures that enable human flourishing.<sup>29</sup>

Sustainable property law therefore has its focus on well-being for all, i.e. the individual but also his surroundings, most notably his community. A neoliberal economic approach does not fit with this approach. A more nuanced economic system, which allows us to develop in moderation within the boundaries that our ecosystem offers us, provides a new view on how the law of property should function.<sup>30</sup>

Essential questions have to be raised on every aspect of our property law. In this contribution, my focus is on property rights, the primary property right of ownership in particular. Property rights are held on objects that generally have a real-world presence. Land in particular, is a scarce resource that, for many, is the most valuable object they will have during their lifetime. Our rules of property law are therefore created and continue to centre around the idea of ownership of land.<sup>31</sup> However, our rules of property law are also created to provide an individual with as much power as possible for his own benefit over that land.

Sustainability requires us to change that perspective. Of course, the owner should be able to enjoy his right of ownership, but not without limits and – sustainability brings this – not without responsibility to those around the owner, the wider community and our planet. Ownership should therefore be a right that comes with obligations. Not only in respect to a concrete situation that gives rise to an obligation, such as the duty to support another building, but a duty in respect to the achievement of sustainability. For that we will need to clearly define

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27 This paper focuses on Human Flourishing theory because of its pluralistic approach. This suits, will be demonstrated below, the purpose of sustainability and offers a framework on the basis of which property law can be further developed.

28 Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. xiv.

29 Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. xv.

30 On the economic developments towards sustainability, economist Kate Raworth has done insightful work: Kate Raworth, *Doughnut Economics* (London: Random House, 2017).

31 And this causes many issues in current day property law as well. See Sjef van Erp, *Access management of digital assets*, 8 *European Property Law Journal* 3 (2019), p. 227 *et seq.*, Sjef van Erp, *Ownership of data and the numerus clausus of legal objects*, in S. Murphy and P. Kenna (Eds.), *eConveyancing and title registration in Ireland* (Dublin: Clarus press, 2019), p. 125 *et seq.*



(1) what that objective of sustainability is, (2) whether there can be an obligation, (3) where that obligation comes from and, (4) whether such obligation can be enforced.

Sustainability, as defined by the Brundtland report, provides property law with a clear objective: it is to provide the building blocks with which sustainability can be achieved.<sup>32</sup> Moreover, these bricks need to provide the holder with rights, but also obligations to achieve sustainable solutions, and the ‘interface rules’ between the bricks needs to accommodate their use in this context. Sustainable property law, in other words, is to provide both the system and the tools. At the core of this is a new conception of the right of ownership.

### 3. The right of (sustainable) ownership

#### 3.1. Sustainable ownership

At the centre of sustainable property law is the right of ownership, a unitary property right that is the most comprehensive property right a person can have. In a non-technical sense all systems adhere to such a primary right, although technically it appears in a very different form in civil and common law systems.<sup>33</sup> This right of ownership is the primary right, i.e. the best right of the available property rights, and traditionally grants an almost absolute power to the right-holder. The core of the right, once more in a traditional sense, is therefore exclusivity: the right-holder may exclude everyone from use and enjoyment, may grant access only to another of his or her choice and under his or her conditions, and may do with the object of the right whatever he or she wants, subject to the limits of the law.<sup>34</sup> Of course, over the years, limitations, mostly from public law have been imposed on what exactly

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**32** See World Commission on Economic Development (WCED), *Our Common Future*, (Oxford: Oxford University Press, 1987), p. 43, Bram Akkermans, Sustainable Property Law: towards a revaluation of our system of property law, in Bram Akkermans and Gijs van Dijck (Eds.) *Private law and Sustainability* (The Hague: Eleven International Publishers, 2019), p. 37 *et seq.*

**33** In relation to land, the primary right in common law systems is known as a freehold estate (or fee simple), whereas civil law systems adhere to the right of ownership in a more narrow and technical sense. See Bram Akkermans and William Swadling, *Property Rights in Sjeff van Erp and Bram Akkermans (Eds), Text, Cases and Materials on Property Law, Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2012), p. 211 *et seq.*

**34** See Dorothy Guyaert, *De exclusiviteit van het eigendomsrecht* (Antwerp: Intersentia, 2016), Bram Akkermans and William Swadling, *Property Rights, in Sjeff van Erp and Bram Akkermans (Eds), Text, Cases and Materials on Property Law, Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2012), p. 215–226.

the owner may do, taxes that have to be paid and some parts of the ownership (for example minerals in or on the land, the airspace above the land) that are no longer part of the prerogatives of the right-holder.<sup>35</sup> There are also private law limitations on the right of ownership, mostly following from the law of neighbours, preventing the owner from abusing his or her powers against others.<sup>36</sup>

A sustainable right of ownership, however, will have to go much further than this.<sup>37</sup> To hold a right of ownership means to hold a powerful property right in context. This context is provided by the community or communities of the owner. Membership of that community (or communities) comes with privileges, such as the right of use and enjoyment of the object, but also with obligations that (a) limit that right of use and enjoyment and (b) that can exist towards other members of the community or to the community as a whole.

To discover what these obligations may be (section 3.4), the social thesis underlying the conception of property rights and communities will have to be explored (3.2), and the various communities of which a sustainable owner can be a member will have to be defined (3.3).

### 3.2. The social thesis of sustainable ownership

When we hold a property right, we do not hold this in isolation: we hold our right in context of the limitations of the object, in the context of the rights of others, but also in relation to the world around us. Human flourishing theory, as advocated by Gregory Alexander, puts emphasis on the latter part.<sup>38</sup> In this theory, the objective is human flourishing for everyone. A much more pluralistic objective than welfare maximisation.<sup>39</sup> It encompasses all sorts of values that centre on the in-

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**35** Bram Akkermans and William Swadling, Property Rights, in Sjeff van Erp and Bram Akkermans (Eds), Text, Cases and Materials on Property Law, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2012), p. 226–239.

**36** The abuse of rights doctrine is particularly strong in civil law systems, see Bram Akkermans and William Swadling, Property Rights, in Sjeff van Erp and Bram Akkermans (Eds), Text, Cases and Materials on Property Law, Ius Commune Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2012), p. 227 *et seq.*

**37** In fact, a reconceptualization of ownership into sustainable ownership requires us to move away from the individualistic- (utilitarian and liberalist) to a more collective approach based on human flourishing theory.

**38** Gregory Alexander, Property and Human Flourishing (Oxford: Oxford University Press, 2019), p. xiv.

**39** See, on this distinction, Gregory Alexander, Property and Human Flourishing (Oxford: Oxford University Press, 2019), p. 4 *et seq.*

dividual, but also on the collective. We are, Alexander argues, all connected to each other in society and therefore under an obligation to be a member of that society and that membership comes with responsibility.

Human flourishing, which finds its basis in the moral philosophy of Aristotle, focuses on virtues and holds that our actions should be guided by whether such an action would be virtuous.<sup>40</sup> In his property theory Alexander holds that human flourishing is the moral foundation for property, both as a concept and as an institution.<sup>41</sup> Human flourishing is therefore the objective that property law seeks to realise. In Alexander's conception of this 'a person's life flourishes when it goes as well as possible, that is, when the person lives a life of dignity, self-respect and satisfaction of basic material needs.'<sup>42</sup>

To operationalise this, Alexander poses a social thesis. He derives this thesis from the work on community of Charles Taylor.<sup>43</sup> Taylor takes a more holistic approach to contrast the more individualistic views that currently reign, and brings the focus on humans as social animals.<sup>44</sup> Humans, is the argument, are not self-sufficient alone, but need others to develop themselves. Although humans strive for autonomy, a dependency on others exists. This leads to a social thesis that provides the framework to analyse what it means to be a member of society. Alexander takes this social thesis and places it more explicitly in the context of human flourishing. Alexander extends (Alexander uses the term augments) the social thesis (ST) to our modern-day society:

'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'<sup>45</sup>

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**40** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 4.

**41** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 4.

**42** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 5.

**43** See Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 45–46.

**44** The term social animal derives from Aristotle, who is also seen as the philosopher at the basis of the Human Flourishing theory. See Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 46.

**45** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 55.

This ST is the foundation of Alexander's property and human flourishing theory. It expressed the objective of human flourishing and emphasizes we all have capabilities to live our lives towards this objective. These capabilities, which Alexander derives from the work of Amartya Sen, include rationality and self-determination, but also health, education and sociability.<sup>46</sup> That means that when we hold property rights, the ST provides the basic framework in which we hold and exercise our rights. This framework therefore also changes our perspective in which we perceive our property rights. Instead of focusing on the powers of the right-holder only, we look at the right holder in context of the world around him. Not only what the right-holder can do, but also what he or she owes to the rest of us.<sup>47</sup>

What it is that a right holder owes and to whom he or she owes it, requires more specification. It is not generally against the whole world, but against members of a community to whom the right holder of a property rights holds obligations. The definition of the community of the right holder (section 3.3) is therefore crucial, before we can turn our attention to the obligations of the right holder (section 3.4).

### 3.3. The community of the sustainable landowner

Alexander's theory relies, besides his social thesis (see section 3.2) and the obligations of owners that follow from that (see section 3.4), on the community of the owner.<sup>48</sup> It is this community that provides the context in which right holders of property rights must exercise their right.<sup>49</sup> Communities are a necessity to get a flourishing life and will determine our place and our relations. What is a community, and therefore what binds people together through their membership, is a matter of definition.<sup>50</sup> Alexander warns that it is almost impossible to properly define what is a community exactly, but does search for criteria. He takes his place in a debate that has been ongoing for decades. Alasdair MacIntyre, for ex-

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<sup>46</sup> Amartya Sen, *Utilitarianism and Welfarism*, 76 *Journal of Philosophy* (1979), p. 474 *et seq.*, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 54.

<sup>47</sup> My proposal goes well beyond the mere recognition not to do harm to others, such as in nuisance cases, but seeks to find true positive obligations that we may have towards each other or towards the community we are a part of.

<sup>48</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 75 *et seq.*

<sup>49</sup> Or 'parameters' in Alexander's terminology, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 76.

<sup>50</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 81.

ample, focuses on the common practice of community members.<sup>51</sup> In MacIntyre's view a community must make possible and sustain the acquisition and development of virtues and must be based on common practices around which the communities are constituted.<sup>52</sup>

Alexander takes a somewhat different approach and focuses on shared values rather than practice. His first criterion is the shared characteristics that community members consider important, such as values, ethnicity, family or otherwise. Associations, which are groups tied together by contract are therefore not contributing to the members' personal identities and therefore should not be considered a community. The crucial element is whether there is a shared value or there are shared values between the community members.<sup>53</sup>

Communities can be defined in terms of territorial boundaries, such as families, neighbourhoods, cities and even countries.<sup>54</sup> They can also have non-territorial boundaries, including virtual communities such as social networks, ethnic communities, religious communities, or professional communities.<sup>55</sup> Also here, it is the membership of the community that provides personal identity and sense of belonging.<sup>56</sup>

It is based particularly on the criterion of shared values that Alexander constructs his concepts of community.<sup>57</sup> The link to a territory is therefore only a relatively simple starting point. When the connecting factor is not necessarily the place where we live our lives, but the connection we have to a group of people that share our values and therefore give us a sense of belonging, it becomes possible (and perhaps necessary) to construct a different type of community to cover what happens in the real world.<sup>58</sup> Alexander also explores the idea of intergenera-

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51 Alasdair MacIntyre, *After Virtue* (London: Duckworth, 1981).

52 Alasdair MacIntyre, *After Virtue* (London: Duckworth, 1981), p. 218.

53 Consequently some groups will have a higher degree of 'community-ness' than others, see Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 82.

54 Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 82–92.

55 Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 94–95.

56 Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 95.

57 This is not without criticism as there may also be communities where its members do not share values, but still belong in a same community. An example of this would be a research community in a university where the practice of research binds several experts with very different values. In that respect, MacIntyre's common practice may offer a much more binding criterion.

58 A very interesting study on belonging and groups is offered by Brené Brown in her book *Braving the Wilderness*. Brown is not a legal scholar, but comes to the same conclusion as Alexander in

tional communities and comes to the conclusion that these too, exist and can give rise to obligations of members of such a community.<sup>59</sup>

The connecting factor of an intergenerational community in Alexander's theory is social reciprocity. It is the idea that the connection between past generations, current generations and future generations creates an intergenerational community between them. In Alexander's words:

'Serial reciprocity has a kind of asymmetrical character. We pay on to the next generation what we have received from the past – clean environment, basic infrastructure, a workable public system of government, that is, the goods that are the substance of the general obligation. Future generations generally depend on their ancestors to leave them with such goods as their starting point.'<sup>60</sup>

With this, Alexander touches on a large philosophical debate on the role of future generations.<sup>61</sup> He takes position in the debate by bringing focus on dependency as a connecting factor between generations.<sup>62</sup> It is through this dependency that he finds obligations that we have towards future generations. For Alexander, this means first and foremost life transcending projects, such as the carrying onwards of a family business. In such cases, there are often legal means to ensure legal obligations are created. Examples of such are last wills or trust devices. When, however, there is less of a direct connection between generations, Alexander still accepts the existence of obligations when the link of dependency has not been broken.<sup>63</sup>

In 1971 Martin Golding connected obligations to future generations to the idea of the good life. Of our immediate posterity, Golding argues, we are able to envi-

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terms of belonging and shared values as the defining criteria to define community. See 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).

<sup>59</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 106–110, in particular p. 119.

<sup>60</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 199.

<sup>61</sup> See, e.g. Martin Golding, *Obligations to future generations*, in Ernest Partridge (ed.), *Responsibilities to Future Generations. Environmental Ethics* (Buffalo NY, Prometheus Books, 1980), p. 61 *et seq.*

<sup>62</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 133.

<sup>63</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), 113.

sion what life they will have and therefore we can owe obligations towards them.<sup>64</sup> However, posterity more remote from us will live in a world of which we cannot imagine the good life and therefore we lose the connection on which we can build an obligation. Golding's work is one of the earliest and most influential pieces on the subject and many others have used his views to develop their own thoughts.<sup>65</sup> The connecting factor that serves as the basis, i.e. dependency for Alexander, the good life for Golding, is not shared by everyone. Kavka, for example, disagrees with Golding's limits, and put forth that all humankind shares some very general features, such as vulnerability to physical and mental suffering and to death, their capacity for enjoyment, self-consciousness, capacity for long-range purposive planning and action, and the capacity for cooperation and identification with others.<sup>66</sup> Kavka sees equality of all humans in this and posits that such can be a basis of an obligation to future generations, also in the sense of obligations towards more remote posterity.<sup>67</sup>

These obligations should not be detrimental to existing members of a generation. The classic example offered is that of taking into account future children. Kavka imagines a poor couple considering having more children and raises the question whether the couple should put their future children on par with their current children in terms of their consumption of resources.<sup>68</sup> He answers this question in the negative. Alexander adds that the living have moral obligations to the living members of their community (or communities), and those obligations must be met first.<sup>69</sup> However, Alexander points out this is a matter of priority: it is to the living we first owe responsibility, before we can tend to our responsibility

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**64** Martin Golding, Obligations to future generations, in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Environmental Ethics (Buffalo NY, Prometheus Books, 1980), p. 62–65.

**65** See, inter alia, Daniel Callahan, in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Environmental Ethics (Buffalo NY, Prometheus Books, 1980), p. 73 et seq, Gregor Kavka, *The Futurity Problem*, in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Environmental Ethics (Buffalo NY, Prometheus Books, 1980), p. 109, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 113 et seq.

**66** Gregor Kavka, *The Futurity Problem*, in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Environmental Ethics (Buffalo NY, Prometheus Books, 1980), p. 112–113.

**67** Gregor Kavka, *The Futurity Problem*, in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Environmental Ethics (Buffalo NY, Prometheus Books, 1980), p. 113, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 129.

**68** Gregor Kavka, *The Futurity Problem*, in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Environmental Ethics (Buffalo NY, Prometheus Books, 1980), p. 114, Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 131.

**69** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 131.

towards future generations. The more remote these future generations, the weaker the obligation we owe them.<sup>70</sup>

With this, Alexander connects to the core question of community again, but also takes the position that the fulfilment of obligations should not be detrimental to the current generation. There are different ways to think about this. It is also imaginable that sacrifices are necessary to support future community members. This seems especially relevant, as will be set out below, in relation to sustainability obligations where it is perhaps necessary to take action and make compromises today to enable a better climate future for our children.<sup>71</sup> In relation to the different criterion of common practice made by MacIntyre, which he makes from the perspective of virtue ethics, that criterion may actually require us to make such a sacrifice for our intergenerational community.<sup>72</sup>

But obligations arise in any case and the nature of these obligations must be explored further. In Alexander's views there is a general obligation and there are specific obligations. The general obligation, such as (in Alexander's view) to provide a clean environment, can be fulfilled by paying taxes to the state. The state in its turn will have to fulfil this obligation by development of public policy.<sup>73</sup>

What is left are specific obligations. It is important to recognise that these are, first and foremost, moral obligations. We may hold obligations towards others, but these are not immediately enforceable in law. Only in specific situations, such as in case of testamentary provisions, these obligations are transformed into legal – and therefore legally enforceable – obligations. Another example is by way of a trust, in which legal obligations also arise to a wide variety of parties. Also, through specific legal persons, such as foundations or even companies, certain obligations can be given a legal shape. Legal tools, in other words, are needed to help translate a moral obligation into a legal obligation.

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**70** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 131.

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

**72** The author thanks his colleague Daniel On for this astute observation.

**73** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 123.



### 3.4. Obligations of the sustainable landowner

In terms of obligations we must, as already mentioned in the last section, distinguish between moral and legal obligations. The obligations we hold towards other members of the communities that we belong to are moral in their foundation. They can, and in many instances will, be made into legal obligations as well. Before we go into the legal obligations, we must look at moral obligations and how they can exist.

Obligations follow from membership of a community, which in turn is based on the social thesis. The obligation is of human flourishing: i.e., to flourish yourself, and also to help others flourish. These obligations exist to help each other based on our own capabilities. In simple terms, a person with more to share is under an obligation to share more than those who have less. At the same time, everyone is also under an obligation to ensure their own human flourishing.<sup>74</sup>

Those of us that hold property rights are in a special position because they generally hold exclusive power. Generally, safe from public law limitations, which are usually imposed in the public interest, it is the property right holder that grants others access to his property. Moreover, the property right holder can generally dispose over his property in such a way as to gain advantage from it. Be it in the form of harvest, income or a place to live.

These assumptions apply not only to the holder of a primary property rights, such as the right of ownership, but also to those that hold a property right that is derived from that (e.g., a lease). Secondary property rights, or limited property rights, also bring this obligation with them. They are equally the source of moral obligations towards fellow community members.

These moral obligations take shape, in Gregory Alexander's work, as general and as specific obligations. General obligations deal with providing the general infrastructure needed for its members to flourish. This includes basic goods, such as water and electricity, defense and transportation. Alexander holds that we can meet these obligations by paying taxes; the organisation of this is therefore part of the state and directly connected to the idea of democracy.<sup>75</sup> How and what amount of taxes should be paid, is part of a different political discussion.<sup>76</sup>

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<sup>74</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 39 *et seq.*

<sup>75</sup> Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 56–57.

<sup>76</sup> See, for a very interesting account of how taxes can contribute towards a more just society Thomas Piketty, *Capital and Ideology* (Cambridge MA: Belknap Press, 2020).

Specific obligations are more complex. They arise in the context of a specific person or group of persons, can be both monetary (such as the general obligations) and non-monetary, and they are not owed to society as a whole, but rather to another member or group of members of our community.<sup>77</sup> They can be both negative and positive in content.<sup>78</sup> Especially positive obligations, are more complex and are generally looked upon with great care.

Property rights take a very central position in our society. Alexander specifies that the social thesis of human flourishing actually depends on property rights that provide a person with the resources needed for human flourishing.<sup>79</sup> This is not without controversy, as having a property right in an object that enables me to flourish as a human being deprives another of the same right and therefore the possibility to flourish on the basis of this. Alexander solves this by posing that when another is also in need of access to the same resource, the owner must grant access under a specific obligation to that person in my community.<sup>80</sup> Of course not in such a manner that I cannot afford it.<sup>81</sup>

The complication that comes with this is therefore that the existence of the specific obligation is depending not only on the community of which you are a member, but also on the position that you are in in terms of your wealth and the dependency you have on others in your community. The metaphor Alexander uses in this respect is that of a good neighbour.<sup>82</sup> A good neighbour does not only respect the legal requirements that apply, such as the respect for boundaries or the rules on abuse of right, but will also actively attempt to take into account other members of his community.<sup>83</sup>

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**77** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 57.

**78** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 58.

**79** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 59.

**80** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 59.

**81** Alexander's bottom line is that 'the social obligation may require the owner to provide resources, in ways that are appropriate to that owner, to others in the owner's community (or communities) where necessary to support the development of their requisite capabilities.' Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 60.

**82** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 68–73.

**83** Gregory Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2019), p. 68–69.

In terms of sustainability, the landowner is a member of multiple communities. Not only is he or she in direct relation to those that hold property rights in the land around him or her, or with those that occupy the land (the neighbourhood community), but those rights are exercised in a national community, a European community and even in a global community context. The 17 UN Sustainable Development Goals (SDGs) apply to everyone, EU law applies to all those in the European Union, and national law applies to all those in a country.<sup>84</sup> These communities provide the land owner with rights, such as autonomy and protection against arbitrary interference from the state.<sup>85</sup> Obligations also can arise in this context. From a moral point of view, the social thesis – being a member of a global community in which we are all depending on each other for a sustainable planet – brings with it the obligation that we owe each other duties to contribute towards maintaining this society.<sup>86</sup> An owner with property situated to use wind, heat or sunlight as a source of energy instead of using fossil fuels, and who has the financial means to make investments to make such a transition happen, should do so. Similarly, a company or other organisation managing the electricity or other utility network (such as natural gas) – as the owner of the network and as member of the same community as the landowner – should, when the financial means are present, enable a landowner to make such investment.

Very rarely such obligations may take a legal form, such as in case of energy certificates of buildings.<sup>87</sup> In some countries, obligations exist to move from a low ranking to a more higher ranking energy certificate for commercial buildings.<sup>88</sup> However, there are more situations in which legal obligations are created to give effect to the social thesis of human flourishing. A great example is offered by new cooperative farming initiatives in the Netherlands. Called *Heerenboeren* ('Lord

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**84** See John Blewitt, *Understanding Sustainable Development*, 2nd edition (London, New York: Routledge, 2015), p. 13 *et seq.*

**85** See Bram Akkermans and William Swadling, *Property Rights in Sjev van Erp and Bram Akkermans (Eds), Text, Cases and Materials on Property Law, Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2012), p. 211 *et seq.*, Article 17 Universal Declaration of Human Rights, Article 17 EU Charter of Fundamental Rights, Article 1 First Protocol European Convention on Human Rights. See, on the latter, Björn Hoops, *The Legitimate Justification of Expropriation* (Cape Town: Juta, 2017).

**86** For an account of how we are connected to each other by the global climate see Eric Holthaus, *The Future Earth. A radical vision for what's possible in the age of warming* (New York: HarperOne, 2020).

**87** Björn Hoops, *Het recht en de transitie naar duurzaam wonen* (Den Haag: SDU Uitgevers, 2019), p. 51 *et seq.*

**88** Björn Hoops, *Het recht en de transitie naar duurzaam wonen* (Den Haag: SDU Uitgevers, 2019), p. 76 *et seq.*

farmers'), a collective of private persons collectively invest in the acquisition of a parcel of agricultural land. The ownership of the land is shared by all of the co-owners in the form of certificates.<sup>89</sup> The collective is also established as a legal person (a cooperation) and a farmer is hired to farm the land. The cooperation, through a general assembly, decides with the farmer how the land will be farmed.<sup>90</sup>

The certificate of co-ownership of course provides the owners with an ownership share in the cooperation and comes with co-decision making power. Through the statutes of the cooperative and through separate rules and regulations, the co-owners also bind themselves to buy fruits and vegetables that come from the land on a weekly basis. With co-ownership of the land, in other words, comes the obligation to acquire the proceeds from the land as well.

Such cooperative initiatives exist in a wider form and are also employed for the collective generation of electricity, the running of a cooperative company, or collective heat pump systems.<sup>91</sup> These are different from the general – and older idea – of a commons, short for the common holding of land. Commons, where property is held collectively, have been at the centre of attention in the sustainability debate recently. Commons have been used throughout time (think of *res communis* in Roman law), as a means of collective holding of property.<sup>92</sup>

In many ways, commons are contrary to the modern way of property holding, with its focus on boundaries and exclusivity.<sup>93</sup> Commons have gained attention with biologist Garrett Hardin's work published in 1968 in which he focused on the idea that failure occurs when commons are overused and decision making on how

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**89** Known in Dutch law as certification of ownership, see Steven Bartels & Aart van Velten, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 5. Zakenrecht, Eigendom en beperkte rechten (Deventer: Wolters Kluwer 2017), n. 359.

**90** See [www.heerenboeren.nl](http://www.heerenboeren.nl), on this see also Bram Akkermans, Sustainable Obligations in (Dutch) property law, in Siel Demeyere and Vincent Sagaert (Eds.), *Contract and Property from an environmental perspective* (Antwerp: Intersentia, 2020), p. 34–35.

**91** See, for an overview of collaborative initiatives, Marjory Kelly, *Owning our Future: the emerging ownership revolution* (Oakland: Berrett-Koehler Publishers Inc, 2012).

**92** Very interesting in this respect is the comparison to public property, in which not the collective but the state holds all the property rights. See, on this distinction, Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a legal system in tune with nature and community* (Oakland CA: Berrett-Koehler Publishers, 2015), p. 45 *et seq.* Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018).

**93** See Howard Mansfield, *The Habit of Turning the World Upside Down* (Peterborough NH: Nathan Publishing, 2018), see also [https://www.theguardian.com/commentisfree/2020/aug/19/pandemic-right-to-roam-england?CMP=share\\_btn\\_tw](https://www.theguardian.com/commentisfree/2020/aug/19/pandemic-right-to-roam-england?CMP=share_btn_tw).

to govern the commons is over-fragmented.<sup>94</sup> This can be avoided by various approaches of which two have become dominant in the last decade.<sup>95</sup> One approach favours a bottom-up use of commons creating a collective ownership.<sup>96</sup> The other approach takes a much wider view and interpretation of a commons and applies it together with a strong notion of community.<sup>97</sup> In this approach it is not the legal construct *per se*, but rather the setting that brings the community and therewith the commons.<sup>98</sup> Mattei and Quarta offer examples in the form of rights to roam in English law, as well as the more extensive *Allemansrätt* in Swedish law.<sup>99</sup> Nick Hayes has recently added a strong account of the tension between orthodox approaches to property focusing on exclusivity and the right to roam to strengthen this analysis.<sup>100</sup> These rights to roam are an issue of access that are in tension with the traditional exclusivity of ownership. By accepting that there are situations in which the exclusivity of the right of ownership must make way, we move towards a much more balanced system.

Another example offered by Mattei and Quarta is the agricultural use of land. When we look at the ownership of land from an exclusivity point of view, the owner may do with the land as he or she wishes. For example, by using chemicals and genetically modified seeds to maximize production for a short term. The owner does not do this in isolation. The neighbour, even though also with exclusive power over his land, cannot move towards organic farming as the land is ‘polluted’ from the neighbour using chemicals on his land.<sup>101</sup> The commons approach proposed by Quarta and Mattei would prevent this as it would require us to reason that the farmer using the chemicals cannot use his land in such way rather than the organic farmer having to prove that the chemical farmer is causing a nui-

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**94** Garrett Hardin, ‘The Tragedy of the Commons’ [1968] 162(3859) *Science* 1243.

**95** See Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 30–31.

**96** See Elinor Ostrom, *Governing the Commons* (Cambridge: Cambridge University Press, 1990), Carol Rose, *Thinking About the Commons*, Arizona Legal Studies Discussion Paper No. 19–24 (2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3487612](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3487612).

**97** See Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 48 *et seq.*

**98** Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 41–43.

**99** Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018) Quarta and Ugo Mattei, p. 44.

**100** Nick Hayes., *The Book of Trespass* (London: Bloomsbury Circus, 2020).

**101** Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 52–53.

sance.<sup>102</sup> A recalibration of the property rules would enable such communities to come about.<sup>103</sup>

The commons approach of Mattei and Quarta echos the obligations in the human flourishing. By nature of his ownership, the farmer should use his right of ownership in a manner responsible to enable his own human flourishing as well as that for his fellow community members. Such obligation is an integral part of his property right. It makes sense to follow Mattei and Quarta's suggestion to adapt the law of nuisance to that.

In short – there are many more examples – commons create a community of users immediately and in the framework of human flourishing theory a balance of rights and obligations comes about. The rules of the operating system of property law should facilitate that, rather than resist it.<sup>104</sup> This is part of the necessary re-wiring or revaluation of property law.<sup>105</sup>

Other examples are offered by private initiatives for various purposes. Examples are community land trusts that provide affordable housing or community development, or common interest communities where residents join forces to manage their common facilities.<sup>106</sup> In these situations, property rights are combined and supplemented by a set of rules on their use. For example, to make housing affordable, but also to maintain common facilities, such as gardens or swimming pools. By nature of their residence a community is formed and the rules that govern these communities provide both rights and legal obligations for the community members.<sup>107</sup>

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**102** Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 53.

**103** Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 50–54.

**104** On the use of the term operating system see Eveline Ramaekers, *European Property Law. From fragments to a system* (Antwerp: Intersentia, 2013), Henry Smith, *Standardization in Property Law*, in Kenneth Ayotte and Henry Smith (Eds.), *Research Handbook on the Economics of Property Law* (Northampton: Edward Elgar, 2011), p. 148.

**105** See Lynda Butler, 'Property's Problems with Extremes', William & Mary Law School Research Paper no. 09–384 (2018), <http://ssrn.com/abstract=3277500>, Bram Akkermans, *Sustainable Property Law: towards a revaluation of our system of property law*, in Bram Akkermans and Gijs van Dijck (Eds.) *Private law and Sustainability* (The Hague: Eleven International Publishers, 2019), p. 37 *et seq.*

**106** See Anna di Robilant, 'Property and Democratic Deliberation', 62 *American Journal of Comparative Law* Issue 2 (Spring 2014).

**107** Anna di Robilant, 'Property and Democratic Deliberation', 62 *American Journal of Comparative Law* Issue 2 (Spring 2014).

## 4. The contours of a new system: sustainable property law, Human (and planetary) Flourishing and sustainable ownership

Property law is not neutral. The application of its rules depends very much on the underlying values in society. When such values are utilitarian in nature, especially combined with a neoliberal foundation, it means accrual of wealth by maximising the extraction from the property. This can be the collection of rent or other payments from the land, intensive agriculture using chemical assistance, or delving for fossil fuels and minerals.

As pressure increases to move towards a sustainable society, especially a society that is eco-sustainable, property law must play its part. Dealing with climate change calls on everyone to contribute towards turning the process of global warming around.<sup>108</sup> The role of property law has been largely neglected until now but turns out to be very significant. As the vast majority of land and resources in the world are privately held and even publicly held land is often still subject to the rules of property law.<sup>109</sup>

The way in which we deal with our property is significant and changes made to the way in which we are currently holding land and other objects can have a positive effect on our climate.<sup>110</sup> Examples are investing in alternative non-fossil sources of energy, such as wind- or solar energy, changing crop rotation on our farmland, and perhaps even converting land into grass-land with greater carbon absorption capacities enabling so-called carbon farming.<sup>111</sup> Sustainable use of land will enable us to contribute to halt climate change and to begin a trajectory of restoring balance on our planet.

Property law taking the form of sustainable property law facilitates this. Human flourishing means taking care of our own needs, but also of those around and after us. Flourishing also means planetary flourishing in this respect and means getting back into harmony with nature. It means losing some of our anthropocentric views and using our property rights not to extract, but rather to

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

**109** Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), 21 *et seq.*

**110** For a scenario of what this could look like, see Eric Holthaus, *The Future Earth. A radical vision for what's possible in the age of warming* (New York: HarperOne, 2020).

**111** Eric Holthaus, *The Future Earth. A radical vision for what's possible in the age of warming* (New York: HarperOne, 2020), p. 73 *et seq.*

regenerate.<sup>112</sup> It means getting more in touch with the communities we are a part of and recognising that by virtue of holding a property right, we not only have rights, but also obligations. This means that obligations we have towards our fellow community members, such as looking after others, or allowing others to roam on our land, become an integral part of our property law framework.

This means we incorporate the social function of ownership in a new and different manner.<sup>113</sup> This right of ownership, as an organisational principle of the (physical) world around us, plays – as a right of sustainable ownership – a central role in this new framework of property law. It means ownership is a privilege that allows us to flourish as a human being, which must mean that our planet needs to flourish as well.<sup>114</sup> In that regard, speaking of flourishing theory is perhaps more appropriate.

That right of sustainable ownership will need a new definition. To define the right of ownership as the paramount entitlement to an object, granting the right holder exclusive power over it, no longer fits the needs we have.<sup>115</sup> The right of sustainable ownership fulfils a different set of criteria:

1. It grants the right holder entitlement to an object or thing;
2. This entitlement includes a right of use, enjoyment and disposal;
3. It grants a private sphere to the right holder, enabling him to enjoy the object without unnecessary interference by others or by the state.<sup>116</sup>
4. The right holder holds the right in context, meaning that the right holder is a member of a community or a number of communities, in which he personally, but also by virtue of his property rights, takes a place amongst his fellow community members.

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**112** Marjory Kelly, *Owning our Future: the emerging ownership revolution* (Oakland: Berrett-Koehler Publishers Inc, 2012), Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018), p. 1.

**113** See on this Anna di Robilant, *Property: a bundle of sticks or a tree*, 66 *Vanderbilt Law Review* 869 (2013), p. 870.

**114** The author is choosing to use the term privilege here to signal that there may be other community members that do not hold property rights. Holding a property right enables the right holder to contribute towards human and planetary flourishing in ways that those community members without property rights cannot.

**115** See, once more, the critical analysis of Thomas Piketty, *Capital and Ideology* (Cambridge MA: Belknap Press, 2020) p. 966 *et seq.* See also Katharina Pistor, *The Code of Capital. How the law creates wealth and inequality* (Princeton: Princeton University Press, 2019).

**116** For an illustration of how this requirement could work, in this case relating to the right to roam vs exclusivity of ownership, see Nick Hayes, *The Book of Trespass* (London: Bloomsbury Circus, 2020), p. 368–370.



5. The context is one of flourishing, meaning that the entitlement to the object must allow the right holder to meet his current needs, without compromising the needs of others, especially those of generations to come.
6. Besides the entitlement of the owner, also obligations arise. (i) General obligations to contribute to the infrastructure needed to be a part of a sustainable society, and (ii) specific obligations that arise in the context of the community of the right holder.

This leads me to propose a new definition of ownership as *a property right that entitles its holder to use, enjoy and dispose of an object, to be held and exercised in context of the rights and needs of others, including future generations.*

This definition includes the entitlement of the owner, but also to obligations that arise in the context in which the right is held. The balance between these rights and obligations provides the core of the sustainable aspects of the right of ownership. Like the tension between economic growth and sustainable development, striking a balance is crucial to ensure sustainable living.

All other property rights follow from this definition and therefore also comprise the balancing requirement between entitlement and obligation.<sup>117</sup>

With this the contours of a renewed system of property law become visible. A property law that facilitates rather than regulates our collective movement towards a sustainable planet. In addition to public policy, which can collectively be funded by paying taxes, sustainable property law provides right holders of property rights with a set of rights and obligations that enable them to contribute to human and therewith also planetary flourishing.

This means that a foundation of planetary flourishing removes some, but not all, of the current anthropocentric foundations of property law, and allows us to include more than the mere relation between the right holder and his object. It means that sustainable property law is able to include more than the singular perspective of the right holder, thus offering a platform on the basis of which a more sustainable society can be created.

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**117** On the relation mother-daughter rights as a ground rule of property law see Sjef van Erp, *European and National Property Law: Osmosis or Growing Antagonism?* (Groningen: Europa Law Publishers, 2006), p. 16–17.

## 5. Conclusion

The law of property is often held to be neutral as regards the intentions of the person holding a property right. Recently, work by economists as well as lawyers, has shown how the law of property has facilitated income and wealth inequality as well as to an unsustainable manner of governance of private property.<sup>118</sup> The foundations of property law therefore lie not only in its rules itself, but also in the economic and philosophical theories underlying it.<sup>119</sup>

New insights in these underlying aspects of property, show us how (neo)liberal economic thinking has led us to define property in terms of exclusivity of private ownership. By bringing as much as possible into private hands, both private and (formerly) public goods have fallen into private hands. With a profit first mindset, holders of property rights have tried to maximize their wealth with these assets.<sup>120</sup> This closely connects to the philosophical framework underlying our system of property law. Utilitarianism allows us to explain how welfare maximisation has become the focal point in our private law systems.<sup>121</sup>

In other literature the ‘imaginary’ of our society is highlighted as a philosophical and sociologic concept.<sup>122</sup> Imaginary, or better social imaginary, refers to:

‘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.’<sup>123</sup>

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**118** See Thomas Piketty, *Capital and Ideology* (Cambridge MA: Belknap Press, 2020), Katharina Pistor, *The Code of Capital. How the law creates wealth and inequality* (Princeton: Princeton University Press, 2019), Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Northampton: Edward Elgar, 2018).

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

**120** See, on this ‘extraction’ of wealth, Marjory Kelly, *Owning our Future: the emerging ownership revolution* (Oakland: Berrett-Koehler Publishers Inc, 2012), p. 53 *et seq.*

**121** Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge, Cambridge University Press, 2012), p. 11 *et seq.*

**122** See Eric Holthaus, *The Future Earth. A radical vision for what’s possible in the age of warming* (New York: HarperOne, 2020), p. 34 *et seq.*, 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. 35 *et seq.*, Jürgen Habermas, *Between Facts and Norms*. Translated by William Rehg (Cambridge: Parity Press, 1996), p. 473.

**123** 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 ima-

In more simple terms, when we construct and imagine our world, what is the common grounding of such construction? The social imaginary therefore provides a very general framework that gives ‘grounding’ to our ideology and the approaches we take.<sup>124</sup> This includes our neoliberal economic approach as well as utilitarianism as our philosophical basis.<sup>125</sup>

To collectively imagine another world, in which sustainability is a key organizing principle, we need to alter our social imaginary construct, so that we can align our social thesis with it.<sup>126</sup> It is on the basis of that social thesis that planetary flourishing, which includes human flourishing, can become our leading objective. That means that the way in which we live our lives, but especially the way in which we hold our property, will come with rights that enable us to flourish, but will also need to come with obligations, both moral and legal, to ensure that others, humankind and nature, can flourish too. A sustainable property law with a sustainable right of ownership is a core element of such a reimagined sustainable society.

We exercise these rights and obligations as a member of several communities. The construction of these communities must also be further explored. We need more and better characteristics on how to construe these. As the author has tried to demonstrate above, our common values and virtues, both in theory and in practice, play a crucial role in this, as well as the common purpose for which we live our lives. This could be human, but certainly also planetary flourishing, linking us not only to past and future generations, but also to the nature around us. These connections may prove critical in the decades to come to ensure a more sustainable climate and, with that, more sustainable world to live in.

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gine, even pre- theoretically, our social life in the contemporary Western world.’ Charles Taylor, *A Secular Age* (Boston: Harvard University Press, 2007), p. 146.

**124** 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. 34–35, Manfred Steger, *The Rise of the Global Imaginary. Political Ideologies from the French Revolution to the Global War on Terror* (Oxford: Oxford University Press, 2008), p. 6–8. See, for a more philosophical approach, Charles Taylor, *A Secular Age* (Boston: Harvard University Press, 2007).

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

**126** On sustainability as a key organization principles see Jill Robbie, *Moving Beyond Boundaries in the Pursuit of Sustainable Property Law*, in Bram Akkermans and Gijs van Dijck (Eds.), p. 59. On radically altering our social imaginary, see Eric Holthaus, *The Future Earth. A radical vision for what’s possible in the age of warming* (New York: HarperOne, 2020), p. 31–42.

Many questions remain as a massive challenge arises to further explore what this means for property law.<sup>127</sup> This contribution seeks to set the framework for a research agenda to carry this out by bringing together several levels of legal and property analysis: (1) property theory, (2) organizational aspects of property law and (3) property doctrine. Sustainability requires us to take a larger perspective. Although small initiatives, such as installing solar panels on a house, certainly contribute towards achieving a sustainable society, we must also work at a larger scale and across disciplines – incorporating philosophical or sociological concepts such as the social imaginary construct with the economic and philosophical foundations of our legal system.<sup>128</sup> A sustainable property law therefore takes its place in the set of building bricks and rules that we use to construct our private lives as well as our communities. In its turn, sustainable property law, can feed into the development of other areas such as contract, tort and environmental law.

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**127** A similar quest is ongoing amongst economists. See, e.g., Economists are turning to culture to explain wealth and poverty, *The Economist* 5 September 2020, schools brief. Peter Victor, *Managing without Growth – slower by design, not by disaster*, 2nd edition (Northampton: Edward Elgar, 2019), Thomas Piketty, *Capital and Ideology* (Cambridge MA: Belknap Press, 2020).

**128** On working at different scales in sustainable development see John Blewitt, *Understanding Sustainable Development*, 2nd edition (London, New York: Routledge, 2015), p. 16. Cf. Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a legal system in tune with nature and community* (Oakland CA: Berrett-Koehler Publishers, 2015).