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Review Article

Sustainability and property: A legal perspective

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Abstract

Property and sustainability both represent strongly felt concepts of society but in very different ways. While the protection of the individual property is at the heart of the capitalist system and deeply embedded in our laws, concerns for ecological sustainability feature less prominently and only indirectly impact private property. Critically, the integrity of Earth's ecological systems is hardly protected at all. Environmental laws in the world over-regulate the use and protection of natural "resources" in a strict instrumental fashion and tend to take the integrity of Earth's ecological systems for granted.

This article explores some of the histories of environmental law, sustainability and property in the European context. It then shows how ecological sustainability can shape the content and scope of the private property using some examples in New Zealand and Germany. The overall thesis is that both concepts can be reconciled on the basis of ecological integrity as a fundamental norm of law.

Introduction

Can ecological sustainability and private property be reconciled? The answer is: "Yes, because they must, but it will not be easy." Property and sustainability each represent strongly felt concerns of society but in very different ways. While the protection of the private property is at the heart of the capitalist system and deeply embedded in our laws, the quest for sustainability is more recent in Western society and only addressed in specific environmental legislation. The right to possession and ownership is fundamental to individual freedom. Ecological sustainability, on the other hand, reflects public morality without direct bearing on the content of individual rights. The sustainability agenda has not yet changed the content of property rights to a degree that would allow for genuine "sustainable development" [1].

Property rights are not absolutes, hence ever adapting to social change, and are now arguably in need of incorporating not just social, but also ecological obligations.

Neither law in general nor environmental law, in particular, have fully accepted the antagonism between individual user rights and the protection of the commons. This antagonism is best illustrated in Garrett Hardin's classic essay, *The Tragedy of the Commons* [2]. To recall a central passage:

"The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy"[3].

On a larger scale, Hardin's pasture can be seen as the global commons of oceans, water, soils, forests, biodiversity, and eventually the entire biosphere. Neighborhoods, rural areas, cities, and states are also commons in the sense that

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no one is denied entry. Anyone may enter and lay claim to the common resources. The tragedy occurs when claims are laid unhampered by any concern for the common good.

The most interesting aspect of Hardin's essay is the inability or unwillingness of the individual actors to look beyond the here and now. They perceive it as rational to maximize individual gain and would not question such rationality even if presented with potentially disastrous consequences for everyone. They are locked into a system of self-destruction.

According to Hardin, the way out of this tragedy is self-control. He referred to the need to "legislate temperance" [4] and called for "mutual coercion mutually agreed upon" [5]. The meaning of self-control and mutual coercion mutually agreed is at the core of this paper. Hardin himself has often been criticized for his reliance on private property and individual rights to protect the commons. Monbiot, by contrast, sees communal ownership as the only way to limit ecological degradation [6]. One could also consider the abolition of any legal entitlements to the commons. However, ownership models are flexible and could accommodate both entitlements and responsibilities.

The concept of property rights, which plays a dominant role in domestic law, is not static, as Hardin assumes, nor is it in need of complete replacement by communal ownership as Monbiot suggests. The problem is that the present definition of 'private property' as an individual entitlement is detached from collective responsibilities. Modern property rights have been molded by the divide between the private and the public resulting in a number of dichotomies: individual versus community, private law versus public law, rights versus responsibilities, privatization of profits versus socialization of costs.

All these spheres must be reconciled and integrated, but this will only be possible with a deeply felt sense of the common good. This sense has almost completely been destroyed by individualism and greed, but now seems to regain strength as the global economy is hit by a "triple crunch" – a combination of a financial crisis, accelerating climate change and soaring energy prices. Calls for a "New Green Deal" signal a renewed sense for the common good, this time of global dimensions. The current financial crisis is a timely reminder that economic security depends on the creation of *real* wealth and that real wealth is created by social, cultural and environmental well-being. Perhaps now we can see more clearly the importance of fundamental values to guide our behavior. The call for a "new covenant with Earth" is certainly more urgent than it has ever been [7].

The law itself cannot create a new covenant, but it can promote and build on it. Any legal reasoning around property rights would be literally without foundation if we overlooked their covenantal, cultural foundations.

Although the role of law in achieving sustainability is limited, it is important because only through law can we actually *coerce* ourselves.

The challenges of environmental law

"Mutual coercion mutually agreed upon" is a standard task of any form of democratic governance and is not confined to environmental governance. From the perspective of legal positivism, the government of the day is mandated to formulate its preferences and the majority in Parliament to act accordingly. This is fine for the bulk of laws. Government can usually achieve at least some mutual agreement, thus no real coercion problem exists. Examples include property protection under criminal law, tax law, or investment regulation. Even a general legislative effort to protect the environment can rely on mutual agreement. However, environmental law fundamentally differs from the rest of the law because of its peculiar *space and time dimensions.*

First, is the space dimension. For the most part, the commons transcend legal boundaries (whether national or international, private or public), and individuals hardly realize their own contributions to the tragedy of the commons. Even if they are aware of their ecological footprint, only some will actually take action to reduce it. Most people simply cannot or will not make the link between their small individual footprint and the gigantic cumulative footprint of all.

Even more important is the time dimension. Unlike any other legal field, environmental law tries to cover a long time span. Activities in the here and now must be controlled to achieve something in the distant future. (Compare that to property rights where any infringements are dealt with almost instantly and on the spot). Responsibilities for activities that do not show impact in the here and now are difficult to justify, let alone enforce [8].

The challenge then is to reconcile two extreme positions. On the one hand, people living today have legal entitlements, but in executing them we may collectively threaten the commons. On the other hand, protecting the commons demands responsibilities from us now to sustain them in the future. Trying to reconcile these two extreme positions puts us into a genuine dilemma. Meeting short-term needs at the expense of long-term needs is no viable option, but giving priority to long-term needs at the expense of short-term needs is not viable either. The only logical way out of such a dilemma is to integrate both time horizons into one. We must coerce ourselves into a situation in which individual property rights no longer exclude collective responsibilities. In other words, we need to establish *inherent* responsibilities to any form of ownership.

Developing a property regime with *inherent* responsibilities is, in fact, the purpose of environmental law. To the legal profession this may sound overly ambitious, but for any student or scholar of environmental law, changing the dominant logic of individual rights versus collective responsibilities is a key motivation. The discipline of environmental law emerged from the need to stop an exploitative human-nature relationship.

In legal education and practice, however, the prevailing view of environmental law is that it is a distinctive branch of law with specific rules, mechanisms, and controls for the legal

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protection of the environment. Environmental lawyers are specialists with an important, yet rather peripheral, role. Yet, in the end, environmental standards must be reconcilable with individual rights and interests that have shaped the Western legal system.

Modern legal systems are complex systems of rights and obligations, including the idea of collective responsibilities. If there is anything that unifies legal systems around the world today, it is the ever-growing influence of public law [9]. The traditional gap between common law and civil law systems is disappearing, giving way to the comprehensive codification of individual rights and collective responsibilities. Individual entitlements to property, public welfare, health, education, and so on are carefully matched by individual duties to pay taxes and respect the entitlements of others. Today's sophisticated system of rights and duties is a system of *interpersonal* rights and duties: one person's entitlement is limited by the entitlement of another person and any duties are justified by the need to ensure everyone's entitlement. Where does the environment feature in this? Without rights or responsibilities, the environment is nothing, legally speaking, but an afterthought in the legal process.

The social construct underpinning modern law is one of mutual coercion to meet social demands, not environmental demands. As a consequence, responsibilities expressed in environmental law appear as externally imposed restrictions on owners of the property. Perceived in this way, property rights appear neutral and removed from ecological realities.

The environmental lawyer raises fundamental questions about the moral and political significance of property rights. I view environmental law as a series of arguments concerning responsibility and justice, as a product of sustained reflection on the relationship between property rights and the environment. From an environmental perspective, it is unacceptable to think of rights and responsibilities as being in conflict with each other. They may clash in the legal process, but not in their conception because the environment is not (or not only) a commodity, but physical reality, ultimately life itself. The only relevant question, therefore, is whether the law can reconcile the environment as a perceived commodity (in the form of property rights) with the environment as a basic condition of life (environmental regulation). More than anything else, this is a question of moral judgment, dare I say ecological wisdom.

The place of the environment in the concept of property rights is not much talked about in the legal profession, I suspect largely because it is taken for granted. From a perspective of legal positivism, the relationship between humans and nature is no doubt of moral importance, but legally of no relevance. A response I have often heard in my 35 years in environmental law is: "It should not matter why we protect the environment, whether selfishly or altruistically, as long as we actually do it." A similar version is: "Whether nature is of instrumental or intrinsic value is for philosophers to reason, but not for lawyers concerned with rules, procedures and outcomes." Conversely, from the perspective of natural law, not only environmental values, but also property rights are of interest because they are imbued with morality, religion, and deeply held beliefs. Like all legal constructs, they are embedded in cultural and political traditions leading to specific characteristics of legal thinking.

It is worth looking at these traditions more closely in the context of this paper. As will be shown, environmental law has always had an interest in property rights and, in fact, owes its very existence to the dark side of property rights – their ecological blindness. I will first summarize some of the histories of Western property rights and then discuss the response of contemporary environmental jurisprudence.

A brief history of a property in Europe

The environmental dimension of property can be traced to the Roman concepts of *ius* and *dominium* as the essence of political culture. If someone had an *ius* (right) in something, it did not mean they had *dominium* (total control) over it. The two concepts were separate. A person's *dominium* over his property could include his land, his slaves, or his money, but it was not constituted by *iura* (rights), that is, by an agreement or other transaction between individuals. *Dominium* originated in social status, either gained or inherited and for this reason included the element of protection and care. The concept of *dominium* was central to natural law theorists until the 17th century. Grotius (1583–1645) and Hobbes (1588–1679) conceived property as rooted in natural rights. Although they differed over the characteristics of natural rights, they both saw property as intimately connected with conceptions of social order, which itself reflected natural order, that is, humankind's place in the order of Creation. This "covenant" (Ron Engel) [10] or "grant" as Hugo Grotius called it, underlies the idea of property. Grotius wrote:

God gave to mankind in general, dominium over all the creatures of the earth, from the first creation of the world; a grant which was renewed upon restoration of the world after the deluge [11].

At this point, we do not yet have private property: *ius* and *dominium* over the land are still separate categories. In Grotius' writings, rights retain their objective moral connotations: "A right is nothing more than what is just" [12], meaning that all rights are reflective of a just natural order in which humans have *dominium* (care and protection) over natural resources.

The Age of Enlightenment dismantled such covenants and replaced them with social contracts. This change was subtle, of course, and not as radical as it may appear today. For example, Samuel Pufendorf (1632–1694) was involved in constant quarrels with clerics and frequently had to defend himself against accusations of heresy. Yet, all he did was detach natural law from Christian theology and derive it from the current state of human development. Pufendorf rejected both Grotius and Hobbes. However, like Grotius, he assumed the existence of "a large number of precepts" (as he called them) in the primeval state. Crucially, he asked:

Whether, if the human race had continued without sin, we would practice the kind of commerce that we now practice, and whether there would have been any use for money [13].

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This quote sums up Pufendorf's mission. In the tradition of Renaissance humanism, he attempted to reconcile the ancient stewardship idea of *dominium* with modern secular, capitalist society. His solution was to define society as based on reason *and* natural law. He was optimistic that reason and judgment allowed man:

The ability to envisage future actions, to set himself to achieve them, to fashion them to a specific norm and purpose, and to deduce the consequences; and he can tell whether the past actions conform to the rule [14].

This belief in the rule of law, it's grounding in natural law, and its ability of foresight make Pufendorf an early pioneer of environmental law. The big question left unanswered by Pufendorf, and by modern liberal theory, is: How can law, as the distinctive intellectual product of society, be reconciled with the idea of a covenantal bond between humans and nature? Until today the predominant view of the law has been one of the interpersonal relationships: individual rights and duties that exist toward one another (leaving out nature and future generations) [15].

The failure of 17th-century writers to spot the negative environmental implications of their theories is excusable. They wrote in a world of empty spaces and at the beginning of the population explosion (which had grown then from 150 million to 500 million over 2,000 years but has since exploded to over 7 billion in just 250 years). There would have been a widespread perception that advances in society and technology would go hand-in-hand with the preservation and cultivation of the natural world.

Presumably, John Locke (1632–1704) had this optimistic perception himself when he developed his theory of property [16]. One might, therefore, concede blissful innocence in his dissociation from a nexus between entitlements and responsibilities [17]. In line with most theorists since Grotius, Locke assumed all humankind had a God-given right to use the wild creatures and fruits of the earth as required for sustenance. But this common right is not the same as property. The property now appears as an individual entitlement created either through labor or acquisition. Like Pufendorf, Locke regarded humans as bound by duties of care. But these duties are now seen as purely moral, and no longer legal because they involve all creatures and all posterity. A right, conversely, is an individual entitlement and can only include duties to other right holders, that is, persons.

This logic of individual rights deprived of inherent duties is the hallmark of all classical liberal thinkers. This includes Blackstone and Bentham despite their opposition to each other. It also includes Kant despite his insistence that public morality must guide the law of reason.

So, the Age of Enlightenment left sustainable human-nature relationships in darkness.

The dark side of the Enlightenment is its alienation from natural law traditions. By justifying property rights in a secular manner (this is the enlightened part), it also detached them from any collective morality (this is the non-enlightened, dark part). Personally, I have always looked at the Enlightenment as "unfinished business." The best is yet to come, but we will have to work hard for it.

The unfinished business is to reconcile the private with the public, the individual with the collective, and rationality with reasoned morality.

Conceptually, environmental law is diametrically opposed to legal positivism. Legal positivism must be opposed because regal authority, legislation, and legal procedures, to this point in time, have not shown any recognition of the fundamental importance of nature. Instead, legal positivism takes nature for granted, rejecting any need to incorporate it into the law. Environmental law is also opposed to Locke's social contract theory and, in fact, to the dominant liberal tradition, which externalizes the environment from economic and legal modeling. Environmental law must oppose these concepts because of the desperate need to accept ecological realities and conceptualize law accordingly.

The effort of integrating ecological realities into public policy and law has a name: sustainability. This term is more than a catchword and sustainable development is not at all an empty promise, at least when we trace its history.

Of course, there is a wealth of sustainability wisdom in the history of *all* cultures, many of them much older than European culture. Perhaps, no one has better explained the universal character of sustainability than Judge C. J. Weeramantry [18], as we shall see later.

Today, at the peak and crisis of capitalist industrialism, it is worth recalling the experience of preindustrial Europe. Sustainability concepts were not introduced to Europe at the end of the 20th century, but 600 years earlier when Europe suffered a major ecological crisis [19]. By the mid-14th century, agricultural development and timber use had reached a peak that led to almost complete deforestation. In response, and as a measure of economic reform, land-use systems were created that allowed individual use only on the basis of public ownership of the land. This was the 'law of the commons' in England and the '*Allmende*' [20] in Germany. The economic recovery during and after the Renaissance was partially the result of these land reforms.

The next ecological crisis hit – again through overuse of resources – in the mid-1800s when Europe's forests were virtually gone. Because of woodcutting for fuel, deforestation was so severe that the entire economy of Europe was threatened. This opened up two options for the future. To refuel the economy, one option was to find a new energy source, the other option was to allow the regeneration of the existing (renewable) energy source.

Of course, the first option was favored. Beginning in England and later in France and Germany, wood was increasingly replaced by coal. Initially considered as an "interim" energy source, coal-fired up the industrial revolution and left the

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wood behind. This was good news for forests, but bad news for the long-term prospects of humanity. The shift from renewable to non-renewable energy sources – first coal, then oil – previewed the shift from a nature-based economy to a financially driven economy. The commodification of energy sources meant that the natural resource base lost its intrinsic value and could be substituted purely determined through cost-benefit calculations. Ever since, we tend to think of money, not nature, as the main (or only?) wealth-creating factor.

But the alternative was – and arguably is still – available. The other option for overcoming the 19th-century crisis was to follow the reasoning of sustainability. Since the early 18th-century forest management theory had focused on the sustainability of energy as the basis of economic wealth.

Forest management scholars in Germany proclaimed the wisdom of replacing every tree felled by planting a new one, citing the medieval *Allmende* system. If publically controlled ownership guides private land use, the substance of the land can be protected from overuse and thereby preserved for future generations. In 1714, German economist and administrator Hans Carl von Carlowitz called this effect "*Nachhaltigkeit*" (sustainability) [21].

The first law based on the sustainability principle was the *Weimar Forestry Statute of 1775*. The term and concept eventually dominated the economic theory of forestry and were exported, for example, to the French Forest Academy [22] where, in 1837, Director Adolphe Parade translated it to 'souvenir' (showing its Latin roots: 'sustinere,' means to keep, preserve, sustain). From there it reached the English translation of 'sustainability.' By the mid-1800s the notion of "living from the yield, not from the substance" was widespread among forest academies and science faculties throughout Europe [23].

Heinrich Cotta, the founder of the first European forest academy in Saxony and many of his contemporary scientists had affiliations with German idealism and holism (Leibniz, Schelling, Goethe, Herder, Hegel, Fichte) [24]. At the beginning of the 19th century, the intellectual scene stood in stark opposition to emerging industrialist capitalism.

The fact that the industrial revolution ignored the sustainability message does not render the idea useless, but it does show that the two concepts were not reconcilable. Only the complete rejection of sustainability traditions allowed industrialism to flourish and expand as it did. Industrialism has been successful – except for the fact that we are again facing the same crisis that Europe faced twice, but this time on a global scale, affecting global systems and accelerating through the cumulative effects of climate change, biodiversity loss, and population/consumption explosion.

The case for sustainability has never been stronger, of course, but it has been made for quite a long time. Throughout European history, the reductionist view of reality was challenged. At least today we should finally accept that individuals are *not* separate from their environment, entitlements are *not* separate from responsibilities, the private is *not* separate from the public, the local is *not* separate from the global, the present is *not* separate from the future, and so on.

The dominant reductionist view of reality has produced a set of distinct "mini-realities" that compete with each other – a phenomenon that psychologists would diagnose as schizophrenia, a mental disorder resulting in social dysfunction (think of personal wasteful lifestyles peppered with feelings of guilt or denial). The Western concept of property rights displays the symptoms of such a mental and social disorder. The sustainability approach, therefore, should not be seen as an attack on private property, but rather as a healing exercise to develop the healthy property, that is, property that sustains us.

The promise of sustainability

This healing approach was behind the 1987 *Report of the UN Commission for Environment and Development* (the "Brundtland Report"), which created the composite term "sustainable development," on the basis of a well-established history of the sustainability concept. The famous Brundtland definition: (of "Sustainable development is a development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs" [25]) leaves open the question: What are the actual needs of future generations? Of course, we can never know for sure, but the Brundtland Commission assumed that each generation has a fundamental duty to keep options open for future generations [26] by sustaining the ecological basis for development. The Commission was very clear about this. At its inaugural meeting in October 1984, the commission set the objective "to build a future which is more prosperous, more just, and more secure because it rests on policies and practices that serve to expand and sustain the ecological basis of development" [27]. In many passages, the Brundtland Report emphasizes that we are borrowing environmental capital from future generations and that economic growth must be constrained to preserve the Earth's ecological integrity [28].

In a book marking the 20th anniversary of the Brundtland Report [29], contributors widely shared the view that the report's concept of sustainable development assumed ecological sustainability at its core. Consequently, if the preservation of the Earth's ecological integrity is the prerequisite for development, limits must be set on both economic and social development. In the literature, this interpretation is often referred to as the "strong" approach to sustainable development [30]. The alternative, the "weak" approach [31], favored by governments and corporations, views ecological sustainability as one concern next to social and economic sustainability [32]. Considering the ecological, economic, and social dimensions of development simultaneously is important, but it does not make development "sustainable." The sustainability of ecological systems must be the bottom-line benchmark. History, science, and ethics all point to the same, rather simple, idea: any form of development must respect ecological boundaries to avoid decline or collapse.

This idea is so prevalent that we may consider it common knowledge of humanity. That modern society has consistently

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ignored this common knowledge does not change the truth of it. Sustainability certainly deserves a status similar to other guiding ideas such as freedom, equity, and justice [33].

Over the past 30 years, there has been increasing recognition of the sustainability principle in international law and policy, but also an increasing gap between soft law development, on the one hand, and hard law, on the other. Soft law represents a consensus of the international community (in a broad sense) that is considered legally relevant, although not binding. It should not be forgotten that progress in international environmental law has been achieved through efforts of the global environmental movement, less so by states themselves. Like human rights, the environmental agenda has been promoted by civil society, not governments.

However, sustainability principles have been worked into the jurisdictions of many states including Japan. I will briefly focus on Germany and New Zealand and add a few remarks on constitutional developments globally.

Two country cases

Looking at Germany and New Zealand, we can see more closely how sustainability concerns have influenced property rights. In 1994, Germany added an article to its constitution that obligates the state to protect the "natural foundation of life (...) in responsibility to future generations." This constitutional directive paved the way for far-reaching energy legislation and court recognition of environmental responsibility in property ownership. New Zealand is one of a few states with no constitution. Its framework environmental law, the 1991 Resource Management Act aims for "sustainable management" defined as balancing social, economic, and environmental objectives, but not enunciating the need for a certain environmental bottom line. Thus courts and other laws tend to allow certain social and economic interests in the name of "balance" even if they are not conducive to ecological sustainability. For this reason, a fundamental reform of the resource management system is underway.

Germany: During the 1980s, Germany increasingly acknowledged that land and resource use is limited by requirements of the 'public weal' (Article 14 Basic Law). This acknowledgment led, *inter alia*, to restrictions on the use of chemical fertilizers and pesticides on farmland, to protection against overgrazing caused by too many cattle, and to the ban of certain hazardous chemicals. However, in all cases, property restrictions were determined by how various actions potentially affected the rights of others, not by concerns for the ecological sustainability of production. As the Federal Constitutional Court (in a 1981 case regarding groundwater levels) stated: "Private land use is limited by the rights and interests of the general public, to have access to certain assets essential for human well-being such as water" [34]. In 1987, the Federal Administrative Court ruled: "The law cannot provide for the health of ecosystems *per se*, but only in so far as required to protect the rights of affected people" [35]. Providing for the health of ecosystems *per se* would have been seen as an unlawful restriction of property rights.

Such anthropocentric reductionism encountered criticism and eventually led to a broad political initiative toward constitutional reform. In 1991, approximately one hundred professors of law and social sciences proposed a draft constitution that centralized the sustainability principle. It defined a revolutionary "socio-ecological market system" that would impose ecological limitations on both human rights and property rights and recognize the inherent value of the environment and its need for protection for its own sake [36]. While this draft was rejected, Germany saw developing movements away from anthropocentrism. The Upper House (*Bundesrat*) resolved to recommend a constitutional amendment to introduce ecological limitations to the property concept, so Article 14(2) would read: "Property imposes duties. Its use should also serve the public well-being and the sustainability of natural conditions of life." The Lower House (*Bundestag*) then resolved to install a "Joint Commission for Constitutional Reform," which presented its final report [37] in 1993. By then, Germany was unified, the cold war had ended and economic globalization was underway. It is surprising, therefore, that the final report did not reject the idea of ecological rights, but called for a broad public debate before such a drastic change was made. The question of either an anthropocentric or ecocentric approach to the Constitution is of such fundamental importance, that the Commission did not see itself as mandated to answer it. sInstead, the Commission calls for a wide expert and public dialogue before considering such a change [38].

In fact, there have been other important amendments to the constitution, for example, the 1994 introduction of Article 20a: "The state, in responsibility also for future generations, protects the natural foundations of life in the framework of the constitutional order, by legislation and, in accordance with law and justice, through the executive and the courts" [39]. The notion "natural foundations of life" rather than "natural foundations of *human* life" [40] was widely noted as recognition that life itself has intrinsic value.

Art. 20a allows for wide discretion, but as a recent decision of the Federal Constitutional Court shows, climate obligations need to be clear and enforceable to protect the fundamental rights of - especially younger - people and future generations [41].

This landmark decision has important implications for Germany's climate obligations, but also for the significance of property rights: "The fundamental right to property under Art.14(1) also imposes a duty of protection on the state with regard to property risks caused by climate change" [42]. While this is not a recognition of ecological limitations to property rights, it demonstrates that climate change causes threats to property. Likewise, we can conclude, the unfettered use of property rights is a threat to the climate! Ecologically blind property rights generate and accelerate the deterioration of the atmosphere and Earth's ecological systems.

The Federal Constitutional Court made it clear that effective climate protection does not impose limitations to individual freedom and property, but - to the contrary – is the pre-requisite of their enjoyment, especially for young people and

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future generations. We can conclude therefore that ecological realities and responsibilities must determine the scope and content of property rights, not the other way around.

The challenge ahead is to incorporate this logic into the concept of property [43]. In 2022, the German Rights of Nature Network launched the "Initiative for Constitutional Reform". At its core is the proposal for redefining human rights based on the recognition of the legal personhood of nature [44]. Article 2 of the *Grundgesetz* guarantees every person the right to free development of their personality insofar as they do not violate the rights of others, *including those of the natural co-environment* ("natürliche Mitwelt"). Likewise, Article 14 guarantees property within the limits of the law. Article 14(2) would be amended to read: "Property entails obligations. Its use shall also serve the public good and the natural co-environment ("natürliche Mitwelt")." Article 20a would include a specific state obligation to protect "the rights of nature" defined in this way: "Every living being had its natural dignity and the right to live according to its nature within the framework of natural cycles, food chains, and biotopes." If followed through, the most fundamental constitutional basis are not human rights *per se*, but the protection of the integrity of ecological systems that make the enjoyment of human rights possible in the first place and sustainable for future generations

New Zealand: New Zealand does not have a written constitution, a distinction shared only with the United Kingdom and Israel. The absence of constitutionally enshrined human rights leaves property rights without definition: their common-law heritage makes them appear static and absolute. In the context of sustainability, however, property rights have to respect certain so-called 'environmental bottom lines' as described in Sec. 5(2) of the 1991 Resource Management Act (RMA):

"In this Act, sustainable management means managing (...) natural (...) resources in a way (...) which enables people and communities to provide for their social, economic, and cultural wellbeing (...) while (a) Sustaining the potential of natural ... resources to meet the ... needs of future generations; and (b) Safeguarding the life-supporting capacity of... ecosystems; and (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

Initially, court decisions followed the environmental bottom line approach, but then in 1997, the "overall broad judgment approach" made its appearance in *North Shore City v. Auckland Regional Council (Okura)* where the High Court stated:

"The method of applying s.5 (...) involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognizes that the Act has a single purpose... Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome" [45].

Ever since, courts have, by and large, followed the overall broad judgment approach. But in 2014, the Supreme Court of New Zealand in a landmark case [46] ruled the overall broad judgment approach was not consistent with the purpose description of s.5 RMA. The Supreme Court moved in the direction of strong sustainability in *King Salmon*. It did so by accepting that the ecological 'bottom line' approach will be appropriate in specified contexts [47].

The *King Salmon* decision has opened the door for further findings of ecological bottom lines in other policy documents in the RMA framework which intend to give effect to Section 5. These include national policy statements, regional policy statements, and other planning documents. Effectively, private property rights have since this decision has been refined as operating within a wider ecological context. Rather than seeing property and sustainability in a categorical conflict with each other, it is now possible to perceive property as the right to use natural resources in a sustainable manner [48].

Also relevant in this context are recent developments in which New Zealand became the first Western country to recognize the rights of nature, challenging the conventional understanding of property rights and recognizing the value of protection over public commons. Landscapes such as Te Urewera Park and Mount Taranaki as well as the Whanganui River possess their own legal personality. Appointed groups of people to speak for them and act as guardians for their well-being [49]. These developments redefined property rights in these areas as relationships of trusteeship, the concept having origins in the Maori concept of kaitiakitanga [50]. Trusteeship functions are jointly performed by the Crown and local Maori tribes.

The current reform of New Zealand's system of environmental law centers around the Natural and Built Environments Bill (November 2022) with its overall purpose to protect "Te Oranga o te Taiao" roughly translating to the health and integrity of the natural world (including humans). Similarly, the protection and, wherever needed, restoration of ecological integrity form part of Bill's purpose description.

It is worth noting that the protection and restoration of the integrity of the earth's ecological systems are recognized in more than twenty-five international agreements as an overarching concern [51]. Signatory states are therefore under the obligation to cooperate with other states to protect the integrity of the Earth's ecological systems. This obligation can only be met if ecological integrity is given clear prominence in domestic legislation with the consequence of limiting any use of property rights.

Constitutional reforms

Constitutional reforms in Europe have been significant over the past 15-20 years. Thirteen member states of the European Union (EU), along with six European states outside the EU, now recognize a human right to a healthy environment. Overall, more than 100 constitutions worldwide have incorporated environmental responsibilities. The constitutions of South Africa [52] and Brazil [53] specifically define property rights to include environmental responsibilities. In 2008, the people of Ecuador adopted a new constitution with the world's first

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bill of rights for nature. The constitution gives "nature or Pachamama" (...) "a right to fully exist, persist and maintain and regenerate its vital cycles, structure, functions, and evolutionary processes" [54] Communities, elected officials, and even individuals have legal standing to defend the rights of nature. Recently, Bolivia adopted the world's first indigenous constitution [55]. Among the key provisions are the concepts of "Pachamama" (Mother Earth) and patrimonium (public ownership) over natural resources [56]. While progress is encouraging, the process of 'greening' national constitutions and international law is slow, incomplete, sketchy, and not following an overarching objective. There remains no global consensus on the importance of environmental obligations in contrast to widely constitutionalized values such as human rights, democracy, or peace. Promoting an overarching sustainability objective should be at the heart of global environmental constitutionalism and is crucial in challenging an anthropocentric understanding of property [57].

Conclusion

From a legal perspective, a reconciliation between sustainability and property is possible. The jurisprudential aspects can be articulated on the basis of sound ethics and corresponding legal concepts. The difficulties don't lie with the law itself but with political will.

The law has always been a willing servant to the prevailing demands of society. Think, for example, of the ease with which rights have been attached to abstract entities such as states, companies, or property. The problem is not rights *per se* but what they entail. Are they pure entitlements? Or are they privileges that come with responsibilities? [58] Property rights have mostly been associated with the former. Landowners or corporations are free to use their property as they please, except for some nuisance-type limitations.

Lawyers and policy-makers should fully understand that well-defined property rights can play a critical role in controlling climate change and biodiversity loss. For too this opportunity has been overlooked. We must change that. Land, water, air, the biosphere, in fact, the entire Earth system are a common heritage of humanity that needs to be honored. Decision-makers in governments and parliaments must recognize therefore the *inherent* limitations to property rights.

If we coerce ourselves in this way, we may have a chance to prevent the unfolding tragedy.

References

1. Bosselmann K. Sustainable Development Law", in: Techera E, Lindley J, Scott K, Telesetsky A. Routledge Handbook of International Environmental Law, 2nd ed (Abingdon: Routledge, 2013), Chapter 3.

2. Hardin G. The Tragedy of the Commons. Science. 1968; 162:3859; 1243-1248. http://www.sciencemag.org/cgi/reprint/162/3859/1243.pdf (accessed August 19, 2010). The phrase, "tragedy of the commons" is most commonly attributed to Hardin, but, in fact, the originator of the phrase was William Forster Lloyd, who coined it in 1833 in his Two Lectures on the Checks to Population. William Forster Lloyd, Two Lectures on the Checks to Population (Oxford: Printed by S. Collingwood, 1833). The commons problem was recognized at least as far back as Aristotle, who wrote: "that which is common to the greatest number has the least care bestowed upon it." Aristotle, Politics, trans. Benjamin Jowett (Toronto: Dover Publications, 2000), book 2, pt 3, 57.

3. Hardin G. The Tragedy of the Commons. supra note. 1244; 2.

4. Ibid. 1245.

5. Ibid. 1247.

6. Monbiot G. The Tragedy of Enclosure. Scientific American. 1994; 270:159-60. http://www.monbiot.com/archives/1994/01/01/the-tragedy-of-enclosure/ (accessed August 19, 2010). In this riposte, Monbiot observes that Hardin's thesis "only works where there is no ownership." Giving the example of the world's oceans, he notes: These are not commons but free-for-alls. In a true commons, everyone watches everyone else, for they know that anyone over-exploiting a resource is exploiting them." Ibid., 159. For examples of the unintended consequences of actions based on this assumption, see also, George Monbiot, No Man's Land: An Investigative Journey Through Kenya and Tanzania (New York: Picador, 1994).

7. See J, Engel R. The Earth Charter as a New Covenant for Democracy. in The Earth Charter: A framework for global governance, eds. Klaus Bosselmann and Engel JR (Amsterdam: KIT Publ. 2010); 29.

8. This difficulty in dealing with the "problem of future generations" is a pervasive problem in many of the conventional philosophical frameworks. The extension of modern human activity beyond our immediate physical and temporal boundaries was explored by Hans Jonas in his seminal work, The Imperative of Responsibility: In Search of Ethics for the Technological Age (Chicago: University of Chicago Press, 1984). Concern for "intergenerational justice" percolated into international environmental legal discourse in the Brundtland Report of 1987 and the Earth Charter of 2000.

9. Sands P, Peel J. International Environmental Law. 4th ed. (Cambridge: Cambridge University Press, 2018).

10. Engel. The Earth Charter. supra note 7.

11. Grotius H. The Rights of War and Peace [De Iure Belli et Pacis Libri Tres] [1625] (Indianapolis: Liberty Fund, 2005). II.2.ii.87, 389.

12. Grotius H. De Iure Praedae Commentarius (Oxford: Oxford University Press, 1950). 8.

13. Pufendorf S. On the Duty of Men and Citizens according to Natural Law [1672] (Cambridge: Cambridge University Press, 1991). 12.

14. Ibid. 17.

15. This (willful) blindness to nonhuman beings is exemplified in the thinking of leading Liberal thinker, John Rawls: "The theory of justice as fairness fails to embrace all moral relationships, since it would seem to include only our relations with other persons and to leave out of account how we are to conduct ourselves toward animals and the rest of nature. I do not contend that the contract notion offers a way to approach these questions which are certainly of the first importance; and I shall have to put them aside. We must recognise the limited scope of justice as fairness and of the general type of view that it exemplifies." John Rawls, A Theory of Justice (Cambridge: Belknap Press, 1971), 17.

16. This was consonant with the "Enlightenment" shift of values toward greater individualism and a more instrumental view of nature as 'natural resources.' Locke's theory of property was welcomed particularly in America where the idea of labour mixed with the land creating a property right system suited to colonial expansion. See Eric T. Freyfogle, Bounded People, Boundless Lands: Envisioning a New Land Ethic (Washington, DC: Island Press, 1998), 94–7.

17. Although his view of human economic relations as a zero-sum game was unambiguous: "when any man snatches for himself as much as he can, he takes away from another's heap the amount he adds to his own, and it is impossible for anyone to grow rich except at the expense of someone else." From an unpublished essay of Locke's in Henry William Spiegel, The Growth of Economic Thought (Upper Saddle River, NJ: Prentice Hall, 1971), 165.

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18. See Chapter 15, "Sustainable Development: An Ancient Concept Recently Revived," in C. J. Weeramantry, Universalising International Law (Leiden: Martinus Nijhof, 2004), 431–47; see also, Environmental aspects of Sri Lanka's ancient irrigation system: separate opinion of Vice President Weeramantry in the International Court of Justice, Gabcikovo- Nagymaros Project (Hungary v. Slovakia) [1997] ICJ Rep 7, 88–119 (Judge Weeramantry).

19. Radkau J. Natur und Macht Eine Weltgeschichte der Umwelt (Munich: Beck, 2000), 245. Recently published in English as Nature and Power: A Global History of the Environment (New York: Cambridge University Press, 2008).

20. Roughly meaning "commons."

21. von Carlowitz HC. Sylicultura oeconomica, Anweisung zur wilden baum Zucht [Forest Economy or Guide to Tree Cultivation Conforming with Nature] [1713] (Freiburg: TU Bergakademie Freiburg und Akademische Buchhandlung, 2000). For an excellent account of the history of sustainability thinking in Europe, see Ulrich Grober, Die Entdecking der Nachhaltigkeit – Kulturgeschichte eines Begriffs (Verlag: Antje Kunstmann, 2010); see also Ulrich Grober, Deep Roots: A Conceptual History of Sustainable Development (Nachhaltigkeit) (Berlin: Wissenschaftzentrum Berlin für Sozialforschung, 2007).

22. In Nancy.

23. Bosselmann K. The Principle of Sustainability: Transforming Law and Governance, 2nd ed. (London/New York, Routledge, 2017), at 20.

24. Bosselmann K. Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat (Munich: Scherz, 1992), 12.

25. World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1987), 8. Commonly known as the "Brundtland Report," named for the chairman of the commission, Gro Harlem Brundtland.

26. Ibid. 4.5.97.

27. Ibid. 356.

28. For example: "We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions." Ibid., Overview, "From One Earth to One World," para 25.

29. Bugge HC, Voigt C. Sustainable Development in International and National Law (Groningen, NL: Europa Law Publishing, 2008). At the time, Hans Christian Bugge was a personal assistant to Gro Harlem Brundtland and secretary of the commission.

30. Bosselmann K. Strong and Weak Sustainable Development: Making the Difference in the Design of Law. South African Journal of Environmental Law and Policy. 2007; 13:14–23.

31. Bosselmann K. The Principle of Sustainability, supra note 23, at 2.

32. A popular notion is "triple bottom-line" reporting and accounting, which includes economic, environmental, and social benefits.

33. Bosselmann K. The Principle of Sustainability, supra note 22, at 8 and 67.

34. The Naßauskiesung (roughly "water gravel mining") case: BVerfGE 58, 300 (342). For a discussion of this case in its context and others see, Human Rights and Access to Water: Comments by the Federal Republic of Germany Pursuant to op.1 of Decision 2/104 of the United Nations Human Rights Council, Berlin, May 4, 2007; http://www2.ohchr.org/english/ issues/water/ contributions/Germany.pdf.

35. BVerwG 4 C 56. 83 – BverwGE 78, 40.

36. Board of Trustees for a Democratic Confederation of German States (ed.), 1991: Draft Constitution for a democratically constituted Confederation of German States. Berlin.

37. Report of the Joint Constitutional Commission. Deutscher Bundestag Drucksache 12/6000 (5 November 1993). http://dip21.bundestag.de/dip21/ btd/12/060/1206000.pdf.

38. Ibid. 68.

39. Article 20a was proposed in the 1993 Joint Commission Report. Ibid. 65.

40. Ibid.

41. See BVerfG decision of the First Senate 24 March 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20.

42. Federal Constitutional Court. Press Release No.31/2021 of 29 April 2021, at 2.

43. As Principle 2 of The Hague Principles for a Universal Declaration on Reponsibilities for Human Rights and Responsibilities stipulates: "1. Human rights are grounded in our membership within the community of life, the Earth Community, which qualifies what rights we are called on to honour and what responsibilities we have for each other and for Nature. 2. Responsibility for Nature, the Earth Community and rights of Nature are grounded in the intrinsic values of Nature and all living things." (https://www.earthtrusteeship.world/ the-hague-principles-for-a-universal-declaration-on-human-responsibilities-and-earth-trusteeship/)

44. Rechte für die Natur - Initiative für eine Grundrechtsreform, April 2022 https:// www.rechte-der-natur.de/de/initiative-grundgesetzreform.html

45. North Shore City v Auckland Regional Council [1997] NZRMA 59, 94.

46. Environmental Defence Society Inc. v. New Zealand King Salmon Co. Ltd [2014] NZSC 38, [2014] 1 NZLR 593.

47. Bosselmann K. The Principle of Sustainability: Transforming Law and Governance, supra note 23, at 76-79.

48. Ibid. at 21.

49. Bosselmann K. The Principle of Sustainability: Transforming Law and Governance, supra note 23, at 163-166; see also Klaus Bosselmann, The Next Step: Earth Trusteeship, Address to the United Nations General Assembly, 21 April 2017 http://files.harmonywithnatureun.org/uploads/upload96.pdf

50. Kaitiakitanga means stewardship or guardianship and is also incorporated in the Resource Management Act 1991.

51. For example, Principle 7 of the 1992 Rio Declaration or Preamble, Art 4 (13) and Art 6(2) of the 2015 Paris Agreement; K. Bosselmann, "Sustainability and the Law", in: P. Salmon, P. and D. Grinlinton (eds), Environmental Law in New Zealand, ThomsonReuters, 2nd ed., 2018; 75-106.

52. Section 24 of the South African constitution says that everyone has the right to an environment that is not harmful to their health or well-being; and a. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and measures that: i. prevent pollution and ecological degradation; ii. promote conservation; and iii. secure ecologically sustainable development and use of natural resources which promoting justifiable economic and social development.

    Constitution of the Republic of South Africa 1996s 24. For a discussion of related provisions and acts, see John R. Nolon, ed., Compendium of Land Use Laws for Sustainable Development (Cambridge: Cambridge University Press, 2006); 73–5.

53. Article 225 of the Brazilian constitution states that: "all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations." Constituição da Republica Federativa do Brasil 1988, art. 225. See also, The Political Database of the Americas, Georgetown University, providing an English translation of the Brazilian Constitution, http://pdba. georgetown.edu/Constitutions/ Brazil/english96.html (accessed August 19, 2010). See also, Nolon, Compendium of Land Use Laws for Sustainable

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Development, supra note 34, at 278–81.

54. Constitución Del Ecuador 2008, art. 71; Bosselmann, The Principle of Sustainability: Transforming Law and Governance, supra note 23, at 160/161.

55. Often referred to as a "plurinational" constitution, the Constitution of Bolivia (adopted in 2008) recognizes 32 indigenous "nations" within the state of Bolivia each with a significant degree of autonomy over their territory and special protections for their languages and traditions; Bosselmann, The Principle of Sustainability: Transforming Law and Governance, supra note 22, at 161-163.

56. Vernon Tava, Resisting Enclosure: The Emergence of Ethno-Ecological Governance in a Comparative Study of Venezuela, Ecuador, and Bolivia, Masters Thesis, University of Auckland, 2010.

57. Bosselmann K. Global Environmental Constitutionalism: Mapping the Terrain. (2015) 21 Widener Law Review 171.

58. Supra note 43.

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