Linking Property Rights to Climate Change Mitigation: A Risk of Over-regulation?

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Abstract: In the last decade a more pronounced state interventionism is reported in property law, contract law and other areas. It is certain that traditional legal institutions will be redefined to some extent and that the autonomy of legal subjects will be restricted in the public interest. This applies in particular to the way in which certain subjective property rights are exercised. The fight to prevent pollution and to mitigate its consequences should be a responsibility for all the inhabitants of a country, as is the right to a healthy environment, expressed in its universal nature. Traditionally, environmental law has been the instrument employed to lay down the requirements and the limits of the right to private property for environmental protection. The collision between private property owners and the objective of sustainable development seems to be the central point of the fair transition. Current trends point to greater state intervention and an increasingly restrictive approach to the exercise of subjective private rights. This position is also reflected in the role of the courts in the transformation of property rights. The paper concludes that the view that the right to property can be limited for the protection of the most important interests of the society prevails in contemporary European legal theory and jurisprudence. One of the reasons for introducing restrictions and for establishing a special legal regime lies in the potential problems caused by climate change.

Keywords: property rights, climate change, state interventionism

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1. Introduction

For decades, the problems connected to environmental protection and climate change have been largely directly related to the public law. This tendency can be to some extent explained by the fact that certain property institutions have been adapted to answer to the practical needs in the field of environmental protection and sustainable development. Coping with climate changes the nature and the scope of the right to private property are changing under the influence of the exercise of the right to a healthy environment. In this context, there is a noticeable strengthening of the owner's actions in order to align his obligations with the imperatives outlined by the public interest[1]. At the same time, limitations on property rights can also arise, not only in the public interest but also to serve private interests[2]. These limitations may be imposed to achieve particular objectives, such as

1. Dušan Nikolić, "Climate Change and Property Rights Change," in *Property Rights and Climate Change: Land use under changing environmental conditions*, ed. Fennie van Straalen, Thomas Hartmann, John Sheehan (New York: Routledge, 2018), 57–60. Daiana Vesmaș. *Interesul politic și interesul public-Noțiuni și interferențe. Caietul Științific al ISAR „Paul Negulescu"* 2 (Sibiu: Burg, 2000), 143.
2. See provisions of art. 556 of the Romanian Civil Code, titled 'Limitations on the exercise of the right to private property.'

conserving natural resources, safeguarding the environment, or actively promoting the well-being of the community and the preservation of essential values.

Environmental protection and climate change issues have, for the most part been directly related to public law (both administrative and constitutional). However, circumstances have changed significantly in recent years. The latest research[3] shows that private law, and therefore property law, is playing an increasing role in this area. This trend can be explained, to some extent, by the fact that certain property law institutions have been adapted to meet the practical needs of environmental protection and sustainable development. The rights to private property and a healthy environment are fundamental human rights that, in the current context, undergo significant changes impacting the nature of private property. Conflicts between these rights emerge when legislation aims to drive radical change toward more sustainable systems, prompting various actors and social groups to assert their established rights vigilantly.

Within a national framework, the Constitution is a crucial instrument delineating the fundamental rights the state must guarantee for individuals within its territory. Accordingly, the Constitution[4] of Romania mandates that the state is responsible for ensuring its citizens have normal environmental conditions, allowing them to live and conduct their activities in a natural and healthy manner. The Romanian Constitution enshrines, in Chapter II, titled 'The fundamental rights and liberties,' Article 35 'The right to a healthy environment' and Article 44 'The right to private property' as fundamental rights, equally guaranteeing their protection.

The designation of 'the right to a healthy environment' in the first paragraph of Article 35 of the Constitution is grounded on the premise that this right underpins the exercise of other fundamental rights, such as the rights to life, health, physical and moral integrity, and property. Thus, the right to 'a healthy and ecologically balanced' environment encompasses the necessity of maintaining an environment that not only supports the emergence and development of life but also sustains its quality under optimal conditions. The third paragraph of the same article emphasizes the dual role of citizens as both subjects of law and active participants in the human-environment relationship. State authority regulates this field, recognizing that every individual's right to live in a healthy environment also obliges them to actively engage in legal responsibilities and duties associated with their status as citizens.

It is expected for individuals to demand a healthy, pollution-free environment. The responsibility to prevent pollution and mitigate its effects lies with all citizens, reflecting the universal nature of the right to a healthy environment[5]. Traditionally, environmental law has established the requirements and limits of the right to private property for the sake of environmental protection[6]. A shift in the dominant approach of private law occurs when the current model becomes ineffective or when societal tensions arising from its implementation reach a critical point[7]. The conflict between private property rights and sustainable development objectives is central to achieving a fair transition.

As part of the research, the investigation examines the core of subjective property rights and analyses how over-regulation limits their exercise for the benefit of climate change policies. From a methodologically point of view, this research employs document, thematic, and content analysis to assess regulations and construct the theoretical framework[8]. The selected documents are closely

3. Armatya Sen, *The Idea of Justice* (London: Penguin Books, 2009), 136.

4. Adopted by the Constituent Assembly in 1991, Published in the Official Gazette of Romania, Part I no. 233 of 21 Novembre 1991. Amended and supplemented by the Law on the Revision of the Constitution of Romania No 429/2003, published in the Official Gazette of Romania, Part I, No 758 of 29 October 2003.

5. Dana Alexandru, and Cristina Oneț, "The Framing of Climate Change Discourse and Policy: Resilience and Vulnerability in Romanian Wave of Building Renovation" in *Rethinking Expropriation Law IV: Takings for Climate Justice and Resilience*, ed. Magdalena Habdas, Björn Hoops, Ernst Marais, Hanri Mostert, Jacques Sluysmans, Leon Verstappen (The Hague: Eleven International Publishing, 2024): 125–144.

6. Cristina Oneț. "Greenhouse gas emission certificates - Financial instruments for implementing environmental policies in Romania" in Pandemic Challenges for European Finance, Business and Regulation, ed. Mihaela Tofan, Irina Bilan, Elena Cigu. (Iași: Editura Universității „Ioan Cuza", 2021): 330-348.

7. Bram Akkermans, "Sustainable Property Law: towards a revaluation of our system of property law," in *Sustainability and Private Law*, ed. Bram Akkermans and Gijs van Dijck (Maastricht: Eleven International Publishing, Law Series No. 13, 2019), 40.

8.Ajai Gaur and Mukesh Kumar, "A systematic approach to conducting review studies: An assessment of content analysis in 25 years of IB research," *Journal of World Business* 53 (2018): 282.

aligned with the research question, ensuring authenticity and reliability in reconciling property rights' legal framework and its limitations with environmental policies. The first section of this article offers an overview of the interplay between the right to property and the right to a healthy environment, elucidates their regulation in national law, and underscores key findings. Section 2 delves into the literature on the evolution and adjustment of private property law amid climate change. Here, we provide an outline of current and potential changes in property law, alongside succinct depictions of relevant solutions and trends in EU supranational law. Next sections explore climate justice as a framework for evaluating climate change through the prisms of transformation of the property law. More pronounced state interventionism might be expected in property relations, contract law and other areas. It is certain that traditional legal institutions will, to some extent, be redefined and that the autonomy of legal subjects will be restricted in the public interest. Current trends indicate increased state intervention and a more restrictive approach to exercising private property rights, a position reinforced by the judiciary's role in transforming property rights. In this context, an overview of current and possible changes in the field of property law will be analysed, with brief presentations of appropriate solutions in some national jurisdictions and EU law.

2. Transforming the property rights to address climate change

The transformation of ownership takes place in several directions. It is clear that its legal nature and extent are being transformed. It is no longer absolute in the sense of giving the owner unlimited authority over what belongs to him. In a world of limited resources, property rights are a privilege. However, this privilege imposes obligations. The owner may be required not only to refrain from certain actions, but also to take other actions, primarily in the public interest, as well as in the interest of other individuals and smaller social groups. The nature and extent of the right to property changes under the influence of the exercise of the right to a healthy environment and we find that we are witnessing the formation of a new legal environment[9].

2.1 State interventionism in the transformation of property rights

Since the French Revolution, two models of ownership relations have alternated in prominence across Europe. One model is characterized by legal and economic liberalism, while the other is marked by significant state interventionism. The liberal concept of ownership relations was formally established by the French Declaration of the Rights of Man and of the Citizen (Déclaration des droits de l'homme et du citoyen) in 1789, and later more precisely (and restrictively) defined by the French Civil Code (Code civil des Français) in 1804. This concept is encapsulated in two key regulations of the Napoleonic Code. Article 544 famously states that ownership is the right to enjoy and dispose of property in the most absolute manner, within the boundaries prescribed by law or regulation. Article 545 adds that no person can be compelled to relinquish ownership except for the public benefit and with prior fair compensation. Influenced by French doctrine, it was widely accepted in Europe for a long time that an owner had complete freedom in using their property, restricted only by the subjective private rights of others.

Under the influence of French doctrine, it was generally accepted in Europe for a long time that the owner enjoys complete freedom in the use of his property and that in the exercise of this right he is restricted only by the subjective private rights of others. Under the influence of French law, it has long been stressed in theory that the right of ownership is: (1) absolute (un droit absolu); (2) exclusive (un droit exclusif); and (3) perpetual (un droit perpétuel). Exclusivity means that the right of ownership is effective in relation to everyone, and no one can, without the owner's consent, exercise ownership authority over the property in question (ius excludendi tertii). The State establishes a kind of monopoly on the exercise of property rights in favour of the right holder. All others have a duty to remain passive with regard to the property in question.

In the second half of the 19th century, a new school of thought emerged in European legal science, whose proponents argued that property law should be understood in a different way. The work of

9. Bram Akkermans, "Sustainable Property Law: towards a revaluation of our system of property law," 52.

the French theorist Léon Duguit attracted particular international attention[10]. In 1911, he put forward his view that property is not a right in the classical sense, but a social function (théorie de la fonction sociale du droit de la propriété). One of his key theses was that the owner should not be given complete freedom in the use of his property. According to Duguit, the object of property law should be used not only in private but also in the public interest. The state has a right (and a duty) to encourage owners to act in this way and, if necessary, to punish them for neglecting such an obligation. In addition, bodies exercising state authority should determine how this right is to be exercised in the public interest. This involves determining the conditions of use of certain assets and prescribing appropriate measures.

In the spirit of legal liberalism, it has long been the view that the state can prohibit an owner of certain property from doing something, but it cannot impose positive obligations on him, i.e. it cannot require him to do something in the public interest. However, as already mentioned, circumstances have changed since then, as have the legal rules with them. The number of positive obligations will continue to grow in parallel with the evolution of climate change and the risks it entails. One may conclude that the prevailing view in contemporary European legal theory and jurisprudence is that the right to property can be limited to protect society's most important interests. One significant reason for introducing these restrictions and establishing a special legal regime is the potential problems caused by climate change. European Union's strategic documents also indicate this. More significant adaptive measures in the EU include adapting building regulations to future climate conditions and extreme weather events to increase the energy efficiency of buildings. Other more significant measures in the EU include efficient use of scarce water resources; increasing flood protection charges and developing the sewage network; developing stream-resistant crops; selecting forest plantations that are less susceptible to storms and fires; and forming corridors to allow the migration of other biological species[11].

It can be concluded that the position that property rights should be limited for the protection of important (existential) interests of the wider social community prevails in contemporary European legal theory and jurisprudence. One of the reasons for introducing restrictions and establishing a special legal regime is the potential problems caused by climate change. Restrictions on property rights can be both negative and positive[12]. In the first case, the owner is prohibited from using his property in a certain way, and in the other case he is required to use it in accordance with the public interest. One may say that as long as the environmental problems continue to grow, state intervention will continue to increase. The state will be obliged, with increasing frequency, to prohibit certain actions to protect the public interest, even when these actions are not directly harmful to others.

2.2 The courts' influence on the evolution of property rights

In the past decade, there has been a notable increase in state interventionism in property law, contract law, and other legal areas. Traditional legal institutions are expected to be redefined to some extent, leading to restrictions on the autonomy of legal subjects in the public interest, especially regarding the exercise of certain subjective property rights. Current trends indicate a rise in state intervention and a more restrictive approach to exercising subjective private rights. This position is also reflected in the role of the courts in the transformation of property rights. We note that an important role in transforming property rights in line with the needs generated by new circumstances, including those related to climate change, has been played by certain national courts[13] as well as the Court of Justice of the European Union. In one case, the Court ruled that "according to existing case law, the right to property is only one of the general principles of the *acquis communautaire*. However, this right is not absolute and must be seen in relation to its social function" (emphasis added). It follows that the right

10. Matthew C. Mirow, "Léon Duguit: (1859–1928)," in *Great Christian Jurists in French History*, ed. Descamps Olivier, and Rafael Domingo (Cambridge: Cambridge University Press, 2019):360. Leon Duguit, Manuel de droit constitutionnel (Paris: Éditions Panthéon-Assas, 2007), 88. Maurice Hauriou, Précis de droit administratif et de droit public, 12e *édition* (Paris: Dalloz, 2002), 46.

11. See http://ec.europa.eu/clima/policies/adaptation/.

12. Gabriel Boroi, Carla Alexandra Anghelescu and Bogdan Nazat, Curs de drept civil. Drepturile reale principale, Editia a 2-a (București: Editura Hamagiu, 2013), 62–71. See provisions of art. 556 of the Romanian Civil Code, titled 'Limitations on the exercise of the right to private property.'

13. Laurențiu Soneriu, "Consideration on the Competence of the Courts to Settle Disputes concerning Administrative Contracts," *Acta Universitatis Lucian Blaga* 2 (2021): 95.

to property may be restricted if such restrictions serve the purposes which the Community wishes to achieve and if, in relation to the aim they seek to achieve, they do not constitute a disproportionate and intolerable interference with the essence of the right guaranteed[14].

Relevant to our topic are the decisions of the Court of Cassation in France, as they marked a turning point in the development of legal practice and provided a conceptual basis for the development of legal theory in France and in many other countries. Some of these decisions deal with issues more or less related to environmental protection, sustainable development, and climate change. In the jurisprudence of the Court of Cassation, theories such as the so-called abuse of rights theory and the excessive nuisance theory were first formulated, and these have significantly restricted property rights[15]. The limits of the right to property were discussed by the full Court of Cassation in 2004 in the famous case of SCP Hôtel de Girancourt v SCIR Normandie[16]. On that occasion, the Court made one of the most important private law decisions in the history of French and even European jurisprudence. The Court of Cassation dismissed the plaintiff's appeal and upheld the position which held, that the right of ownership is neither absolute nor unlimited[17].

In this context, it is significant that the Court of Justice of the European Union has taken the same position on the legal nature, role, and social function of the right to property. Some of its decisions are a striking testimony to the development of private law and the efforts of the European Union institutions to limit property rights in the public interest. It represents a kind of pan-European, supranational interventionism. Property rights are thus subject to restrictions at two levels: national and supranational. The courts have the power to interpret and apply the law, but not to create it, in accordance with the traditional principle of the separation of powers that prevails in continental Europe. Although the creation of law is a matter for the legislature, some national courts, as well as the Court of Justice of the European Union, can influence the transformation of property rights according to the needs created by new circumstances, including those related to climate change.

The Court of Justice of the European Union has interpreted the provision of Protocol 1 to the European Convention on Human Rights, stating that Article 1 of Protocol 1 offers significant guidance by acknowledging the State's right "to apply such laws as it considers necessary to regulate the use of property in accordance with the general interest." Consequently, Protocol 1 encapsulates the principle of legality regarding restrictions on property use, while simultaneously allowing such restrictions insofar as the State deems them "necessary" to safeguard the "general interest." In one case[18], the Court ruled that 'according to the existing case-law, the right to property is only one of the general principles of the acquis Communautaire. However, that right is not absolute and must be seen in the light of its social function'. It follows that the right to property may be restricted if such restrictions serve the objectives which the Community wishes to achieve and if they do not constitute a disproportionate and intolerable interference with the essence of the right guaranteed in relation to the objective pursued[19].

It can be concluded that the position that property rights should be limited in order to protect important (existential) interests of the wider social community prevails in contemporary European legal theory and jurisprudence. One of the reasons for introducing restrictions and creating a special

14. Corneliu Bîrsan, *Drept Civil. Drepturile reale principale*. Ediția 4 (Bucharest: Hamangiu, 2020), 47.
15. J. Willisch, *State Responsibility for Technological Damage in International Law* (Berlin: Drucker & Humbolt, 1987), 237.
16. Cour de Cassation, Assemblée plénière, du 7 mai 2004, 02-10.450, Publié au bulletin, Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000007048576/ (accessed February 12, 2024).
17. Cour d'appel de Rouen, arrêt du 31 octobre 2001.
18. The Regione Autonoma Friuli-Venezia Giulia (the autonomous region of Friuli-Venezia Giulia) and the Agenzia Regionale per lo Sviluppo Rurale (ERSA) (the Regional Agency for Rural Development) ('the applicants') have brought proceedings before the Tribunale Amministrativo Regionale per il Lazio (the Regional Administrative Court for Lazio) seeking annulment of a national law which in effect reflects that prohibition. The applicants argue essentially that the Community had no competence to enter into the agreement with Hungary, that the prohibition conflicted with other provisions in the agreement, that the agreement was based on a misrepresentation of reality so that the relevant provision is null and void as a matter of international law, that the prohibition has been superseded by the TRIPs Agreement and that the prohibition is inconsistent with the right of ownership protected by the European Convention on Human Rights and Charter of Fundamental Rights of the European Union. Case C-347/03, available at: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62003CC0347 (accessed 19 February 19, 2024).
19. Hanoch Dagan, Exclusion and Inclusion in Property (June 9, 2009). http://dx.doi.org/10.2139/ssrn.1416580

legal regime is the potential problems caused by climate change. However, as the impact of human activities on the environment and the well-being of future generations becomes more apparent, there is a growing recognition that owners have a responsibility to act in ways that promote sustainable development. Some contributors wrote that property laws - especially property rights - need to change or evolve to better equip society to deal with the ecological challenges of our time[20].

The concept of positive owner obligations can take many forms, ranging from requiring owners to implement environmentally sustainable practices on their property to requiring them to take steps to mitigate the negative impacts of their activities on the surrounding ecosystem. These obligations can be enforced through a range of legal mechanisms, including fines, penalties, and injunctions. Overall, the shift towards positive property obligations is part of a broader movement towards a more sustainable and equitable society, where the well-being of people and the planet is prioritised over narrow economic interests.

Conclusions

Concerning limitations imposed in the name of the general public interest, these have evidently and significantly increased in the contemporary era. The exercise by public authorities of their mission of economic and social regulation has led to greater restrictions on the right to property, affecting its core attributes: possession, use, and disposition. When analyzing the rules governing the substantive limitations legally imposed on private property for the public interest, it is crucial to ensure that these measures do not result in a disproportionate distortion of property rights. Excessive regulation aimed at achieving general interest objectives could strip the right of its essential substance. The idea of positive property obligations, which require owners to take proactive measures to prevent harm and promote sustainability[21], is increasingly recognised in legal and policy circles. By incorporating values such as well-being and human flourishing into property law, owners are encouraged to act in ways that benefit not only themselves but also the wider community and the environment. Under the goals of achieving sustainable development, over-regulation of the exercise of property rights may conceal a form of taking for climate justice and resilience. However, the boundaries in takings law to such government action for climate protection are mostly unexplored and therefore uncertain.

One may conclude that the intensification of property rights limitations means that, under special circumstances such as climate change, these rights can also be limited in the private interest, by imposing positive obligations on property owners. The pursuit of environmental rights necessitates that property rights and owners' legitimate expectations are not viewed as obstacles to transition. Under these circumstances, the government must provide compensation if the imposed regulations disproportionately limit the owners' legitimate expectations, thereby achieving a balance. Therefore, we observe that climate justice has evolved into a political concept that transcends any concrete inconveniences it may cause to private interests when implementing strategic climate action documentation, ultimately serving the general interest. Under national law, this remains largely a theoretical issue, as there is not yet relevant case law on the topic.

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21. Agustin Parise, "Preliminary Reflections on Paradigms, Ownership, and Ecology," in *Sustainability and Private Law*, ed. Bram Akkermans, Gijs van Dijck (The Hague: Eleven International Publishing, 2020), 30–31.

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