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Sustainable Obligations in (Dutch) Property Law

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1. Introduction

Private law does not operate in isolation. Throughout history, private lawyers have been aware of the limits of their field. In property law, this traditionally means referring to public law – especially public law limitations to property rights. The juxtaposition so created is that private law stands for freedom and autonomy and it is public law, in the form of constitutional law or administrative law, that forms most restrictions. With the exception of the doctrine of abuse of rights, for example, the ideas surrounding the right of ownership are virtually limitless. The owner is the person that can dispose over his property in the most absolute manner.[2]

Of course, the application of the law in practice has led to many restrictions, such as on mining or airspace, but the starting point in private law remains freedom and autonomy. So much, that freedom of ownership, including the right for everyone to hold and trade property, has become the hallmark of our economic system.

In the 21st century, it is becoming more and more obvious that this system cannot be maintained.[3] Not only our economic system, but also the world around us is changing. Change to climate, more and more referred to as a climate crisis, call on everyone and every area of society to contribute to finding a solution.[4] Environmental concerns are becoming more and more mainstream and slowly making their way into the field of private law.[5]

To some – some would argue a considerable – extent, existing rules of private law can contribute to finding solutions.[6] In the context of sustainability, especially eco-sustainability, restrictions imposed on the use of property take a central role. Increasingly, the current theoretical foundations of property are challenged. Most systems of property law currently are considered to operate on the basis of a utilitarian foundation. Combined with a neoliberal economic foundation, property rights have taken a central place in the accrual of personal wealth.[7]

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[2] See B. Akkermans and W. Swadling, 'Types of Property Rights', in S. van Erp and B. Akkermans (Eds.), *Text, Cases and Materials on Property Law; Ius Commune Casebooks for the Common Law of Europe,* Oxford, Hart Publishing, 2012, p. 213 *et seq*.

[3] See Lynda Butler, 'Property's Problems with Extremes', William & Mary Law School, Research Paper no. 09-384, <http://ssrn.com/abstract=3277500>; B. Akkermans, 'Sustainable Property Law: towards a revaluation of our system of property law', in B. Akkermans and G. van Dijck (Eds.), *Sustainability and Private Law,* The Hague, Eleven International Publishing, 2019, forthcoming.

[4] See <www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>.

[5] See, *inter alia,* U. Mattei and A. Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons,* Northampton MA, Edward Elgar, 2018; B. Akkermans and G. van Dijck (Eds.), *Private Law and Sustainability,* The Hague, Eleven International Publishing, 2019, forthcoming.

[6] See, for references, B. Akkermans, 'Duurzaam Goederenrecht: naar een herijking van ons goederenrechtelijk stelsel?', *Tijdschrift voor Privaatrecht* (2018), p. 1437 *et seq.*, and extended version in English in Akkermans, *Sustainable Property Law* 2019.

[7] See G. Alexander and E. Peñalver, *Introduction to Property Theory,* Cambridge, Cambridge University Press, 2012, p. 11 *et seq*.

This does not just concern applying the rules of property law in a different manner but requires a strong foundation to guide their application. Such foundation can be found in human flourishing theory. Human flourishing theory offers us boundaries, in the form of a balance between individual and collective interests. Central to human flourishing theory are relationships between individuals, which come in the form of obligations we hold towards each other. These obligations are moral to begin with, but under certain circumstances can be transformed into legal obligations. Examples of such are trusts or the use of special limited property rights. The qualitative obligation, an obligation with *in rem* effects, such as exists in Dutch law, offers an excellent opportunity to be used as a tool to create such legal obligations.

In this contribution, I will first explore the theoretical foundations of property law and their importance (section 2). I will then turn to property and human flourishing (section 3), obligations in property law (section 4) and deal with the Dutch qualitative obligation (section 5).

2. Theoretical foundations of property law

The importance of knowing and studying theoretical foundations of property law is often underestimated. Rules of property law are perceived as a system, but the 'system theory' that underlies it is not made explicit. This is perhaps best seen when looking at the right of ownership. In traditional continental European scholarship, the right of ownership - in a post-feudal expression - is described as the right to do with an object whatever the owner wants.[8] In 19th century France, at the height of liberalist thought, this was considered to include even the right to destroy one's own object.[9] The starting point is a society in which there is freedom of ownership, free circulation of goods and party autonomy (or freedom of contract), so that - once more in a post-feudal sentiment - everyone is able to hold property and trade that property with the objective to accrue wealth.[10]

2.1 Utilitarianism

Classic systems of property law are aimed at providing individual property rights to the accrual of wealth. Utilitarianism, especially welfare maximisation, combined with (neo-)liberal thinking, makes that we apply our property rules in a very individualistic manner.[11]

At the core of our current system is a utilitarian perception of what an owner (or holder of another property rights) is and what he may do with his right. Welfare maximisation, *i.e.* the idea that profit 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. Choices made by the owner are assumed to be made in the interest of increasing utility, *i.e.* wealth, of the owner. With that, the owner is not only assumed to make the best

[8] See, for example Article 5:1 BW, on this comparatively see B. Akkermans and W. Swadling, *Types of Property Rights*, 2012, p. 213-215.
9 Demolombe, *Traité de la distinction des biens; de la propriéte; de l'usufruit de l'usage et de l'habitation*, Tome Premier, 4th edn, Paris, Auguste Durand/L Hachette et Cie, 1870, n 543 at p. 462.
[10] See B. Akkermans, *Sustainable Property Law*, 2019.
[11] Alexander and Peñalver, *An Introduction to Property Theory*, 2012, p. 11.

decision in his interest, but the rest of society benefits as well. The system of property rights and other property institutions is therefore organized in such a manner as to maximize net utility.[12]
Mostly this comes out in law and economic analysis of the law.[13] Economic analysis allows us to deter the benefit of decisions made over property. Legal economists often take such analysis to explain why property law is as it looks like, but also to propose how systems should be different.[14] The analysis of property rights as a bundle of rights is closely related to this as well. Although not strictly utilitarian in nature, the way in which leading scholarship allocates the entitlements and liabilities connected to property rights follow a utilitarian line of reasoning.[15] The focus in such analysis is on individual property rights, due to the cost benefit analysis that is involved, and not so much on the system of property as a whole.[16]

In this perspective, the right of ownership is the central focus point in the system of property law. It is the paramount property entitlement that provides its holder with as much freedom as possible. It is the right that the system of property law seeks to protect; all other rights and limitations are structured to maintain the position of the owner. Other areas of private law, most notably the law of obligations, are outside the system of property law and only serve to regulate property relations, making use of the building bricks property law offers.
In traditional systems of property law, there is therefore a separation between the law of property and the law of obligations, between private law and public law.[17] Insolvency law, in which these traditional distinctions are upheld, demonstrates which relations do and which no not have third party effect. Such system allows for the highest degree of legal certainty, ensuring high degrees of predictability of outcomes. Decisions to maximise welfare, in other words, can easily be taken.

2.2 Human Flourishing

In contrast to the utilitarian view that the sole objective of society is to maximize welfare, there are theories taking a more pluralistic approach.[18] Among these theories, human flourishing theory provides a valuable basis to incorporate multiple values into our system of property law. This includes values of welfare and economic prosperity, but also includes other aspects such as democracy, equality and sustainability. Especially in the perspective of sustainability, where we are dealing with

[12] Alexander and Peñalver, *An Introduction to Property Theory*, 2012, p. 17.
[13] Although not all law and economics is automatically utilitarian, see Alexander and Peñalver, *An Introduction to Property Theory*, 2012, p. 18.
[14] An example of the former are two great articles by T. Merrill and H. Smith, 'What Happened to Property in Law and Economics?', 111 Yale L.J. 357 (2001); T. Merrill and H.E. Smith, 'Optimal Standardization: The Numerus Clausus Principle', 110 Yale L.J. 1 (2000). Example of the latter are offered by Michael Heller in M. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets', *Harvard Law Review*, (111/3) 1998, p. 621-688, or by the work of Elinor Ostrom on the commons, see E. Ostrom, *Governing the Commons*, Cambridge, Cambridge University Press, 1990.
[15] Alexander and Peñalver, *An Introduction to Property Theory*, 2012, p. 30.
[16] *Ibid.*, p. 30-31.
[17] See S. van Erp, 'Introduction', in S. van Erp and B. Akkermans (Eds.), *Text, Cases and Materials on Property Law; Ius Commune Casebooks for the Common Law of Europe,* Oxford, Hart Publishing, 2012, p. 37 *et seq*.
[18] See, e.g. E. Peñalver, 'Land Virtues', 94 Cornell Law Review 4 (2009), 821-888, J. Singer, 'Property as the Law of Democracy', 63 Duke Law Journal (2014), 1287-1335; G. Alexander, *Property and Human Flourishing,* Oxford, Oxford University Press, 2018.

broad concepts and multiple values, human flourishing theory offers a theoretical framework that can incorporate all of this.[19]

Human flourishing theory operates on the basis of a social thesis, a common understanding that underlies how we live together. Gregory Alexander constructs this social thesis as follows:

> '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'[20]

The social thesis expresses the objective of human flourishing and emphasizes we all have capabilities to live our life 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.[21] That means that when we hold property rights, the social thesis 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 owes to the rest of us.

The central place for us to exercise these rights in human flourishing theory is the community in which we participate. These can be communities such as the family we belong to, the neighbourhood in which we live, or the sports club or other organization that we belong to.[22] Other communities can also be the city we live in, the country we hold citizenship of, or even the international community, such as the European Union, that we are a part of. In human flourishing theory, the assumption is that most of us will belong to more than one community.

One community deserves special attention. Within the community of our family, there is a strong relation to the family members that came before us, ourselves and the family members that come after us. The family community, in other words, is inter-generational.[23] The same argument can be made for other communities. Sustainability science shows us that we are more connected to each other as humankind than has previously been assumed.[24] CO2 emissions made in one part of the planet, contribute to global warming with effects that can be seen in places very remote from the source of pollution.[25] If, in other words, one needs to be a free person with the capabilities for human flourishing, then we must accept that the society we belong to can also be construed as a community.

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[19] Alexander, *Property and Human Flourishing*, 2018, p. xi *et seq.*

[20] *Ibid.*, p. 55.

[21] A. Sen, 'Well-Being, Agency and Freedom: The Dewey Lectures'. *The Journal* of Philosophy 82 (1985), p. 169 *et seq*, Alexander, *Property and Human Flourishing*, 2018, p. 54.

[22] Alexander, *Property and Human Flourishing*, 2018, p. 74 *et seq*.

[23] *Ibid.*, 103 *et seq*.

24 See John Blewitt, *Understanding Sustainable Development*, second edition, London, Routledge, 2015, p. 68 et seq.

25 See Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. World Meteorological Organization, Geneva, Switzerland, 32 pp, <www.ipcc.ch/sr15/>.

Within this community we are connected to each other.[26] This connection means that we are not on our own and therefore should take others into account. In other words, we do not only hold rights but also have obligations towards our community members.[27] These obligations concern not only our own flourishing as a human, but also the flourishing of our fellow community members. This notion of obligation is at the core of human flourishing theory.[28]

3. Property and Human Flourishing

When it comes to property in human flourishing, there are many very strong connections. Through the property rights we hold, we can flourish ourselves, for example by living on the land that has been held by our family for centuries, or by continuing to own and direct the family company. We can also help other members of our community flourish. Not only can we donate money to charitable causes, we can also directly help others. There are many communities in which local schools, for example, are funded and ran with community funds.[29] Other examples concern common energy schemes, or common gardens providing the community with food.[30]

At the core of human flourishing theory is therefore that the purpose of property is to enable individuals to live a flourishing life.[31] What a flourishing life is, is a pluralistic concept and cannot only be expressed in money. It includes, amongst others, autonomy, security, personhood, self-determination, community, equality and dignity. Another way to look at this is to accept that we do not hold our property rights in isolation of the rights and the existence of others. The importance of the focus on the context in which property rights are held makes this into a relational theory. The community, especially the relationships we have towards our fellow community members, require resources so they can flourish. To hold a property right, therefore, means that you have rights, but also duties – both positive and negative in your community. At the core of human flourishing theory is the idea that these duties are not imposed on you by external forces, such as through legislation, but that they follow from the very nature of what it means to hold property.[32]

Human flourishing theory, in other words, offers a property theory that allows us to make visible what it means to own property. It allows us to incorporate a set of multiple values at the core of our system of property.[33]

3.1. Obligations of ownership

[26] Alexander, *Property and Human Flourishing*, 2018, p. 58-59.
[27] *Ibid.*, p. 60.
[28] *Ibid.*, p. 67.
[29] See Marjorie Kelly, *Owning our Future. The Emerging Ownership Revolution,* Oakland, Berrett-Koehler Publishers Inc, 2012.
[30] A great example is cooperative farming. In many countries cooperative farms are making a return. See, in Dutch, www.vpro.nl/programmas/tegenlicht/kijk/afleveringen/2019-2020/plattelandspioniers.html. See also www.herenboeren.nl. See, in English, Marjorie Kelly, *Owning our Future*, 2012, p. 147 *et seq*.
[31] Alexander, *Property and Human Flourishing*, 2018, p. xiv.
[32] *Ibid.*, p. xv-xvi.
[33] *Ibid.*, p. 3-4.

At the core of human flourishing in property is the right of ownership. Gregory Alexander even submits human flourishing is at its core a theory of ownership.[34] The idea of a right of ownership that comes with obligations is not new.[35] However, the central place the obligations of owners hold in human flourishing theory is certainly original. In terms of obligations we must, as already hinted at in the previous section, distinguish between moral and legal obligations. The foundation of 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 legal obligations as well. Before we go into the legal obligations, we must look at moral obligations and how they can exist.

Obligation follows from membership of a community, which in turn is based on the social thesis. The obligation is of human flourishing. To flourish yourself, but also to help others flourish. These obligations exist to help one another 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.[36]
Those that hold property rights are in a special position because they generally hold exclusive power. Safe from public law limitations, it is the property right holder that grants others access to his property. Moreover, the property right holder can generally dispose of his property in such as way as to gain advantage from it. Be it in the form of harvest, income or a place to live.
Obligations, in Gregory Alexander's terms, can be general and specific. General obligations concern upholding the general infrastructure that should enable human flourishing.[37] This includes, for example, clean air and clean water. Specific obligations arise in specific situations and thus depend on the community in which they arise. For example, the duty of parents to support their children, or that of fair play on the sports field.
These obligations are first and foremost moral in nature, but there are situations in which specific obligations are given shape as legal obligations. Alexander mentions a last will in which a father wanted his children to continue the family business.[38] His heirs therefore inherited ownership of a company, but with a restriction to continue the business. This example concerned a newspaper business and when maintaining the company became financially very difficult, the question on the nature of the obligation arose. As a result, the court had to rule on the question what it meant for the heirs to be obliged by the will of their father. The court ruled, and this fits the human flourishing theory very well, that the obligation connected to the ownership of the heirs was not to be strictly bound, but rather to use the right in the spirit of which it was granted.[39]

Another very interesting example is offered by cooperative farms. Increasingly, groups of individuals are joining forces and are returning to cooperative organisational forms. Cooperative farming, whether of fruit or vegetables, or of energy or other fuels, means that individuals acquire a property

[34] *Ibid.*, p. xxii.
[35] See B. Akkermans, *Duurzaam Goederenrecht*, 2018, p. 1437 *et seq*.
[36] Alexander, Property and Human Flourishing, 2018, p. 59.
[37] *Ibid.*, p. 36.
[38] *Ibid.*, p. 113-118.
[39] *Ibid.*, p. 113-114.

right in land together and decide together how to farm the land.[40] Connected to the right that these cooperative farmers collectively hold, they also oblige themselves to acquire the proceeds of the land.[41] After all, this is the purpose to create the cooperation and therefore there are moral duties to maintain it. In practice, these obligations are given shape as legal obligations as well. Usually this is done by creating a general duty in the statutes that found the cooperation, combined with general rules and contracts in which the obligations are further specified. In other words, the right therefore comes with obligations.

To give shape to human flourishing in property law, we can look for more instances where these moral obligations can be strengthened into legal obligations. One prime example of these are offered by Dutch law in the form of qualitative obligations. By way of a case study, therefore, we will now turn to Dutch law, before drawing some more general conclusions at the end of this contribution.

4. Case study: legal obligations in Dutch law

4.1 The qualitative duty

With the introduction of the Dutch civil code in 1992, an innovative element between contract and property was introduced. The qualitative obligation is an obligation imposed on someone in his quality as owner of a piece of land. Although it resembles the traditional right of servitude (*erfdienstbaarheid),* the qualitative duty has taken its place in the Dutch legal landscape. Placed in book 6 of the Dutch Civil Code, which deals with the law of obligations, and not in book 5, which deals with property law, the qualitative duty is placed firmly within the law of obligations. At the same time, however, the duty is open for registration in the land registry and with that will gain third party effect.[42]

In the general models for obligations with third party effect that exist, (1) the obligation *propter rem*, (2) the qualitative obligation and (3) the chain clause, Dutch law has opted for the second option.[43] Article 6:252 BW states:

> '1. It may be stipulated by contract that the duty of one of the parties to tolerate or not to do something in respect to a registered thing (registergoed) that belongs to that party, shall pass onto those that acquire the registered thing under specific title, and the persons who acquire a right to use the object from the holder of a right shall also be bound.
>
> 2. To give effect to the stipulation mentioned in paragraph 1, it is required that the parties draw up a notarial deed of their contract, followed by registration in the public land registers. The person who is subject to the duty must choose residence in the Netherlands in the deed of creation.

[40] See, e.g. www.herenboeren.nl, or for energy, see https://www.wen.frl.

[41] See statutes of the cooperation of the 'herenboeren' initiative at wilhelminapark.herenboeren.nl/wp-content/uploads/2018/03/Statuten-Herenboeren-Wilhelminapark-Cooperatie-U.A.-aangepast.pdf. For a legal analysis see staatsrechtpraktijk.nl/?p=722.

[42] C. Sieburgh, *Verbintenissenrecht. Algemeen overeenkomstenrecht. Mr. C. Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*, Volume 6-III, The Hague, Wolters Kluwer, 2014 (Asser/Hartkamp/Sieburgh 6-III), n. 541 *et seq*.

[43] See, extensively on this, S. Demeyere, *Real Obligations at the Edge of Contract and Property* (Antwerp: Intersentia, 2020), forthcoming.

3. Also after registration, the stipulation will have no effect:

a) against those that have acquired a right to the thing or a right to use the thing under specific title before registration;

b) against the seizure of the thing or of a right on that thing, when the summons for the seizure was registered before registration of the deed;

c) against those who have acquired their right from a person that was not bound by the agreed upon duty under a or b.

4. If a counter performance has been agreed upon for the duty, then with the passing of the duty, the right to the counter performance will pass in so far as this relates to the period after the passing and this duty to perform has also been entered into the registry.

5. The article does not apply to those duties that limit a holder of a right in his powers to transfer or burden his right.'

Its introduction was not without resistance, as many authors held the existence of this right breaches the *numerus clausus* of property rights.[44] The right created is still considered to be a hybrid form between the law of obligations and the law of property.

First, the duty must be limited to a negative burden on the owner of the land. In this, the qualitative duty closely resembles a right of servitude.[45] However, in its use, the qualitative duty offers more possibilities than the property right of servitude.[46] Also the duty not to enter into any or certain legal acts can be subject matter of the duty.[47] Secondary duties, like in case of rights of servitude, may be positive in nature if they support the existence of a primary negative duty. However, the use of secondary duties is much more limited than in case of servitudes.[48]

A special provision exists for the penalty clause that usually accompanies a qualitative duty.[49] A qualitative duty is placed within the law of obligations and therefore the performance of the duty is subject to the rules of contract law and not of property. As a result, the performance of the qualitative duty, for which the remedy of specific performance is open, can be strengthened with a penalty clause. The clause will, even though this concerns a positive obligation, transfer with the qualitative duty.[50]

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[44] A. Pitlo, 'Na 3 maart 1905,' in P.A.N. Houwing (ed.), *Onroerend goed: opstellen geschreven ter gelegenheid van het 125-jarig bestaan van de Broederschap der Notarissen in Nederland*, Deventer, Kluwer, 1968, p. 231 et seq.; J.M.M. Maeijer, *Erfdienstbaarheden en kwalitatieve verbintenissen (huidig en wordend recht),* The Hague, KNB, 1966, p. 80; H.J. Rijtma, 'Kwalitatieve rechten,' in H.L. Bakels et al., *Op de grenzen van komend recht. Opstellen aangeboden aan prof. mr. J.H. Beekhuis,* Deventer-Zwolle, Kluwer-Tjeenk Willink, 1969, p. 229; P.A. Stein, 'Van kettingbeding naar kwalitatieve verbintenis,' *Weekblad voor Privaatrecht, Notariaat en Registratie*, 5365 (1976), p. 644-650, p. 650; in favour see J.T. Smalbraak, *Erfdienstbaarheden en kwalitatieve verbintenissen (huidig en wordend recht)*, The Hague, KNB, 1966, p. 110. See on this also B. Akkermans, 'The New Dutch Civil Code: the Borderline between Property and Contract', in S. van Erp and B. Akkermans (Eds), *Towards a Unified System of Land Burdens?,* Anwerp: Intersentia, 2006, p. 163 *et seq*.

[45] See Article 5:74 BW that uses almost exactly the same formulation.

[46] Asser/Hartkamp/Sieburg n. 557-558.

[47] See J.L.P. Cahen, *Overeenkomst en derden*, Deventer, Kluwer 2004, p. 34, Asser n. 407.

[48] Asser/Hartkamp/Sieburg n 553, see also N. van Oostrom-Streep, *De kwalitatieve verplichting,* The Hague, Boom Juridische Uitgevers, 2006, p. 218-219.

[49] Asser/Hartkamp/Sieburg n 553.

[50] Asser/Hartkamp/Sieburg n 553.

In order for the duty to be created, a simple contract will suffice, but for the duty to gain its special third-party effect, it must be drafted by notarial deed and be registered in the public land registry.[51] Two obligations actually arise. One between the parties that create the right and between them the duty is of a personal nature. Secondly, between the parties there is also a duty with third party effect. However, this will only become apparent once the party whose land is burdened by the duty, transfers his right of ownership to, or creates a limited property right for, another.[52]

The effect of the duty, after the deed of creation is registered, is a limited third-party effect. On the side of the person holding the corresponding right to the duty, the right is personal. On the side of the duty, the owner of the land is bound in his capacity as owner of the land.[53] The same applies to those who acquire the ownership of the land, or to those who acquire a limited property right on the land, those lease the land or hold another personal right to use. Another party that may be bound by the duty is a creditor who seizes the land on which the qualitative duty rests. The effect is therefore not *erga omnes*, but only concerns those that are directly affected by the land.

The qualitative duty, however, is a useful addition to the catalogue of property rights. Originally intended to be used by municipalities to ensure that they would have access to land for the maintenance of water, gas or electricity supply, the qualitative duty is also used in private settings. Two examples will illustrate its use.

4.2 Sustainable applications of the qualitative duty

A first example is offered in the context of nature preservation. Increasingly, nature organisations are trying to increase natural reserves or to develop land so that nature can take its own course. Organisations such as *Groenontwikkelfonds Brabant* (Green Development Fund for the province of Brabant, hereafter the Fund) will attempt to acquire ownership of – mostly agricultural – land to create a network of natural space. To that effect, private parties such as entrepreneurs, civil organisations and local governments work together to build funds.[54] When land is not acquired in ownership, the organization seeks to enter into a partnership with owners or those who hold the land in *emphyteusis*. Usually this partnership is accompanied by a subsidy or other financial compensation to the landowner to transform the purpose for which the land is used into a nature purpose.[55] The qualitative duty then serves to secure that the agreement in the partnership is upheld.

Non-performance of the duty will allow the Fund to terminate the agreement if necessary but will also provide the Fund with the possibility to enforce the duty through a penalty clause.[56] Article 3 of the model deed used for this states:

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[51] See N. van Oostroom-Streep, *De kwalitatieve verplichting*, 2006, p. 81 *et seq*.
[52] See Asser/Hartkamp/Sieburg n. 551.
[53] Asser/Hartkamp/Sieburg, n 555.
[54] See www.groenontwikkelfondsbrabant.nl (in Dutch)
[55] See model deed available at www.groenontwikkelfondsbrabant.nl/wp-content/uploads/2018/04/20180409-Format-model-Kwalitatieve-Verplichting-GOB-1april-2018.pdf, hereafter model deed.
[56] See model deed articles 4 and 5.

'a. The owner uses the terrain for nature-purposes and tolerates development and maintenance of nature-conservation for an unlimited period of time, or tolerates the conservation of the land for that natural purpose for which a subsidy has been granted on the basis of the regulation …, or of the development, or conservation of another type of natural purpose in so far as … has given written permission;
b. The owner will not undertake any action that hampers, impedes or hinders that what is proved under a.
c. The owner will not use the land for any other purpose than for the development or conservation of the management of the plan that is attached to this deed, for which a subsidy has been granted on the basis of regulation…
d. The owner tolerates the effects on his land that arise through hydrologic measures taken in his surrounding to benefit nature purposes, Natura2000 and the Framework Regulation Water.'

As far as the third-party effect is concerned. Article 8 of the model deed states:

'The Fund and the land owner agree that the obligations they agreed to, namely to tolerate or not to do something in respect to the land, shall transfer to those who will acquire the land under specific or universal title and that also those who receive a right to use from the right-holder shall be bound…'

This example shows how the qualitative duty can be used as a conservation duty by making use of the existing framework. It is – in my view – very likely that therefore Dutch law does not offer environmental conservation duties in specific legislation.[57] The use of the obligation, especially in combination with a penalty clause that will transfer with the obligation, is a very effective and relatively easy method to regulate the use of land and to ensure that land is used in a certain way.

A second example shows that the width of the qualitative duty goes beyond the conservation use. Qualitative duties are also used to strengthen other obligations. Increasingly, commercial parties are entering the market offering the placing of solar panels to individuals or companies. Of course, these solar panels can be financed completely by the landowner, but these companies offer a solution where the panels are owned by the company, and placed on the roof-space of the land owner. In exchange for a periodic payment the panels are leased by the landowner, who will not have to concern himself with the construction, placing, or maintenance. To that effect the owner of the land will create a right of *superficies* on his land, creating a separate right of ownership of any construction placed on the roof.[58] The parties enter into such an agreement for a limited duration of time. During that period the landowner is locked in to paying the lease instalments.
The payment for the lease follows from a contract that the leasing company and the landowner have concluded and therefore will not have third party effect. The risk is therefore for the leasing company that if the owner transfers his land to another, the lease agreement will not pass. To that effect, third

[57] See on these special duties the contributions elsewhere in this book. For a comparative overview see also S. Demeyere, *Real Obligations at the Edge of Contract and Property*, 2020, forthcoming.
[58] Article 5:101 BW.

party effect of the lease agreement can be woven into the *superficies* agreement. All obligations that have a negative content, so a duty not to do or to tolerate something on the land, that follow from the right of superficies or from the lease agreement, are given shape into a qualitative duty. The effect of the qualitative duty explicitly also includes anyone who is granted a personal or property right to use of the land. Thus, the leasing company ensures that it will have continued access to the solar panels for maintenance, repairs etc. Any positive duties that remain, which would mostly stem from the lease agreement, are put into a contractual chain clause. Also, these are therefore intended to be transferred to a potential new landowner. A penalty clause protects the performance of both the qualitative duty and the chain clause.[59]

An example from a model notarial deed on the subject:

> 'In so far as the conditions of the right of *superficies* that the parties intend to create cannot be designated as belonging to the right of superficies itself, the right holder of the right of *superficies* and the land owner agree that these will hold as a qualitative duty as meant in Article 6:252 of the Civil Code and as such will transfer to successors in title … and that also those with a personal right to use shall be bound…
>
> … in as far as the conditions of the right of superficies that the parties intend to create cannot be designated as belonging to the right of *superficies* itself, or as a qualitative duty as meant in Article 6:252 of the Civil Code, the right holder of the right of *superficies* and the land owner agree that the right holder c.q. the landowner (as well as his successors in title) will be obliged towards the land owner c.q. right holder to include the obligation in a subsequent transfer by way of a chain clause… such on the penalty of a direct monetary claim of X EUR.'[60]

4.3 Qualitative duties revisited

This second example shows how the qualitative duty can be used to supplement the limited possibilities for third party effect that property law offers. The *numerus clausus* of property rights limits the number (*Typenzwang*) and content (*Typenfixierung*) of property rights.[61] These limitations control a large part of what parties can agree. However, at the same time there are still many agreements parties can make both in and outside of the confines of property law. For example, most legal systems, Dutch law included, define what the criteria are for a right of servitude to exist.[62] But parties can give content to the servitude and decide whether it concerns a right of way, who can use the right of way under what circumstances and whether payment is required.

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[59] This example is derived from speaking with notaries and land registrars about the practice of commercially placing solar panels. There is model notarial deed available at www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwjw2-jv8P_kAhWDPFAKHTpwAyQQFjAFegQIAxAC&url=https%3A%2F%2Fwww.nvb.nl%2Fmedia%2F1078%2F004106_model-akte-opstalrecht-zonnestroomsysteem-dakproject.docx&usg=AOvVaw3-qbqCCOcVgp2RPZDCS6n1 (Model deed *superficies* for solar power). See also www.dirkzwager.nl/kennis/artikelen/zakelijke-rechten-voor-een-windmolenpark/?utm_expid=.rUxlHM_fRVuvpi9UF7RdhA.0&utm_referrer=https%3A%2F%2Fwww.google.com%2F (concerning commercial exploitation of windmills).

[60] See Article 20.1 and 20.2 Model deed *superficies* for solar power.

[61] See B. Akkermans, *The Principle of Numerus Clausus in European Property Law*, Antwerp, Intersentia 2008, p. 5 *et seq*.

[62] Article 5:70 and 5:71 BW.

The Dutch legislature on purpose left room for parties to give shape to property rights.[63] The open criteria of property rights in the Dutch civil code are further supplemented with another criterion developed by the Dutch Supreme Court. All agreements that are sufficiently connected to the nature of the property right, will become an inherent part of the property right. They will therefore transfer with the property right and can be enforced with the property right under the rules of property law. Agreements that do not meet the criterion are personal in nature and therefore apply between the parties only. Enforcement must follow the lines of the law of obligations.[64] Qualitative duties of Article 6:252 BW add a third possibility to this: there can be obligations that have limited third party effect. Clever use of these can strengthen the effect of obligations that would otherwise fall outside of the *numerus clausus* and would only have personal effect.

Qualitative duties therefore offer a great possibility to strengthen obligations in a community. Returning to the idea of human flourishing, the social thesis and the need to support each other. The example of nature conservation, the first example discussed above, shows how this can be done within the framework of human flourishing: citizens collectively take responsibility and collect – from their own patrimonies – wealth to use to help others convert land to a nature purpose, thus strengthening the infrastructure needed for human flourishing of all in the community. These moral obligations can be strengthened by transforming them, in part, into a legal obligation by making use of the available property rights, but that cannot always be done. Qualitative duties offer the possibility, as seen by the first example, to create legal obligations to give shape to a more permanent solution.
Also, in case of the second example, leasing solar panels is an opportunity for many people to spread out the investment in solar energy over a longer period of time. When people own land, but do not have the financial means to invest in solar panels, they can take the route of leasing to fulfil their obligation towards the global community and reduce carbon emissions by switching to solar energy.

5. Conclusion

Sustainability means taking care of our own needs, while incorporating the needs of future generations.[65] That means that property law does not only need to deal with the accrual of personal wealth, and the freedom that property rights provide, but also with responsibility towards ourselves and future generations. We need, more than before, to search for the obligation in property law.[66] The scholarship on obligations of ownership in particular makes us look at the values that underlie our system of property law.[67] At the core of the human flourishing theory is the approach that there can be more than one value underlying this system. Human flourishing, in this respect, is a pluralistic theory. Moreover, human flourishing theory, in building the value-base of property also brings purpose to the way in which we should see and understand our rules of property. In the context of

[63] T. Struycken, *De numerus clausus in het goederenrecht,* The Hague, Kluwer, 2007, p. 386-387.
[64] *Ibid.*, p. 422-425.
[65] World Commission on Environment and Development, 'Our Common Future' (1987) Ch 2.1. <www.un-documents.net/ocf-02.htm>; J. Blewitt, *Understanding Sustainable Development*, 2015, p. 6 *et seq*.
[66] The idea of the obligation in property law is not new, see e.g. M. Mirow, 'The Social-Obligation Norm of property: Duguit, Hayem and Others', FIU Legal Studies Research Paper 10-60 (2010) available at ssrn.com/abstract=1662226, see also G. Alexander, *Property and Human Flourishing*, p. 39 ff.
[67] See E. Peñalver, 'Land Virtue', 95 Cornell Law Review 4 (2009), p. 821 *et seq*.

sustainability this becomes even stronger. Sustainability, as a pluralistic concept itself, allows us to factor in not only the right we have ourselves, but also makes us ask the question of what we owe to each other, what we owe to those other members in our community. The concept of community is the central connecting factor between the rights and obligations in property law. The construction of community is therefore complex and not without problems. Some communities, such as those of the landowner and his neighbours, are easy to construct and easy to understand. It provides a framework in which we can explain, justify and develop the law of neighbours.
Other communities are more difficult to construct, especially when there is no territorial basis. At the same time, non-territorial communities, such as our family, have always had a place in property law as well. The possibility of the creation of the right of usufruct means that the right holder not only has the rights of use and enjoyment of the owner, but also a duty to maintain, preserve and protect the object. The bare owner, in his turn, still has the right of ownership, but also the duty to enable the right holder of the usufruct to exercise his right. In an intergenerational setting, for example a spouse leaving a right of usufruct on the matrimonial home, whilst bequeathing the ownership to his children, offers a legal construct of the moral obligation to help our family members flourish.[68]

In the era where ecology, especially environmental protection, becomes more and more relevant, and in which there is a global agreement that everyone should contribute to this objective, this cannot be left to states and governments alone.[69] There are plenty of initiatives that can be taken in public law, but private law must also play its part. Private law, especially the law of property, can enable individuals to contribute to sustainable innovations and solutions themselves. Private parties can gather funds to increase the amount of nature in their community, thus contributing to a reduction of CO2 rather than an increase in CO2 emission.[70]
For this to work, we must look for the obligations in property law with which we can give shape to a sustainable property law.[71] However, the numerus clausus of property rights offers an inherent limitation to this: we must stay within the confines of the existing types of property rights or create a new type of property right. The latter is generally only for the legislature.[72] In this contribution I examined the specific possibility offered by Dutch law in the form of the qualitative duty, an obligation in contract law that can achieve a limited third-party effect upon registration in the land registry. The qualitative duty is deliberately described as open as possible to enable private practice to make use of this possibility as much as possible. No positive duties can be created with it, but when used in combination with a contractual chain clause, the qualitative duty proves to be a useful tool to strengthen obligations that cannot be part of a property right.

[68] See B. Akkermans, 'Duurzaam Goederenrecht', 2018, p. 1437 *et seq*.
[69] See the 17 UN Sustainable Development Goals, made in the UN Resolution of 25 September 2015, 70/1, Tranforming our world: the 2030 Agenda for Sustainable Development, www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. On the ecological paradigm in property law see A. Parise, 'Preliminary Reflections on Paradigms, Ownership and Ecology', in B. Akkermans and G. van Dijck (Eds.), *Sustainability and Private Law,* The Hague, Eleven, 2019, forthcoming.
[70] This is exactly the purpose of the nature conservation initiatives deals with the previous section.
[71] See B. Akkermans, *Sustainable Property Law*, 2019, forthcoming.
[72] Although in some legal systems also courts authorize new types of property rights. See Cass. 31 October 2012, *RTD Civ.* 2013, 141 and Cass. 8 September 2016, n° 14-26.953 (also known as the *Maison de Poésie* litigation)

By allowing a penalty clause to be part of the qualitative duty, the enforcement – although in the law of obligations instead of the law of property – is strengthened. The use of the qualitative duty as a conservation burden is therefore an option that has become widely used.

The question whether this is enough in the context of sustainability, and whether human flourishing theory does not require us to look beyond the restriction of the negative duty, arises once more.[73] The reason in Dutch law not to go near the idea of positive duties is the fear of reinstating feudal duties.[74] However, that view only makes sense when we look at it solely from the perspective of the owner. When human flourishing delivers the core underlying values of our system of property law, then we must also take the other members in our community into account, as well as the idea that property law must contribute to sustainability. Changing property law to this effect is perhaps a step too far, but the use of a hybrid form, such as the qualitative duty, to offer much more flexibility is well worth consideration. However, as we are dealing with third party effect, be it in a limited form, it is not private parties themselves, but the legislature that should act on this.[75]

[73] This discussion is not new in Dutch law, see Asser n. 553, N. van Oostrom-Streep, *De kwalitatieve verplichting*, 2006, p. 28-42.
[74] See Asser/Hartkamp/Sieburg 6-III, n. 553, N. van Oostrom-Streep, *De kwalitatieve verplichting*, 2006, p. 218 *et seq*., H. Heyman, 'Blaauboer/Berlips (HR 3-3-1905)', in: E. Hondius & G.E. van Maanen (eds.), *Civiele klassiekers revisited; Van Blaauboer/Berlips tot Breda/Antonius – Zestien standaardarresten opnieuw geannoteerd*, Deventer, Kluwer 2003, p. 9-3; H. Heyman, 'Contents of the Real Right: Dogmatic Rigidity and Pragmatic Flexibility of Dutch Property Law', in: S. Bartels and M. Milo (Eds.), *Contents of Real Rights,* Nijmegen, Wolf Legal Publishers, 2004, p. 71-81.
[75] See, in the same sense and offering an algorithm on how to do so, B. Akkermans, 'Duurzaam goederenrecht', 2018, p. 1467; B. Akkermans, *Sustainable Property Law*, 2019, forthcoming.