Rethinking **Expropriation Law**

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BIOGRAPHIES & ABSTRACTS

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Prof Dana Alexandru & Prof Cristina Onet (University of Sibiu)

The framing of climate change discourse and policy: Resilience and vulnerability in Romanian wave of building renovation

For decades, the problems related to environment protection and climate change have largely been directly liked to public law. However, the circumstances have changed significantly over the past few years, so that private law and, as such, property law play an increasingly pronounced role in this field nowadays. Climate change coping strategies have an impact on the development of private law. New regulation for implementing public policies in this field is being adopted, determining the shaping of new legal institutions. Attaining the climate goals justifies broader state interventionism insomuch as the national and international fundamental acts establish the state's obligation to protect the public interest concerning environment protection and, implicitly, climate change, but also the citizens' right to benefit from a healthy environment. This study attempts to answer two questions. What substantive legal rights do the private property owners enjoy when losing the consistency of the exercise of rights, for the purpose of promoting policy responses to climate change? How should private property rights and the fundamental environmental rights be balanced, in order to ensure an equitable transition? The paper discusses climate justice as a lens for assessing climate change, from the standpoint of transformation, resilience, and vulnerability. To illustrate this, the paper examines the environmental policies and the financial instruments adopted by the government in order to enforce positive (or negative) obligations on citizens in their exercise of property rights. To evaluate the effects of the measures taken by the government, this study analyzes the manner in which Romania manages the rehabilitation process of the built environment. The population has adapted to the changing climate conditions in a variety of ways, including by using new technologies for the renovation of existing buildings and the construction of new ones. However, the ability of both the population and the companies to make use of such innovations is subject to legislation, on the one hand, and to the access to resources, on the other hand. To sum up, the paper finds that the imperative of mitigating the effects of climate change justifies the state intervention, and that, in order not to break the balance between the private and the public interests, the key element are the compensations generating positive effects on the owners' assets.

Dana Alexandru *graduated the "Simion Bărnuţiu" Law School from "Lucian Blaga" University of Sibiu in 1999. In 2011 she was a French scholar at the École Nationale d'Administration (ENA), Paris, where she followed an international cycle specialized in public administration. In 2013, she obtained the title of Doctor in administrative sciences at the National School of Political and Administrative Sciences in Bucharest, with the thesis Local Communities and Their Role in the European Administrative Space in the Context of Administrative Decentralization. She is associate professor at the Faculty of Social and Human Sciences, Department of Political Sciences, International Relations and Security Studies of "Lucian Blaga" University of Sibiu. Between 2004 and 2017, she was a legal advisor to the Legal Departement of Sibiu City Hall and in 2013-2017 she was the Head of the Legal Departament, having an important practical experience acquired during the 13 years spent in the administration. Her research focuses on relation of strategies of municipal land policy and property rights; decentralisation and local collectivities.*

Cristina Onet *graduated the "Simion Bărnuţiu" Law School from "Lucian Blaga" University of Sibiu in 1994. In 1995 she received a Masters degree, at the "Simion Bărnuţiu" Law School,*

being specialized in the domain of Administrative Law. In 2001 she obtained a PhD. in juridical sciences at the Faculty of Law from "Babeş-Bolyai" University of Cluj-Napoca with the thesis "Răspunderea juridică în dreptul finanţelor publice" (Juridical responsability in the financial public law). Now, she is an associate professor and the Public Department Director at the Faculty of Law from "Lucian Blaga", University of Sibiu, having a 28 years long career.

Dr Liz Alden Wily (Van Vollenhoven Institute, Leiden)

Land Rights & Wrongs: Rethinking Expropriation for Protected Areas

A main output of COP 26 in Glasgow in 2021 was pledge by 141 states to halt and reverse forest loss and land degradation by 2030, backed by financial pledges of nearly $20 billion. The expansion of Protected Areas is elemental to this intention. This paper explores the changes in when and how compulsory acquisition is applied for this purpose to be justly achieved and with resilience. It focuses on conditions in the African tropics, one of two regions where the United Nations documents as suffering most alarming deforestation. Part One of this paper brings together analysis of legal and strategic norms upon which Part Two argues that significant shifts in expropriation law are required to deliver a sustainably expanded protected forest estate.

Accordingly, the paper opens with analysis showing how the vast majority of new protected forestlands will have to come from the customary land sector. The legal status of customary lands in 2022 is presented. A trend towards restitution claims against existing Protected Forests is assessed. The extent to which African states are adopting conservation approaches which depart from classical presumption that only government may own Protected Areas is critiqued. The resulting facts are summarized suggesting that significant changes are required to achieve an expanded protected forest domain.

Part Two explores linked strategic and legal measures to overcome impediments to success. This potentially includes the suspension of expropriation as a useful tool to fairly and sustainably expand the protected forest area in favour of dramatically increasing investment in community-owned protected forests as the principal source of expansion. To this end, a prototype is presented for a form of community land title tailored to the demands of resilient tenure and conservation. This has the advantage of being tentatively explored in one of the affected tropical countries of Africa.

Liz Alden Wily, PhD is an independent land tenure and governance specialist, based in Nairobi. She is Fellow at the Van Vollenhoven Institute of Law, Governance and Society, Leiden School of Law, The Netherlands, and Fellow at the Rights and Resources Initiative, Washington DC.

Prof Rachelle Alterman (Technion, Israel Institute of Technology)

Compensation for "regulatory takings" and capacity to meet climate challenges: a cross-national perspective

The aspirational declarations of the international and national forums about climate change are almost oblivious to the role of land-use planning and related laws. Current laws are likely to hold not only promises, gut also tough impediments to implementation of measure for climate mitigation or adaptation.

In every country with a real-estate market, planning regulations often cause property values to increase or decrease. A large-scale comparative study by this author a decade ago, unrelated to climate change, showed that there are dramatic differences across countries in the basic approach to compensation rights. The issue is universal, but answers are place-based. In every country where planning regulations operate, they often cause property values to increase or decrease. Whereas the upwards side, currently known as land value capture, is increasingly capturing the imagination of scholars and policymakers internationally, the downward side remains in a dusty legal corner.

Thirteen advanced-economy countries (plus one additional US state) were selected for analysis. The findings – often surprising and counter-intuitive - show a high degree of variation among the 14 jurisdictions – even among ones with shared legal tradition, language, and culture. Such differences are in stark contrast to the universality of climate challenges. Today, these differences are not prone to direct international or supra-national intervention in the domestic land and regulations.

The presentation will first present these basic cross-national findings, then delve into several concrete case examples based on subsequent research, where two or more countries are studied. I will attempt to demonstrate the (surmised) role of differences in levels of compensation rights - as either constraints or facilitators - in implementing climate measures. The cases may include (depending on time):

- Retreat from seacoast zones with existing buildings or development rights
- Right to beach access
- Flood retention areas on private (agricultural) land – "nature-based solutions"
- Location of renewable energy facilities (solar or wind).

Rachelle Alterman is emeritus (non-retired) professor of urban planning and law at the Technion—Israel Institute of Technology, a senior researcher at the Neaman Institute for National Policy Research, and a visiting full professor at Bar Ilan University where she heads a degree program in real estate and land valuation. Alterman is the Founding President of the International Academic Association on Planning, Law and Property Rights and Honorary Member of the Association of European Schools of Planning. Her research and extensive publications focus on international comparative analysis of planning laws and institutions, property rights, housing policy and land taxation. For her academic innovation in promoting an interdisciplanry field of planning and law, she was selected among 16 global "leaders in planning thought" (Routledge book, 2017) and among the ten global winners of the Athena Accolates granted by the Royal institute of Technology, Stockholm.

Dr Miriam Anderson (University of Barcelona)

Facilitating Climate-Friendly Improvements in Condominiums: Recent Developments in Spanish and Catalan Law

The majority of existing buildings in European cities do not meet current energy-efficiency standards. Moreover, a great number of these buildings are not owned -and are not occupied- by a sole person. Concurrent interests over the same building are generally subject to rules designed to facilitate the management of joint problems. But reaching agreements is not straightforward, much less so when the cost is high, as occurs with climate-friendly improvements, and the building homes people and businesses with very different backgrounds, objectives, incomes and life expectancy. In order to overcome such difficulties in the context of tackling climate change, in 2021 both the Spanish and the Catalan legislatures reduced the majority required to reach agreements on energy-efficient improvements, so that owners contribute to the cost regardless of whether they opposed the decision. It is a similar technique as was used to promote the elimination of architectural barriers and it is consistent with a progressive departure from the original requirement of unanimity to decide on structural or major works.

This contribution explores the extent and the expected effects of said modification, together with other new rules designed to promote energy-efficient upgrades in multi-owned buildings. Although there is no doubt that it is everyone's responsibility to protect the environment, mandatory private law norms such as the ones to be discussed effectively amount to a reduced majority 'expropriating' the minority's right to decide and to make affordable choices. In the absence of adequate public funding, social exclusion of vulnerable owners is highly likely to occur.

Dr Miriam Anderson is Senior Lecturer and Co-director of the Legal Clinic on Housing and Residential Mediation at Universitat de Barcelona (Spain). Member of the Catalan Codification Commission. Research areas include property rights and securities, housing in general and the law of succession.

Dr Richard Cramer & Prof Hanri Mostert (University of Cape Town)

The Duty of the State to Expropriate Property that has Accrued a Negative Value due to Climate Change

An inevitable consequence of climate change is that the value of land will be affected. In particular, land which becomes particularly vulnerable to natural disasters may not only lose all economic value, but may accrue a negative value for owners. Owners of such land may find themselves burdened with property that they cannot insure and cannot sell or even donate to a willing recipient. It is important to explore possible exits from ownership for such owners.

This paper proposes to explore the duty of the State to expropriate and take responsibility for land which has accrued a negative value due to climate change, particularly where the State is failing in its obligations to tackle climate change. Such a duty would inevitably require a delicate balancing act of the responsibilities of individual landowners and the State, taking into account the potential strain on the public purse in a context in which the State is already struggling to meet its socio-economic obligations.

The possibility of a regulated form of abandonment, through which landowners will be permitted to divest themselves and ownership, will also be explored. While an unrestricted right to abandon land is not viable in South Africa (thus passing responsibility therefor to the State), it may be justified in circumstances where a landowner's property has accrued a negative value due to climate change.

Richard Cramer is a Postdoctoral Fellow at the SARChI Research Chair: Mineral Law in Africa. His research areas include property law and mineral law. His research in particular focuses on the law of abandonment, including the manner in which the law regulates how we may dispose of unwanted property.

Hanri Mostert holds the SARChI Research Chair: Mineral Law in Africa at the University of Cape Town.

Prof Ann Davis (Marist College)

Rethinking Property Rights in the Era of Climate Change

The "takings" literature in the US assumes that the role of the government is to stimulate the economy and to promote commerce. In this context, government environmental legislation can constitute a "takings" of the reasonable profit expectations of the property owner. This assumption, that property rights includes a future expectation of profit, was not always part of the definition of property (Banner; Horwitz). The implications are that if the government were to protect the environment for its national citizens, or global population, that payments would need to be made to all property holders. This interpretation would render any comprehensive climate change approach far too expensive for any national government to undertake, even with global sponsors. There are alternative approaches: 1) public trust law, with a recent example of the Children's Trust; 2) "greenwood in the bundle of sticks" concept by Robert J. Goldstein, which would include specific environmental protections in any property in land; 3) inclusion of new knowledge of the science of ecology in the definition of "nuisance," in which all property owners would be required to acknowledge and support global biogeochemical cycles, such as water, land use, nitrogen, and carbon, for their mutual benefit and long term security. The challenge of climate change amounts to a "colossus" (Nordhaus), beyond the economic concept of "externalities". The ecology of the earth is a "public good" of immense proportions, with international implications, and requiring a long-term perspective. To address climate change in any adequate manner will require a redefinition of property rights. While such a change in the meaning of property will threaten existing market values in the short term, the result will be a much more secure outlook for property on the earth, along with the habitat for humans and other species.

Ann E. Davis is Associate Professor of Economics at Marist College in Poughkeepsie, NY. She served as Director of the National Endowment for Humanities Summer Institute "Meanings of Property," in June, 2014, with visiting leading scholars John Searle, Alan Ryan, and Mary Poovey. Her recent books include The Evolution of the Property Relation: Understanding Paradigms, Debates, and Prospects, Palgrave MacMillan, 2015, and Money as a Social Institution: The Institutional Development of Capitalism, Routledge, 2017. The End of Individualism and the Economy: Emerging Paradigms of Connections and Community was published by Routledge in 2020. Her fourth book, Whole Earth: Beyond the Entitlement of the Property Owner, will be published by Springer in 2022. Her articles have appeared in the Cambridge Journal of Economics, Science and Society, Review of Radical Political Economics, Critical Historical Studies, and Journal of Economic Issues, along with several book chapters. She has served as an elected board member in the Eastern Economic Association, the Union for Radical Political Economics, and the Association for Evolutionary Economics. She was the founding director of the Marist College Bureau of Economic Research, and served as Chair of the Department of Economics, Accounting and Finance at Marist College, and chair of the Faculty Affairs Committee. She has enjoyed teaching a variety of courses at Marist, including First Year Seminars, international economics, and environmental economics, as well as serve on the Honors Committee and the Core/Liberal Studies Committee. She was a Marist faculty exchange with Instituto Lorenzo de Medici in Fall, 2010, with subsequent research trips to Florence, Italy.

Dr Maylis Desrousseaux *et al* (Geomatics engineering and land tenure laboratory (GeF), National Conservatory of Arts and Crafts, Le Mans, France)

Expropriation as a last resort: is climate change modifying the game? The case of coastal risk management in France

In France, expropriation mechanisms are conditioned by a declaration of public utility and implemented only as a last resort, when all other legal mechanisms could not be used or failed. In this regard, the administrative judge builds a jurisprudence which controls that no other restriction or regulation could apply to the situation and equally satisfies the targeted objective or provides the same level of protection as expropriation. Empirical research shows that public policy makers and planners implement expropriation very rarely but may hang the threat of such mechanism as a sword of Damocles above landowners' heads, to facilitate their projects.

However, in the context of climate change, French planners face major challenges today, especially along the coastlines, in areas facing severe coastal erosion or submersion. What legal mechanisms to define and implement relocation projects which seem necessary but raise strong local oppositions? This communication will present the most recent legal innovations designed by the French legislator in the so-called "Climate and Resilience" law (adopted on the 20th of July 2021 and enacted on the 22nd of August 2021) to facilitate such projects and provide alternatives to expropriation. If a wide variety of measures were adopted in this law, we will focus on 2 innovations:
- the creation of a new preemption right, dedicated and adapted to the specificities of coastal areas;
- the possibility for the central government to adopt a new real estate lease contract, designed as an intermediate and graduate response before any forced transfer of property.

This new "legislative arsenal" offers innovative legal mechanisms for planners and policy makers to avoid such a constraining and conflicting procedure as expropriation and facilitate the implementation of relocation projects. However, in practice, it remains unclear whether they will be efficient enough in face of climate change challenges on the French coastal areas.

Dr Maylis Desrousseaux *holds a PhD in Public Law (University of Lyon 3, 2014). She is Assistant Professor in Public Law at the Higher School of Surveyors and Topographers (National Conservatory of Arts and Crafts). For several years, her research has been related to the perception of land by law, nationally and internationally. These reflections led her to question the notion of the common good, confronted with various regimes of land ownership. By extension, her works address various issues such as agriculture, biodiversity protection and environmental governance.*

Dr Elisabeth Botrel *is Assistant Professor in Private law at the Higher School of Surveyors and Topographers from the National Conservatory of Arts and Crafts. She received her PhD in private Law from the University of Nantes in 2011. In her doctoral thesis, she analysed contractual enforcement, particularly in civil execution proceedings and in fund apportionment proceedings. She is member of the scientific committee of the Atlas bleu (CNRS) review and member of the "Land Committee" in the French national Order of licensed surveyors (OGE). Her research is related to property rights and land use rights, rights in rem, law effectiveness. Her work will contribute to the analysis of private law mechanisms in the*

implementation of the French climate change adaptations policies (CCAP) for relocation of people, goods and services.

Dr Marie Fournier *is Assistant Professor in Spatial and Urban Planning at the Higher School of Surveyors and Topographers (National Conservatory of Arts and Crafts). In 2010, her PhD focused on public participation in flood risk management policies. She is involved in several research projects which analyze the implementation of river and wetland management policies in France. She has a specific focus on local governance and the involvement of private stakeholders in public policies. In her research, she is also interested in the design and implementation of environmental public policy instruments, local arrangements and their consequences on land uses and land use rights. She was partner in the FP7 STARFLOOD (https://www.starflood.eu), in the JPI Climate 2013 TRANSADAPT (http://www.jpi-climate.eu/2013projects/transadapt) and is currently co-coordinating the JPI Climate 2021 SOLARIS project.*

Prof Sjur K Dyrkolbotn & Prof Børge Aadland (Western Norway University of Applied Sciences)

Property Rights, Regulation, and Expropriation for Renewable Energy in Norway

In this paper, we present an overview of the law relating to key sources of renewable energy in Norway, including hydro, wind, solar, and geothermal heat. The emphasis is on the forms of property rights we encounter, the scope of the government's regulatory power, and the rules and procedures pertaining to expropriation. In Norway, there is a long tradition for special-purpose regulation of renewable energy sources, starting with hydropower in the 19th century. This has resulted in a fragmented regulatory framework, as renewables tend to fall partly or wholly outside the scope of regular planning law provisions. However, there are also some common principles at work, rooted in Norwegian property law and the early days of Norwegian hydropower. We identify and discuss these principles and track their implications for property rights and expropriation procedures pertaining to renewable energy. We also reflect briefly on the ideas of justice underpinning these principles, as well as their impact on sustainable development in Norway.

Sjur K Dyrkolbotn *is Professor in law and artificial intelligene at the Western Norway University of Applied Sciences. Dyrkolbotn teaches and does research on property and planning law, land consolidation, as well as law and artificial intelligence.*

Børge Aadland *is Associate Professor in law at the Western Norway University of Applied Sciences. Aadland teaches and does research on land administration and law.*

Prof Dorothy Gruyaert (University of Leuven)

The positive obligation to renovate: a Flemish example of the change in ownership regulations

On 9 July 2021, the Flemish government decided to impose an obligation to renovate non-residential buildings on all owners and holders of a long lease right or right of superficies who acquired their right as of 1 January 2022. If the buildings do not meet certain specific energy requirements, the necessary works should be carried out within five years after the real estate transaction. This new regulatory framework aims at creating a better energy performance of the Flemish (public and private) patrimony, such as schools, offices, shopping malls, etc. Whereas the government usually tries to stimulate and activate the private owners by granting subsidies or rent-free loans, policy- making is shifting towards mandatory rules that must guarantee the desired outcome of a more sustainable real estate development. Also in the Netherlands, owners of office buildings are obliged to make their properties more sustainable (i.e. energy performance level C).

This new regulation is symptomatic for a broader tendency towards more positive obligations imposed on owners. For a long time, the right of ownership was only limited by a negative obligation for the private owner to not abuse his right or to not cause nuisance to his neighbours. The Flemish government now takes it one step further by imposing on an owner a positive obligation to act, i.e. to renovate his property.

This contribution analyses the content and implications of the new Flemish regulation and its role in the broader evolution towards restrictions on property rights. How far can government go in imposing positive obligations on owners for the transition towards a sustainable development?

Prof. Dr. Dorothy Gruyaert (°1988) is professor in administrative law at the KU Leuven campus Kulak. She is a member of both the Leuven Centre for Public Law and the Institute for Property Law, since her research on law and sustainability is at the interface of public law and private law. She also teaches in the Postgraduate Real Estate of the Post University Learning Centre of the Kulak. From 2006 till 2011 she studied law at the Kulak, KU Leuven and Stellenbosch University and she graduated magna cum laude. In 2016 she received the degree of doctor in law with her thesis on "The exclusivity of ownership". From 2016 till 2021 she worked as a lawyer and was part of the real estate team of Eubelius. She gained a lot of experience in real estate litigation, counselling and contract drafting.

Julie Hassman (University of Cape Town)

Expropriation's Afterlives: Abandoned Infrastructure, Toxic Ruins, and the Public Interest

The waning era of fossil fuels has left us living amidst the ruins and toxic waste of ageing and abandoned infrastructure. Around the world today, there are millions of abandoned oil wells and miles of abandoned pipelines. Many of the companies that built and used this infrastructure have long since moved on or no longer exist. The landowners and occupants are left to deal with the detritus, many of whom are rural and impoverished farmers and traditional or indigenous communities. Such abandoned or orphaned infrastructure is often left to rust away, leaking contaminants into the groundwater and methane into the skies. When these easements were obtained—many via expropriation—the future of this infrastructure was essentially left unimagined.

To date, there has been limited engagement in legal scholarship with the links between infrastructural takings and that which is left behind, particularly from a climate justice perspective.

This paper will examine what can be learned from abandoned oil wells and pipelines in the expropriation context. Applying a legal-theoretical approach, the paper will explore the spatial and temporal imprints expropriation law leaves on our material world. It will specifically examine the intersection of property law and participatory governance in considering how to rethink expropriation law from an ethics of care and interdependence. In so doing, it will consider the following questions: How can the 'public interest' of expropriation law be reconceptualised to address more equitably the externalities and environmental injustices of development in light of the climate crisis? What can be learned from the critical need to repair, restore, and clean the abandoned infrastructures of the fossil fuel age as we build new infrastructure for the renewable energy of the future? And how do these lessons help inform new approaches to expropriation and property law? The African context will be the central focus.

Julie Hassman is currently a PhD candidate at the University of Cape Town's Faculty of Law. Her research interests include property law and theory, corporate governance and accountability, and science and technology studies (STS). She is particularly interested in political contestations over land, natural resources, and climate change. She is a US-qualified attorney with experience litigating and negotiating complex civil and criminal law matters. She is admitted to practice in the state of New York and the United States District Courts for the Southern and Eastern Districts of New York. She received her J.D. from Columbia Law School. She also holds a Master's degree from Columbia University's School of International and Public Affairs and a Bachelor of Science in Foreign Service from Georgetown University.

Prof Yifat Holzman-Gazit (College of Management Academic Studies, Israel)

Private Trees, Climate Change and Regulatory Takings

Trees in urban areas are vital for mitigating the negative impacts associated with climate change. Urban trees reduce the formation of heat islands, facilitate stormwater absorption and provide health benefits for residents. Urban trees also reduce greenhouse gas emissions and air pollution. Thus. increasing urban tree canopy in parks, streets, community centers, and other urban pedestrian gathering spaces has become a familiar practice for many cities. Private trees, however, rarely receive the attention they deserve. Private trees constitute a large component of urban forests. Many of the trees are on private property, and gardens and yards constitute a substantial part of the city tree canopy.

This research focuses on the legal mechanisms that could help preserve and protect urban trees on private land. The study examines US court decisions as to whether tree ordinances that restrict removal of trees on private land are regulatory takings under the Fifth Amendment and thus unconstitutional (e.g. P. Development, LLC. v. Charter Twp. of Canton, Mich., 20-1466 (6th Cir. October 13, 2021); Wilmes v. City of St. Paul, A11-589 (Minn. Ct. App. Jan. 23, 2012)). Most urban trees on private land are cut due to development and densification, as well as blurring of public and private property lines. A common argument is that tree regulations restrict what should be basic private property rights. Others point out that the freedom of persons to do what they want with the trees on their land should be pitted against the need to address climate change.

Both opponents and supporters of tree ordinances are preoccupied with private property terms and doctrines. As part of my study, I introduce a new framework for analysis that highlights the public good nature of trees and its implications for regulation and management. As trees on private land are central to addressing climate change, they should be regarded as public goods, and restrictions on their removal are not unconstitutional.

Yifat Holzman-Gazit is an Associate Professor at the Haim Striks Faculty of Law *at the College of Management Academic Studies, Israel. Her primary research and teaching interests are in land use regulation, law of the urban forest, land expropriation and property law. She received her JSD from Stanford Law School (1997) and has been a visiting professor at Stanford Law School (2007-2008) and a Senior Michigan Grotius Research Scholar at University of Michigan Law School. Her most recent article on "The Tragedy of Private Trees in the City" won the Yaacov Ne'eman prize for the best article in the Bar-Ilan University Law Review (2022).*

Dr Tina Kotzé (University of Stellenbosch)

Combatting the climate and electricity crisis in South Africa: Private property rights and the establishment of renewable energy plants

Mitigating greenhouse gas (GHG) emissions that result from the use of non-renewable energy sources in the energy sector, is imperative as a means of combatting the impending global climate crisis and the considerable risk it poses to human health. In line with the 1992 United Nations Framework Convention on Climate Change and as a signatory State to the 2015 Paris Agreement, the South African government is committed to taking actions that will decrease GHG emissions, as is also underlined by the constitutional right to the environment in the South African Constitution.

The development and reliance on renewable energy sources in the energy sector is one way of reducing GHG emissions while generating safer, cleaner energy for consumption. To provide some background, the chapter begins with an exposition of South Africa's energy composition, legal framework and renewable energy programme. It also highlights that there is a need to accelerate the diversification and development of renewable energy sources. The transition to these sources of energy is expected to intensify the competition for land, because renewable energy plants, such as solar and wind power plants, require vast tracks of land which makes conflicts over land use and project siting more likely. To this end, the main aim of this chapter is to question the extent to which the government may interfere with private property rights for the establishment of renewable energy plants to combat the climate and electricity crisis. Such a consideration inevitably involves balancing or reconciling different constitutional rights such as the right to the environment (section 24) and the right to property (section 25) in the energy context. This determination turns on the distinction between "deprivation" and "expropriation" of property in South Africa, as provided for in section 25 of the Constitution – the property clause. To this end, the chapter considers these concepts as they pertain to the establishment of renewable energy plants on privately-owned land.

Dr Tina Kotzé is a post-doctoral research fellow at the South African Research Chair in Property Law at Stellenbosch University. She is also a lecturer in the Department of Private Law at Stellenbosch where she teaches Property Law to undergraduate students. She holds a BA (Law), LLB, LLM (cum laude) and LLD from Stellenbosch University.

Prof Thomas Lundmark (University of Hull)

Takings for Climate, Justice, and Resilience in Germany

This paper will illuminate and critique the implications of expropriation law in Germany in the fight against the climate crisis. The paper will focus on the constitutional protection of property rights in the scenarios listed in the call for papers, such as expropriating a farmer's land to give the land to an energy company, expropriating a private nature preserve to allow for the construction of CCS facilities, expropriating farmland without a plan for the future use of the land, revoking or cancelling permits for mining activities, and compelling owners of existing buildings to install insulation, heat pumps, and/or solar panels.

In Germany, private property is protected by Article 14 of the German Basic Law. According to the doctrine of property rights (Eigentumsdogmatik) expounded by the German Federal Constitutional Court, one must strictly distinguish takings under Article 14 III from property content regulations (Inhaltsbestimmungen) under Article 14 I sentence 2, although both may give rise to a claim for damages.

The courts employ various tests to distinguish regulations that merely interpret the social obligation of property from those measures that are confiscatory (enteignend), and consequently give rise to a claim for compensation under the takings clause (Art. 14 III), and from those measures that are excessively harsh (übermäßig belastend), and therefore require economic reimbursement under the property content clause (Art. 14 I sentence 2). These tests include the special sacrifice (Sonderopfertheorie); situational limitations of real property ownership (Situationsgebundenheit des Grundeigentums), beneficial private use (Privatnützigkeitstheorie), and reasonableness (Zumutbarkeitstheorie).

These tests will be employed in this paper to address the various questions listed in the call for papers, including can owners prevent an expropriation by establishing that they are able and willing to implement the government project and can the state expropriate property for climate protection without establishing a specific future use.

Thomas Lundmark is the HK Bevan Chair in Law at the University of Hull. Previously, he served as Professor of Common Law and Comparative Legal Theory at the University of Münster, where he is now Emeritus. He studied in San Diego, Uppsala, Berkeley, Freiburg, and Bonn, and serves on the editorial staff of the journal Rechtstheorie and on the editorial board of the journal Proceedings of the Institute of State and Law of the Russian Academy of Sciences.

Prof Frankie McCarthy (University of Glasgow; Scottish Law Commission)

Making Scottish apartment law sustainable: an A1P1 analysis

In common with many European jurisdictions, Scotland has identified improvements to the energy efficiency of existing buildings as a central aspect of its response to the climate emergency. However, the law regulating ownership and governance of tenements (the Scots term for an apartment block or condominium) presents significant obstacles to the retrofit of these buildings. To address the obstacles, the Scottish Government has recently proposed the introduction of mandatory owners' associations, entities with legal personality empowered to take decisions which affect all owners in the building and the property which they own. Although this governance structure may seem unremarkable in most jurisdictions, in Scotland it represents a significant alteration to rights of ownership within tenements. The change will certainly engage Article 1 of the First Protocol to the European Convention on Human Rights: what is required of the amending legislation to ensure the interference can be justified?

This paper will explain the current law, the policy background to the proposed changes, and the Scottish Law Commission project making recommendations to Government on how the changes might be implemented in a Convention-compliant manner. It will also touch on the more foundational question of whether the demands of sustainability require a reconceptualisation of the idea of ownership in apartment buildings, and if so, how takings doctrines might respond.

Frankie McCarthy is Professor of Private Law at the University of Glasgow. She is currently on long-term secondment to the Scottish Law Commission where she is leading on a review of the law of mortgages, and on a project considering reforms to the law of the tenement (apartment/condominium law).

Ignatius Yordan Nugraha & Harriet Ní Chinnéide (University of Hasselt)

'Procedural Turn', the Right to Property and Climate Change Expropriation: *Quo Vadis*?

This article will analyse the extent to which the 'procedural turn' of the European Court of Human Rights (ECtHR) would affect the balancing of interests in right to property cases relating to climate change. Since 2012, a 'procedural turn' can be detected in the case law of the ECtHR as the Court accords increasing deference to national authorities who comply with its standards in their decision making. This is particularly evident in cases involving the balancing of rights and in the assessment of proportionality. This 'procedural turn' raises a question as to what extent the ECtHR would defer to national authorities with regard to climate change expropriations. In various cases before the ECtHR, the right to property has been invoked to argue against expropriation for the purpose of protecting the environment. At the same time, the right to property is not absolute, as expropriation is possible "in the public interest and subject to the conditions provided for by law and by the general principles of international law." Thus, this article will explore how the 'procedural turn' could impact the ECtHR's balancing of interests and assessment of proportionality in (future) cases concerning climate change expropriation. Based on the analysis, this paper will conclude whether the 'procedural turn' could serve to broaden the government's margin of appreciation and thereby strengthen their position in mitigating climate change while balancing this pre-eminent public interest with individual (economic) interests.

Ignatius Yordan Nugraha *is a PhD Research Fellow at Hasselt University, Belgium. He obtained his LLB degree from the University of Groningen and his LLM degree from Leiden University.*

Harriet Ní Chinnéide *is a PhD Research Fellow at Hasselt University, Belgium. She obtained her LLM Degree from the University of Groningen and her LLB degree from University College Cork.*

Prof Víðir Smári Petersen (University of Iceland)

Climate change and the social function of property – a human flourishing reading of Article 1 of Protocol No 1 to the European Convention on Human Rights

There is tension between private property and climate change action. Most of the planet's surface is privately owned, but at the same time drastic measures are needed in the battle against climate change. This begs the question how far States can go in regulating climate change, without triggering the compensation requirement under Article 1 of Protocol No 1 to the European Convention on Human Rights. The purpose of this paper is to explain why human flourishing theory, which introduces a social obligation inherent in property rights, is a sensible moral framework for applying A1P1. I provide two central arguments. First, the notion of a social obligation is descriptively quite accurate when it comes to understanding A1P1. Indeed, it can rationalize a lot of the European Court of Human Right's case law. Second, human flourishing theory is normatively appealing and can push the law in the right direction when it comes to "new" problems, such as climate change. The social obligation norm is more concrete and transparent than the current doctrinal standards. In sum, I conclude that compensation for interference with property rights under A1P1 is only appropriate when society is calling on owners to go beyond the social obligations inherent in their property rights. To make the tension between private property and climate change action more concrete, the focus of the paper will be on land-use decisions, which will serve as a case study.

Víðir Smári Petersen is Associate Professor of Law at the University of Iceland, with research focus in the fields of Property Law and Law of Obligations. Before joining the Law Faculty in 2020, Víðir was a partner and Supreme Court Attorney at LEX Law Offices. In 2015, Víðir finished his LL.M. degree from Harvard Law School. Since February 2022, Víðir has been an external PhD Candidate at Maastricht University, where his research focuses on climate change and private property. His supervisor is Prof. Dr. Bram Akkermans LL.M.

Prof Shai Stern (Bar Ilan University)

Red, Yellow & Green: A Model for Regulating Private Property in the Face of Environmental Challenges

Property law has always maintained a complex and contradictory relationship with the environment. On the one hand, the preservation of the environment, the prevention of environmental hazards, and the desire to prevent the deterioration of natural resources have served as a justification for a regime of private property. On the other hand, private ownership of property has, at times, thwarted community and government initiatives to conserve natural resources, harmed the conservation of minerals, and threatened governments' ability to cope with climate and environmental challenges. The intensification of these challenges, and especially the raising of awareness to act quickly to mitigate them, heightens the tension between the right to private property and the preservation of the environment.

The article proposes an innovative model for governments to address environmental challenges, which consists of identifying the unique characteristics of environmental regulations. Environmental regulation is characterized by urgency, absence of scientific certainty, irreversibility, and sometimes cross-border damage. When examined through the main justifications for compensation - efficiency and fairness - these characteristics enable decision-makers to formulate a clear policy in cases where environmental regulation harms private property. Specifically, the balance between these characteristics of environmental regulation allows decision-makers to know in advance the costs of regulation and the distributive implications of its implementation. This information enables governments to select the appropriate governmental power to exercise in the circumstances of any threat and the extent of their liability to compensate injured property owners. The ability of decision-makers to know in advance the economic and social costs of environmental regulation increases the effectiveness and fairness of the governments' actions. It therefore strengthens the ability of governments to deal with growing environmental threats.

Shai Stern (LL.B., Bar Ilan University; LL.M., Tel Aviv University, D.Phil, Tel Aviv University, 2014) is an associate professor at Bar Ilan University, Israel. His research centers on private law theory, property law, expropriation law and the law of communities.

Prof Leon Verstappen (University of Groningen)

Climate Change as an Emergency and Expropriation Law

The climate crisis forces us to take action. The aim of these measures is to reduce greenhouse gas emissions and, in general, to (re-)use scarce resources more efficiently to prevent global warming. Making the built environment more sustainable is important. According to the Netherlands Bureau of Statistics, 21.6% of all greenhouse gases were emitted for heating buildings in 2020, of which 15.3% can be attributed to residential buildings and 6.3% to commercial buildings. Making buildings more sustainable is therefore an important link to a sustainable society.

Making buildings more sustainable does not just happen. The government can provide incentives through e.g. subsidies and tax deductions. However, it is almost certain that this voluntary process does not contribute enough to making the built environment more sustainable. The government can also impose obligations that can be sanctioned with all kinds of measures. These obligations and the associated sanctions can have a profound effect on the ownership of buildings.

Increasingly, the question must be answered to what extent such obligations relate to expropriation legislation in the broad sense. In particular, it needs to be considered to what extent the increasing urgency to solve the climate crisis affects the extent to which the government is legitimately allowed and able to intervene in the ownership of buildings. In other words: to what extent does this urgency influence the criteria on the basis of which infringement of property and – ultimately – expropriation are permissible? In answering this question, aspects of proportionality and subsidiarity play a role, as does the doctrine of 'emergency law'.

Leon Verstappen is full professor of private law, in particular notarial law, at the University of Groningen.

Dr Rachael Walsh (Trinity College)

Constitutional Property Rights and Climate Protection: Assessing the Potential for Resilient Property Law

This paper examines whether the objective of developing resilient property law that supports climate protection justifies restrictions and expropriations of constitutionally protected property rights, or whether such rights represent a legal and/or political impediment to effective climate protection. It focuses on two key doctrinal questions: first, whether resilience and sustainability can justify uncompensated interferences with property rights falling short of outright expropriation; second, whether those objectives could support the award of less than market value compensation for expropriation of private property.

It explores these questions through the lens of Irish law, which uniquely in the common law, English-speaking world protects property rights but empowers the State to regulate the exercise of such rights to secure 'the exigencies of the common good' and 'the principles of social justice'. As such, it offers an insightful case-study for exploring the adaptability of constitutional property rights guarantees to the challenge of climate protection, and more broadly, the resilience of property systems that include such guarantees.

At a theoretical level, the paper addresses the foundational question of whether constitutional property rights create rigidity in legal and political systems that is inconsistent with the development of resilient property law. Thomas Wilbanks and Robert Kates argue, '…resilience is place based, rooted in linked social, economic, and environmental systems that are always in some ways unique to a particular place'. This paper endorses this assessment of the contextual, place-based nature of resilience, but suggests that resilience is also linked to *legal* systems that are unique to particular jurisdictions, including the content of master-text constitutions. That content can shape the adaptability of property systems to new climate protection challenges, in particular by creating or bolstering regulatory inertia.

Rachael Walsh is an Assistant Professor and Fellow of Trinity College Dublin. She previously was a Lecturer at King's College London. She teaches property law and constitutional law. She is a graduate of Trinity College Dublin, Harvard Law School (where she studied as a Fulbright Scholar) and the Honourable Society of the King's Inns. Dr Walsh's research analyses legal protection for property rights across a range of policy contexts, including housing and environmental protection. She is author of Property Rights and Social Justice: Progressive Property in Action (Cambridge University Press, 2021).