[Review] G Winter (2016), Property and Environmental Protection in Europe

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“Property cannot stand as a pillar”.¹

How should property institutions designed to protect current entitlements respond to processes of social and ecological change? Although this is not a new question, analysis of the nexus between property, environment and economy continues to be one of the most important challenges facing property scholars across Europe and beyond. This collection edited by Professor Gerd Winter aims to assess the balancing of proprietary and environmental interests in the light of “radical industrial transformation on environmental grounds”.² A wide-ranging comparative study, it explores the ways in which a developing environmental jurisprudence might alter our fundamental concepts of property. It focuses on the extent to which private property rights give rise to protection against changes to entitlements (for example, new restrictions on land use) and, conversely, the extent to which duties towards the environment are understood to inhere in property rights.

The book is premised on the fact that, within the European Union, property rights exist within a multi-level context in which supranational jurisprudence (in particular that surrounding Article 1 Protocol 1 to the European Convention on Human Rights) often plays an important role. Comparative work is therefore crucial to facilitate mutual learning and perhaps even shared understandings (a new ius commune). The collection includes contributions from scholars covering EU and ECHR jurisprudence and international investment arbitration, as well as the national laws of fifteen EU and EEA member states. A functional perspective is adopted, with each contributor addressing the same scenarios and exploring legal responses in his or her chosen jurisprudential context. Among the issues examined are, for example, what rights and liabilities arise when property owners are afflicted by pollution from a neighbouring factory or landfill? To what extent do property protections, in particular protection against expropriation, limit the state regulator’s ability to control land use and management of natural resources? And what liabilities does a property owner bear for the environmental condition of its land?

In large part, the answers to these questions depend on broader jurisprudential understandings regarding the scope of “property”. Are administrative entitlements or permits to exploit natural resources considered to be proprietary interests? Subsidies for renewable electricity generation? What type of protection do such claims merit? Ultimately, discussion in the book is concerned with the extent to which private property entitlements protect an owner’s right to use or exploit land or other resources in a manner of his or her choice. A typology of three potential conflicts is presented: dispute between private property owners and polluting neighbours, use of the private property rights of industrial operators to oppose environmental regulation and, finally, divergence between the environmental objectives pursued by private property owners and other ecological interests, for example biomass production versus biodiversity protection.³ The conflict between different “environmentally friendly” land uses is interesting and would merit a more in-depth investigation than that pursued within the volume. The need to settle such conflicts in a just manner points to the importance of the comments made by Massimiliano Montini and Mery Ciacci in Part IV Chapter 1 of the book regarding the need for greater community participation in land-use decision making. Participation is a theme that has long preoccupied environmental law scholars, but its relevance to property scholarship is only beginning to be explored.

¹ G Winter, “Property and Environmental Protection: An Overview”, in G Winter (ed), Property and Environmental Protection in Europe (Europa Law Publishing 2016) 2 at 24
² Ibid.
³ Winter, “Property and Environmental Protection” at 10.
The book captures successfully the fundamental ambivalence of property and its dual role both as bulwark against environmental regulation and guarantor against environmental harms. It provides a useful doctrinal context to the ongoing theoretical debates regarding stewardship and the extent to which obligations inhere in ownership.\(^4\) In most jurisdictions, the context in which the object of property exists appears to play a vital role in shaping the modes by which the owner may use or enjoy it. Indeed, this is explicitly theorised, for example, German jurisprudence as the “situation boundedness” of rights in land.\(^5\) Regardless of the extent to which jurisdictions recognise a “permit defence”, the broader constitutional and environmental context in which a polluting use occurs will be crucial in determining the outcome.

Several contributions point to the difficulties of requiring rules based around private property to account for the collective interest in environmental protection. The overall impression gained is that property rights are more useful as a shield than as a sword to further environmental causes. Across the jurisdictions examined, rights to property are generally explicitly protected, constitutionally or otherwise, but rights to a clean environment less frequently so. It is beyond the scope of the book to reflect on whether constitutional reform is desirable to address this balance but Monti and Ciacci’s suggestion for a new generalised right to participate in environmental decision making provides an interesting starting point for future debate.\(^6\)

The book has a broad scope, indeed, any one of the aspects covered might have merited a volume in its own right. It certainly achieves its aim of furthering understanding of the multi-level context in which property rules now function. The comparative angle adopted provides a significant contribution to the existing literature, in particular in its coverage of both common and civil law jurisdictions. When analysed in functional terms, the common-civil law divide appears less important than the constitutional context and the extent to which a given distribution of environmental risks and benefits is seen as politically acceptable. As Agustin Garcia-Ureta’s discussion of the debates surrounding the implications of the Natura 2000 for landowners\(^7\) demonstrates, property rights are part of a process of ongoing negotiation. Eloise Scotford (who contributes to the volume) and Rachael Walsh have pointed to a symbiotic relationship between private property rights and administrative control of land use in English law.\(^8\) The material covered in the volume reinforces the impression of a complex interplay between public and private regulation that is sensitive to the constitutional balance in each jurisdiction. Property rights always occur within an ecological, social and political context, and must evolve accordingly. Scotland is not discussed separately in the chapter on UK law, but the ongoing debate surrounding the provisions of the Land Reform (Scotland) Act 2016\(^9\) highlights the acute policy relevance of the questions raised.

Overall, the wide lens adopted by the text succeeds in generating valuable insights into the chameleonic nature of property but the lack of theoretical and doctrinal detail on any given point means that its principal contribution is likely to be mapping a doctrinal landscape rich in potential for future research and collaboration. The book is targeted at an international audience; it will be of


\(^5\) See part III ch 6, “Property and Environmental Protection in Germany” by G Winter.

\(^6\) See part IV ch 1.

\(^7\) See part II ch 3.


\(^9\) Asp 18. See in particular parts 1 (Land Rights and Responsibilities Statement) and 5 (Right to buy land to further sustainable development).
obvious interest to scholars working in the areas related to property and environment across Europe, as well as practitioners who wish to understand the context in which property doctrine is developing. It is also to be hoped that students and junior researchers will be inspired by the connections drawn, and that the book will provide a foundation for further investigation of the significant themes covered.