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## **SOCIAL DIMENSIONS AND SOCIAL FUNCTION BORN IN LATIN AMERICA: PROPERTY LIMITS IN THE U.S. AND THE EUROPEAN UNION LEGAL SYSTEMS**

Wellington Migliari\*

### **ABSTRACT**

This article is a comparative analysis of property systems and their social dimensions between the United States (U.S.) and the European Union (EU). Throughout the article, we show how the fees and development taxes applied in the U.S. refer to an *ex ante* rationale assumed by private owners to compensate communities for land transformation or environmental impacts, while inside the EU, the political consensus is responsible for the imposition of limits in *ex post* abuses of ownership. Either in public administrations, or in the Council of Ministers of the EU, the social function of property is better understood as a sensitive matter of national governments that may affect the harmony of the organisation (Trstenjak, 2017). First, we point out the importance of the social function of property in historical terms with the intellectual debate introduced by Léon Duguit on the internal limits of ownership. Second, we apply an interpretative methodology to distinguish the meaning, use and totality of law from experience (Ferrajoli, 2008). Third, leading U.S. and EU case laws about disputes involving impact fees, development taxes and the juridical category of social dimension are discussed. Our study concludes that the U.S. legal system is mostly linked to the notion of fees and taxes to tackle abuses in urban development against the environment. The American federalist pact provides public administrations, local, and state courts with robust discretionary power. In contrast, we observed that the EU tends to be more anarchical in mechanisms of enforcement when compared to its institutional legal organisms with supranational binding decisions (Muir, 2015; Wendt, 1992).

**KEY WORDS:** social function of property, impact fees, development taxes, environmental risks, European Union

### **1. SOCIAL FUNCTION OF PROPERTY BEYOND THE PRIVATE LAW METAPHYSICS**

The seminal text on the social function of property as a juridical category was originally delivered at a conference by Léon Duguit in Buenos Aires in 1911. The first of several ideas introduced in the work has to do with a political and historical context unfolding a reflection on the abuses of the system of property from the Ancien Régime to a more complex social

experience led by the bourgeoisie. Duguit points out how eminent is the place for civilizations after the French Revolution (1789) and the Napoleonic Civil Code (1804). Next, he presents himself as a lecturer guided by his scientist perspective, without any political, religious or dogmatic belief, to examine private law. The French professor admits his thoughts were addressed to an audience of experts and should be restricted to the academic realm once he was not inciting minds to transform his words in a vulgar propaganda. The context in which the attendees took place during the political celebration of the first anniversary of Argentinian independence. A moment yet susceptible to revolution, as the one which occurred in 1905 when the provinces rebelled against the central power in Buenos Aires. Léon Duguit was an eloquent defender of a legal thinking centered on social experience, which contrasted with the pure philosophy in law vindicated by a positivist tradition (Duguit, 1987, pp. 19-21). He used to criticise the *modus operandi* of private law in the fields of metaphysics, because most of all conceptual and intellectual dogmatism for him was usually challenged by reality. The category of property may remain stable in Duguit's writings while he used to see the ownership as a real object vulnerable to the social contingency and liberal conceptions (Pasquale, 2015; Rodotà, 1986).

By contingency, the French intellectual understood the irreparable fissure between the task of the legislator in making laws or codes and the challenging reality. Whether we classify a legal system as progressive or conservative, the reality built by individuals does not have the same time, pace and desires of political representatives. However, for Léon Duguit, the strength of the people make up the core of a deictic law, which establishes a strong connection to history and moment, since human demands are the real, giant impulses for new juridical institutions. Beyond a supposed and infecund interpretation of what may be law, he questions the historical authority to set the limits for life, freedom, and property of the 1789 Declaration of the Rights of Man and Citizen which reveals its inner retrograde face in the 1804 Napoleonic Code. Property became central in that debate about contingency, because ownership started being the cruel parameter for the other principles idealised by the French Revolution. In other words, we translate the metaphysical boundaries of the Republican joy on *liberté, égalité* and *fraternité* by the liberty or absolute power of property over the rest of human values. Proprietors were the owners of the contingency, i.e., they possessed by force and violence supported by the Napoleonic Empire the prerogative to set their own rights (Duguit, 1987, pp. 22-23).

The first half of the 19th century proved that men did not accept that establishment. Popular political organisations crystallised in the Paris Commune proved a radical view on what might be the change of time, or the revolution of an established contingent order. The French post-revolutionary private law that had been created for the benefit of the few was the first legal trench the unsatisfied wanted to modify. Léon Duguit defends his point of

view, presenting two questions to be observed. First, the 1789 Declaration of the Rights of Man and Citizen and the 1804 Napoleonic Code relies on the notion of individuals living free of conflicts in their surroundings. It is a disguised tautology. Second, the two normative frameworks forged in France left the false impression that the wishes of individuals and groups would supplant the social dimension present in all rights. So, for the French jurist, the documents of 1789 and 1804 created metaphysical or abstract meanings of private law, not to corroborate the needs of the majority, but to differentiate a minority of proprietors from the rest of the dispossessed (Duguit, 1987, pp. 24-25). The Empire of Napoleon III, the Paris Commune, and the Franco-Prussian War attested to how the lack of a cohesive social function in law in France fragmented, inflicted and humiliated the French for almost a century since 1789. As some historians affirm, the internal tension between the greedy affluent elites and the working class debilitated the French State because France was not unified on domestic issues leaving internal disputes to favour other nations. This allowed for the emergence of new political powers in Europe, as is shown by the strengthening of the German and Russian Empire (Wells, 2006).

## 2. INTERPRETATIVE BOUNDARIES

Rights are usually taken for granted as an unrestricted powerful conquest for individuals in democratic societies. However, the combination of legal entitlements with other powers, such as economic ones, can result in the need to create common ground in the international order (Griffiths, 1992). In that sense, proprietors are usually the ones who fight for the definition of what a right is, through their representatives, regardless of territorial matters. Under the flag of individual freedom, they are expected to be entitled to all autonomy to express their desires related to the object that belongs to them. According to M. R. Cohen, it is a relation that may occur in absoluteness and negative forms if considered a matter out of any public control:

Hence the theory of the natural rights of the individual took not only an absolute but a negative form; men have inalienable rights, the state must never interfere with private property, etc. The state, however, must interfere in order that individual rights should become effective and not degenerate into public nuisances.

(Cohen, 1927, p. 21). More recent reflections of constitutional or foundational rights of a society have been proposed by two famous jurists. Ronald Dworkin defends the notion that any exercised right should be subject to limitation. Dworkin asks whether justice or liberty is free from any limit. This is the core question for fundamental rights in the age of abuse (Dworkin, 2011). The right to property has not been different. An Italian jurist called Luigi Ferrajoli also pointed out how slippery the semantics of constitutions may be, since charters

are impregnated with values and principles that are not necessarily born in social experience (Ferrajoli, 2008). Although both authors belong to different schools and traditions in law, they have important values in common.

However, when we delve into the view Ferrajoli uses to suggest a theory in law, the syntax is put aside by the author since syntactical analyses are prone to the calculus of how words operate for language interpreters. Justices, public defenders, and lawyers tend to be technical translators of law and, consequently, the debate of legal content is transformed into a grammar debate. Therefore, besides any legal postulation relying much more on grammar, there are meta-theories in relation to the positive law which is eventually in charge of the discourse. Ferrajoli refers to the meanings (*semantics*) of real finalities and the explanation of law as a meta-theory reduced to the formality of the written norms evidently susceptible to action of time, social class and domination. The notions of sovereignty, property and government are very illustrative when they are captured by economic forces (Habermas, 2011). Second, the Italian jurist suggests the relevance of the pragmatic views (*pragmatics*) when law is in use showing theories of law most of the time manipulate linguistic codes to justify what is legal. As a third meta-theory, the level of syntax is the most complex one since it is the ground where the syntactic relationships of signs occur. We see the realm of symbols and signs as the place where the law trespasses the limits of language, touching the human experience and showing at the same time the contradictions of the social function. To better understand the theoretical debate of Ferrajoli, we intend to show how social dimensions of the right to property may be strictly pragmatic in cities where law tends to be very restrictive in interpreting environmental impacts. In the U.S. cases, ownership is not always an absolute right even when a legal act seems to be exhaustive in terms of expropriation and fair compensation. However, examples of abuses in property use still exist in places where ownership is obliged by law to play a social role.

### **3. SOCIAL DIMENSIONS OF THE RIGHT TO PROPERTY AND PUBLIC ADMINISTRATIONS**

The expression of “social” is not conspicuously used in the United States when authorities show their interest in limiting the use of the right to property. The opposite happens in constitutional legal systems during the post-World War II period in which we can observe a moral mandate through the social function of property as suggested by Léon Duguit (Gismondi, 2008, pp. 17-46). Nevertheless, it does not mean the understanding of ownership in the country remains an absolute individual prerogative against social perspectives. Born from the Housing Act of 1937, the 42 U.S. Code § 1437 on low-income housing assistance gives the state, which is represented by the Secretary of Housing and Urban Development, the power to make effective decent homes and urban renewal projects. The finality and the explanatory reasons for the

Housing Act of 1937, or in Ferrajoli's words, the pragmatic issues of the act, were conceived by the values of decency and acceptable standards for housing, which the American society has held by consensus since the 1930s. Another kind of general agreement of how proprietors should cooperate with society is present in the pragmatism of the impact fees. According to Juergensmeyer (2015), impact fees are nurtured by the theory that "new development, and not existing residents, should bear the cost of providing new infrastructure". Impact fees serve as:

Payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development. The fees typically require cash payments in advance of the completion of development, are based on a methodology and calculation derived from the cost of the facility and the nature and size of the development, and are used to finance improvements offsite of, but to the benefit of the development.<sup>1</sup>

In the following section, we will see how the impact of environmental issues may lead to a more systemic view on property, its social dimensions and the role of public administrations.

Homestead Exemption is defined as a legal regime to protect proprietors under some extreme circumstances dictated by socioeconomic contingency. It is used by individuals over 60, or the disabled, to give certain immunities in forced sale situations when one has to sell his or her home to pay off creditors. Property tax exemption is also seen as a progressive policy; the more the value of the property, the more the owner pays, taking into consideration a fixed monetary amount. For example, a property valued at \$100,000 dollars will have the first \$50,000 of the assessed value not taxed, resulting in this case in only half of the total value being taxed. Another property valued at \$200,000 dollars will also be exempt of \$50,000, but the owner will have taxes on the remaining \$150,000. Exemption may be applied differently from state to state in United States. The Code of Civil Procedure for California describes all the prerequisites in Article 4, §704.710, to be eligible. The maximum value for elderly people over 65 years old is \$175,000

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<sup>1</sup> American Planning Association. Impact fees (1997). In *American Planning Association*. Retrieved from <https://www.planning.org/policy/guides/adopted/impactfees.htm>.

dollars according to §704.730(a)(3) of the Californian Code of Civil Procedure or the letter “c” of the same provision, affirming the right to homestead exemption for those individuals earning up to \$25,000 dollars per year.<sup>2</sup> For residents in Ohio, according to the Code Section 2329.66(A): “Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order”.<sup>3</sup> Nevertheless, it is interesting how the legislature added a legal remedy to protect people owing money “for health care services rendered or health care supplies provided to the person or a dependent of the person, one parcel or item of real or personal property that the person or a dependent of the person uses as a residence.” It is this connection between property and social needs, translated by the American legal system as a remedy for individuals that Léon Duguit defended in his conferences in Argentina. Ownership has an intimate connection with low-income earners, social care, and retirement. All these areas were the core of the welfare state in the European continent after World War II, and in many constitutional systems in Latin America (Migliari, 2015). The Federal Homestead Exemption is present in Section 522(d)(1) of the U.S. Bankruptcy Code, and gives homeowners the benefit of not having the total property equity taxed in their primary residences. So, the interpretative boundaries of the social function of property, even when the juridical category does not exist in a legal system, may not maintain a strict relation with political regimes in either capitalist or social democratic societies.

In 2012, Act 13 was passed in Pennsylvania as an amendment to Title 58 of the Pennsylvania Consolidated Statutes for oil and gas. It is also called an impact fee, understood as an unconventional gas well fee. The accumulated funds are directed to local and state governments. Act 13 details how the fee must be spent, and usually covers the local impacts of drilling, although a variety of other purposes may be served with the funds. Act 13, or the Impact Fee Act, specifically regulates the imposition of that unconventional sum by county or alternatively municipalities, making it more effective. A county is permitted to impose the fee if unconventional gas wells are located within its borders and the local public authorities pass an ordinance within 60 days of the effective date of Act 13. Under the Impact Fee Act, the Pennsylvania Public Utility Commission (PUC) may collect and disburse the fee. Also, the PUC is responsible for any review related to ordinances at the request of a municipality, as well as complaints filed by a well proprietor/operator, or any person residing within the municipality who is somehow affected by the enactment or enforcement of a local ordinance.<sup>4</sup>

Although the notion of the social function of property is not explicitly mentioned by any act in United States, we suggest the description of the

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<sup>2</sup> Retrieved from <https://leginfo.legislature.ca.gov/>

<sup>3</sup> Retrieved from <http://codes.ohio.gov/orc/2329>

<sup>4</sup> Retrieved from <http://www.puc.state.pa.us/>

impact fee as the most radical idea of environmental impact connected to either municipal or local powers. In Brazil, for example, there is a tax called financial compensation for the natural resources exploitation or “compensação financeira pela exploração de recursos minerais”.<sup>5</sup> It is much more like a compensation based on the notion of a commercial activity, rather than the idea of an environmental cost. According to the Pennsylvania’s Unconventional Gas Well Impact Fee Report, the funds collected with the Impact Fee Act were used to develop a sustainable and modern gas transportation sector in the state.<sup>6</sup> Moreover, the fee also proportioned partnerships and investments to ameliorate the transparency of the gas or oil extraction.<sup>7</sup> Any person can access a webpage in real time in which a complete cartography of all economic activities is available.<sup>8</sup> Individuals may also observe the quantities connecting them with the funds collected. This webpage is a mechanism for transparency that forces private and public actors to reduce mistakes or even avoid corruption. In these two respects, the development of infrastructure to increase environmental protection, and transparent information, the concept of property is intimately linked to its social dimension.<sup>9</sup>

Impact fees were initiated by local governments in the omission of explicit state-enabling legislation. Consequently, such sums were originally defended as an exercise of local government to preserve the health, safety and welfare of the community. It is important to say that the notion of impact fees is stronger than the concept of social function in the United States, despite the fact that the targets of both legal concepts are easily interchangeable. In Tennessee, municipalities embedded in the general law mayor-aldermanic charter, and the general law modified city manager-council charter, the authority to levy impact fees based on Tennessee Code Annotated § 6-2-201(15) and § 6-33-101(a). The County Powers Relief Act of 2006 established some restrictions on the assessment of impact fees for counties. Moreover, the

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<sup>5</sup> Brazilian taxes for mineral extraction are applied to a company’s activity without any environmental compensation. See Confederação Nacional de Municípios. (2012). *Entenda a CFEM (Compensação Financeira pela Exploração de Recursos Minerais)*, Estudos Técnicos (Report No. 5). Retrieved from <http://www.cnm.org.br/cms/biblioteca/ET%20Vol%205%20-%202014.%20Entenda%20a%20CFEM.pdf>

<sup>6</sup> 2013 Annual Act 13, Unconventional Gas Well Impact Fee Report to the Pennsylvania Legislature and the Governor’s Budget Office, Jan. 1- Dec. 31, 2013, Pennsylvania Department of Environmental Protection, available at <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/Act13/Documents/0120-RE-DEP4436%20%20202013%20NGV%20and%20ESF%20Annual%20Report.pdf>

<sup>7</sup> Id.

<sup>8</sup> Retrieved from <http://www.depgis.state.pa.us/PaOilAndGasMapping/>

<sup>9</sup> Infrastructure investments had a positive balance during 2015. The exploitation of natural resources meant more facilities for society. The funds are used between the counties, and municipalities can be consulted with the information offered by the Public Utility Commission. Retrieved from <https://www.act13-reporting.puc.pa.gov/Modules/PublicReporting/Overview.aspx>



law also imposed some criteria for metropolitan governments as well after June 30, 2006. However, limitations were not extended to cities.

Regarding jurisprudence and interpretative boundaries for property in connection with ownership, the courts gradually established guidelines for constitutional interpretation of valid impact fees relying on a “rational nexus” that must create intimate links between the regulatory fee or exaction and the activity that is being regulated. While Tennessee courts have scrutinised the extent of the meaning “public services,” the Tennessee Supreme Court has addressed the interpretation of “public purpose” on several occasions, because municipal expenditures of the public budget is tied to public ends. The case *Metropolitan Development and Housing Agency v. Leech*, 591 S.W.2d 427 (Tenn. 1979) corroborated the idea of using tax increment financing for urban renewal programmes in zones in need of a minimum infrastructure (Briffault, 2010). In *McConnell v. City of Lebanon*, 203 Tenn. 498, 314 S.W.2d 12 (1958), when the privilege taxes were analysed with an analogous case, *Smith v. City of Pigeon Forge*, the court stated: “Taxation is a mode of raising revenue for public purposes only.” *Taylor McBean & Co. v. Chandler*, 56 Tenn. 349. This is true even when there is no express restriction in the Constitution and such a constitutional provision is simply declaratory of the common law. 84 C.J.S. Taxation §§ 13, 14, p. 64; 51 Am. Jur. 372, sec. 321 et seq. 203 Tenn. at 509, 314 S.W.2d at 17”.<sup>10</sup>

The rationale of taxes and fees tends to be limited by social investments in the sense that the community reaps the benefits of public funds. Nonetheless, impact fees are devoted to the marginal or additional costs of serving a new development and must not be confused with development taxes. The latter is intended for either construction or adequate facilities taxes and is considered a privilege tax on the development industry that intends to raise revenue for general government purposes, while the former “levies are for streets and roads, parks, or fire protection services. The actual rate of the fee is set by the local governing body, often at a level that is less than the maximum that could be supported” (Green & Young, 2002, p. 2).<sup>11</sup> When we study the case *Imboden v. City of Bristol*, 132 Tenn. 562, 179 S.W. 147 (1915), the understanding of “‘public purpose’ is limited by anything that promotes the public health, safety, morals, general welfare, security, prosperity, and

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<sup>10</sup> Retrieved from <https://law.justia.com/cases/tennessee/supreme-court/1980/600-s-w-2d-231-2.html>

<sup>11</sup> When we analyse the difference between impact fees and development taxes in the United States, it is noticeable that the latter may favour housing affordability more than the former. They are easier to deal with by local public administrations: “Development/adequate facilities taxes are simpler to enact, administer, and update, and are not usually subject to legal challenge. Development taxes promote housing affordability by taxing all development, whereas some impact fees are assessed only on residential development”. Retrieved from <https://www.tn.gov/content/dam/tn/tacir/documents/PayingForGrowth.pdf>

contentment of the residents of a municipal corporation”.<sup>12</sup> As regards content of the same *ratio decidendi*, the case of *Knoxville Housing Authority v. City of Knoxville*, 174 Tenn. 76, 83, 123 S.W.2d 1085, 1087 (1939) refers to the public administration’s responsibility in combating poor shelters in the form of slums during the first half of the 20th century in the United States. Affordable and decent places to live, for example, were understood also as part of the property wealth.

The courts there took notice that ‘slum districts with their filthy, congested, weather-exposed living quarters are breeding places of disease, immorality and crime’ and that ‘the existence of such districts depresses the taxable value of neighboring property’ depriving local and state governments of revenue while at the same time being a source of ‘great expense in combating disease, crime and conflagration originating in such localities.’

(Maltbie, 1944, p. 125). However, impact fees should not be used to pay for the sins of the past, as it is said in colloquial contexts. In California, the California Government Code, 66001(g), affirms: “A fee shall not include the costs attributable to existing deficiencies in public facilities.” As the Sec. 29-20- 104.5(2), Colorado Revised Statutes says: “No impact fee or other similar development charge shall be imposed to remedy any deficiency in capital facilities that exists without regard to the proposed development” (Been, 2005).

#### 4. ENVIRONMENTAL COSTS AND PROPERTY SOCIAL DIMENSIONS

##### *Federal Laws and United States*

In 2001, the Supreme Court of Colorado decided the case *Krupp v. Breckenridge Sanitation District*. The dispute started when the company questioned the plant investment fee applied to one of the company's new developments. The argument was that costs used for the improvement of the sewer systems could be offset against the investment fee. Furthermore, the developer argued the amounts levied on the project should be proportional in an individualised fashion, and not on non-residential investments. The court reaffirmed the application of the impact fee as lawful and not subject to an analysis as in the cases *Nollan v. Californian Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In all cases, it is clear the denial for an automatic just compensation was derived from the limits imposed by the public powers on property development under the

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Retrieved

from

<https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2017/op17-043.pdf>

rationale of takings foreseen in the Fifth Amendment.<sup>13</sup> Minimum standards set by public authorities based on law required for all developers were not interchangeable with the fees paid. In other words, the fact an urban project was obliged to provide for a certain level of sanitary service included in the budget of the investments did not mean the sum should be applied exactly on the plot built, but also elsewhere (Crossmit, 2010).

It is important to notice how topics we usually name in the Latin American and European experience as "the right to the city" and "social function" appear in the U.S. urban reality as much more of an issue translated into community's rights or concerning taxpayer citizens. A notion that functions as a sort of umbrella to translate the human demands in urban context and planning, but defined as the right to the city by a consolidated literature. A different approach would be redefining social dimensions and social function, discerning the idea of social indicating the praxis of limiting the property system. Urban studies specially linked to participative citizenry and decision-making processes include the philosophical seminal reflection of Henri Lefebvre (Lefebvre, 2009) and other areas of knowledge such as the geographic urban inquiries of Harvey (2013), De Souza (2010), Purcell (2002), Mitchell (1995); other intellectuals from public administrative and urban law analyses as Ponce (2013), Fernandes (2007), Zamora (2002), Jacquot & Priet (2004), Parejo Alonso & García Enterría (1981); human rights such as Kenna (2006); and other studies involving urban development and forms of State violence or segregation such as Alkhalili, Dajani & De Leo (2014), Friendly (2013) and Marcuse (2009).

Two Supreme Court cases, *Nollan v. Californian Coastal Commission* and *Dolan v. City of Tigard*, appeared in the dispute, *Koontz v. St. Johns River Water Management District*. When Mr. Koontz intended to develop 3.7 acres from the owned area of 14.9 acres, St. Johns River Water Management District imposed a fee that the proprietor refused to pay, because the zone where the money was to be spent was miles away. The proprietors agreed that the compensation did not have any connection to the location of the project. As an instrument of impact mitigation, a conditional permit was issued by the District requiring a reduction in the size of the development to one acre,

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<sup>13</sup> *Nollan v. Californian Coastal Commission* started with an administrative requirement of the Californian Coastal Commission (CCC), conditioning a permit for the developer to build on his property if the owner accepted an easement guaranteeing passage for people in order to reach the coastal line. The dispute reached the Supreme Court of United States once the owner did not accept the imposition by the CCC since the access condition disrespected the Takings Clause of the Fifth Amendment, as assimilated against the States by the Fourteenth Amendment. The Supreme Court rejected the argument, because the proportion of the easement was almost imperceptible and the passage did not impair the value of the property. In *Dolan v. City of Tigard*, the Supreme Court of United States came to the conclusion that the: "City held not to have shown rough proportionality required, under Fifth Amendment's takings clause, to condition building permit's approval on dedication of portions of lot to city for greenway and pedestrian/bicycle pathway".

specific drainage, and construction of one more easement on the remaining acreage (Hagerman, 2015; Keogh, 2013). The developer understood the District's indicated mitigation as "an unreasonable exercise of the state's police power constituting a taking without just compensation."<sup>14</sup> The case arrived at the Supreme Court of Florida, because:

. . . [the] District did not approve his application on the condition that he surrender (sic) an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that Nollan and Dolan cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.<sup>15</sup>

Two procedural issues were formulated by the Supreme Court of the United States in the case of *Koontz v. St. Johns River Water Management District*. The first addresses the growth of the discretionary power. A type of coercion:

"[...] that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation".<sup>16</sup>

The second procedural issue relies on the evidence that private enterprises generate costs for the public interest, but owners can offset impairments and impacts for the community:

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<sup>14</sup> See *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2592–2593 (2013). Retrieved from [https://www.supremecourt.gov/opinions/12pdf/11-1447\\_4e46.pdf](https://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf)

<sup>15</sup> *Idem*

<sup>16</sup> See *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2592–2593 (2013). Retrieved from [https://www.supremecourt.gov/opinions/12pdf/11-1447\\_4e46.pdf](https://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf), p. 7.

“Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner’s agreement to deed over the land needed to widen a public road [...] Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926)”.<sup>17</sup>

Therefore, the Florida Supreme Court’s judgment is reversed and remanded for further proceedings more consistent with the opinion of the Supreme Court of United States (Fenster, 2014). In the case *Koontz v. St. Johns River Water Management District*, the content of the U.S. Supreme Court’s decision calls attention to the analogous aspects and responsibilities to what Léon Duguit calls the social function.

When we study city conflicts we find in the case of *Olympia v. Drebeck*, a broader debate on urban complexity. “Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development’s impact on the community, like increased traffic or pollution—or destruction of wetlands. See, e.g., *Olympia v. Drebeck*, 156 Wash. 2d 289, 305, 126 P. 3d 802, 809 (2006)”.<sup>18</sup> Segregation is also one of the negative consequences of the development of urban zones since the creation of spaces oriented by a capitalist and a consumerist view may impose their material wish fulfilment. Public policies are a powerful instrument to reestablish new political and urban possibilities for a citizenry consensus oriented by the general interest (Ponce, 2013).

Sometimes the legal category of social function reveals more abstract or even intangible conflicts regarding the limits of property, but also connects to some restrictions for absolute anti-democratic notions on fundamental rights. A New York case sparked a controversy when in *Penn Central Transportation Co. v. New York City*, the historical value of a building was defended by the city administrative power by not giving a construction permit to the owners. The company presented a project of fifty apartments to be erected on the original structure and, following the city’s restriction on its plans for the building, went to court alleging the taking of its property without fair compensation:

“After the Commission had rejected appellants’ plans for the building as destructive of the Terminal’s historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the

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<sup>17</sup> *Ibidem*, p. 8.

<sup>18</sup> See *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2592–2593 (2013). Retrieved from [https://www.supremecourt.gov/opinions/12pdf/11-1447\\_4e46.pdf](https://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf)

application of the Landmarks Law had ‘taken’ their property without just compensation in violation of the Fifth and Fourteenth Amendments, and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. The trial court’s grant of relief was reversed on appeal.”

Regarding a possible act of expropriation:

“. . . the New York Court of Appeals ultimately conclude[d] that there was no ‘taking,’ since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants’ exploitation of it; and that there was no denial of due process because (1) the same use of the Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment. . . .”

In 1978, the dispute ended with the United States Supreme Court reaffirming the historical value of the building, and the act of the city was found legally binding due to New York’s Landmarks Preservation Law.<sup>19</sup>

## 5. EU LAW AND THE FRENCH LEGAL SYSTEM

Since 1966, the Alteo Society, an aluminium manufacturer in Gardanne, France, has been dumping toxic waste such as arsenic, uranium-238, thorium-232, and mercury, among other heavy metals, in the Mediterranean Sea. The plant is located seven kilometres from the coast of Casis, Marseille Metropolitan Area, but coexisting with the National Park of Calanques, Bouches-du-Rhône, Department of the Provence-Alpes-Côte d’Azur region.<sup>20</sup> The dumping has gained the attention of citizens and academics since the discovery that the toxic waste is directly disposed into the sea without any proper treatment or other mitigating measure. Altea is obligated to comply with the standards of information required by the European Union (EU) in risky environmental activities.<sup>21</sup> According to the Directive 2006/118/EC of the European Parliament and of the Council, Member States are authorised to grant exemptions from measures to prevent or restrict the input of pollutants into groundwater, but any “exemptions should be based on transparent criteria and be detailed in the river basin management plans.” Articles 3, 4 and 5 of the document detail, respectively, the assessment of groundwater chemical status, the adequate procedures, and

<sup>19</sup> Retrieved from <https://supreme.justia.com/cases/federal/us/438/104/case.html>

<sup>20</sup> Landrevie, B. (2015, May). La Méditerranée empoisonnée. *Le Monde Diplomatique*. Retrieved from <https://www.monde-diplomatique.fr/2015/05/LANDREVIE/52952>

<sup>21</sup> See the debate about Alteo and pollutants in the article Valo, M. (2017, January 10). *Boues rouges: la justice ordonne à Valls de s’expliquer sur les rejets d’Alteo*. *Le Monde*. Retrieved from [http://www.lemonde.fr/pollution/article/2017/01/10/boues-rouges-la-justice-ordonne-a-valls-de-s-expliquer-sur-les-rejets-d-alteo\\_5060565\\_1652666.html](http://www.lemonde.fr/pollution/article/2017/01/10/boues-rouges-la-justice-ordonne-a-valls-de-s-expliquer-sur-les-rejets-d-alteo_5060565_1652666.html)

what to do in case of a finding of any sort of residue putting animal or human lives at risk. Provision 5.2 says:

“Member States shall, in accordance with Part B of Annex IV, reverse trends which present a significant risk of harm to the quality of aquatic ecosystems or terrestrial ecosystems, to human health, or to actual or potential legitimate uses of the water environment, through the programme of measures referred to in Article 11 of Directive 2000/60/EC, in order progressively to reduce pollution and prevent deterioration of groundwater.”<sup>22</sup>

Directive 2006/118/EC of the European Parliament and of the Council creates responsibilities for the Member States to prevent and control groundwater pollution, as Article 1 affirms. The European Union law is designed under the umbrella of harmonised norms (directives) that establish goals and a time limit to adapt national legislation, whilst giving freedom of means to national authorities.<sup>23</sup> Although the normative framework has a neoliberal, consensual, and political tradition in the history of the EU (Bugarcic, 2013), Article 2.1 affirms: “groundwater quality standard’ means an environmental quality standard expressed as the concentration of a particular pollutant, group of pollutants or indicator of pollution in groundwater, which should not be exceeded in order to protect human health and the environment.” There are two relevant aspects to that provision. The first one deals with the technical definition of groundwater quality standard based on a specific quantity of a particular pollutant or a group of chemicals dangerous for the environment or human health. The other aspect confronts the possibility of control to promote the groundwater quality standard since Article 2.3: “[the] ‘threshold value’ means a groundwater quality standard set by Member States in accordance with Article 3,” meaning one Member State may have a different notion of what is a pollutant or not. In that sense, harmonising the law of the EU becomes an object of political arrangements inside the country and a topic of interested exchanges in the Council of Ministers. Conflicting dualities, such as an either-or situation involving national-supranational competences dedicated to a problem, have been part of political dissent in the Council (Hayes-Renshaw, 2017, p. 80). Article 6 of the Directive 2006/118/EC of the European Parliament and of the Council indicates the measures that Member States shall take to avoid the negligent contact of hazardous substances with humans and environment.

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<sup>22</sup> Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0118&from=EN>

<sup>23</sup> According to the Article 1, Directive 2006/118/EC of the European Parliament and of the Council: “This Directive establishes specific measures as provided for in Article 17(1) and (2) of Directive 2000/60/EC in order to prevent and control groundwater pollution”.

What happens to France if the country does not respect the European Communitarian Law? Observing Article 7 of the Treaty on European Union, we find:

“. . . the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.”

Whether a technical issue or not, politics will define an existent and continuous breach of the law. For example, if France were deemed to be exhibiting negligent behaviour, and if said negligent behaviour was unanimously understood as menacing for the EU purposes, with at least one third of the Member States' or Commission's support, then France, in that case, would be invited to explain what was occurring in Gardanne, affecting the National Park of Calanques, Bouches-du-Rhône, Department of the Provence-Alpes-Côte d'Azur region. As predicted in the Article 8.2 of the Treaty on European Union, it does not seem plausible that:

“For the purposes of paragraph 1 [values of the Union on peace and cooperation], the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.”

The Directive 2000/60/EC of the European Parliament and of the Council establishes strong guidelines for the EU Community providing a strict water policy for the Member States. Articles 1 and 2.2 reiterate how states shall comply in avoiding groundwater pollutants. The Article 4 sets the environmental objectives to be achieved as also the responsibility States must committed to regarding a non-deterioration of the environmental conditions of the water seen in the letter b(1) of the same provision:

“Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j).”

With reference to the limits of fundamental principles in economic or tax disputes inside the EU market, the Court of Justice of the European Union (CJEU) has rejected the argument or legal rationale of unlimited power of the states disguised by their historical absolute formulas of sovereignty. As two



examples, we mention the Case 26/62 *van Gend & Loos v. Netherlands Inland Revenue Administration* in which the CJEU affirmed in paragraph 11, letter B:

“On the substance of the Case [...] The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit with limited fields, and the subjects of which comprise not only Member States but also their nationals.”

Additionally, the Case 6/64 *Costa v. ENEL*, the tribunal says in its section “On the submission that the court was obliged to apply the national law,” paragraph 9, that:

“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.” (Emmert, 2000, pp. 14-23).

## **6. THE INTERPRETATIVE BOUNDARIES OF SOCIAL DIMENSIONS IN ENVIRONMENTAL ISSUES**

What are the environmental issues behind American impact fees or development taxes? Which social dimensions can be found in the European directives made for groundwater protection? In Luigi Ferrajoli’s constitutional theory, we may find that the real finality and explanation of both legal systems completely disorient our common sense. While the United States impact fees and development taxes presuppose an undeniable collision between the interests of the community and entrepreneurs because private sectors are expected to pay or compensate individuals beforehand, the European directives reinforce the notion of control only after a Member State does not comply with the law. One assumes that economic power transforming or exploiting nature generates negative consequences, the other sees dissenting externalities in the field of political confidence in the Council of Ministers, the European Commission, or even the Parliament. Yet the EU does not have any power in the field of land use. The Charter of Fundamental Rights of the European Union (CFREU), for instance, brings some remedies for the violation of everyone’s rights and the environmental protection, respectively, Articles 47 and 37. Further, the CFREU refers to improvement of the environmental quality accompanied by public policies and in accordance with the principle of sustainable development.

From our perspective, the explanation of how environmental impact is seen may link to the social dimensions and limits previously discussed in this work. The meanings, references and presuppositions of the European politics or its semantics based on historical facets of sovereignty cannot guarantee the social function of property, or its limits in the financial realm.<sup>24</sup> Other elements behind the curtain of Ferrajoli's constitutional theory give room to empirical and informative content embodied in the theory of law that is translated in the EU as harmonised legal grounds, which is mainly politics not law. Remedies for any risky or dangerous situation related to environmental questions are not an objective of the CJEU. In critical moments, some European nations will be more influential than the others in intergovernmental rooms, for example, the one where Council of Ministers meets. However, supranational powers may counterbalance the interest of powerful states with sensitive topics such as water, natural resources and environmental protection if the chemical muddle, polluted air or any other risky activity exploiting a property can cross over the border for political, not legal, reasons. Moreover, transnational issues and open markets subject to a ferocious global order operating since 1970 may interfere in legal matters (Kjaer, 2013; Eckersley, 2004; Huntington, 1973; Nye & Keohane, 1971).

There are two main reasons for that complex mistrust among nation-states in that common legal system, procedural law and independence of the EU institutions. The first is connected to the pragmatic use of the directives inside the organisation since the dumping of pollutants into the Mediterranean Sea by Alteo Society was interpreted as an internal issue out of the competence of the EU. It is a political mechanism, in which member States negotiate for or against, that ultimately leads to a report, recommendations or even sanctions against the offending State. The timing depends on the internal dynamics of the parties in France and the relations the country will set with other Member States. Second, the principles of non-intervention and self-determination, corroborated by the long history of the Treaty of Westphalia in the continent, reinforces the political approach over the legal one. However, the CJEU has already said that "Environmental protection is most commonly included in the judicial deliberations concerning the Charter [of Fundamental Rights] as a possible justification for breach of EU's fundamental rights, and primarily the right to property, and the principle of equality and non-discrimination." The general rule concerning the right to property, as

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<sup>24</sup> Up to a certain extent, the case of Brexit is a sort of mistrust between the economic and political elites in EU even when the numbers of the process will cost half million jobs, for example, while the British finances struggle inside the regional organisation. The question seems to be how the United Kingdom will guarantee the marginal returns for the financial institutions regardless of the number of people are unemployed and which roles the property system will play after all. See Walker, P. (2018, January 11). UK could lose half a million jobs with no deal, says Sadiq Khan. *The Guardian*. Retrieved from <https://www.theguardian.com/politics/2018/jan/11/brexit-uk-could-lose-half-a-million-jobs-with-no-deal-says-sadiq-khan>

established by the Court, is that “it must be viewed in relation to its social function” and not as a human right (Bogojević, 2017; Estapà, 2013). The case C-530/11, European Commission v. United Kingdom, is an eloquent example of how the CJEU understands the right to ownership as a limited right. As to the United Kingdom’s argument that the limiting of cross-undertakings could result in infringement of the right to property, the Court consistently acknowledges that the right to property is not an absolute right, but must be viewed in relation to its social function. Its exercise may therefore be restricted, provided that those restrictions, in fact, correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see, to this effect, *Križan and Others*, paragraph 113 and the case-law cited). Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property (see, also, to this effect, *Križan and Others*, paragraph 114 and the case-law cited).<sup>25</sup> Public participation and access to justice are the immediate remedies for the control of uses and abuses in property usufruct against the general interest in many thematic fields (Ponce, 2008, pp. 9-13; Krasner, 1972). Therefore, the internal limits of the property, i.e., the exercise of right putting the environment and human relations at risk, is one of the cornerstones to differentiate it from the external limits (Crawford, 2011).

## CONCLUSION

When we analyze the social dimensions of the impact fees and the development taxes in the U.S. legal system, it is noticeable how the American legal thought assumes the notion of impact produced by ownership. It is a modern and pragmatic overview perfectly comparable with Léon Duguit’s ideas of social function of property to limit the expanding subjectivity or individuality of proprietors. Nevertheless, in the land of the French philosopher’s ideas, we find the case of Alteo Society, on the coast of Casis, Marseille Metropolitan Area. It produces aluminium at an industrial plant in Gardanne and has since 1966 been dumping toxic waste such as arsenic, uranium-238, thorium-232, and mercury, among other heavy metals, into the Mediterranean Sea. It is a flagrant abuse involving proprietors and public administrations that will be demonstrated with the first small submarine explorer collecting samples for laboratory tests and chemical analyses. Although inside the EU, and obliged to perpetrate the principles and values of the Charter of Fundamental Rights of the European Union, France is only controlled and subject to binding decisions if the political institutions of the organisation say so. From a domestic perspective, national remedies are predicted in the Articles L. 216-6 and Art. L. 432-2 of the Code of Environment, *Code de l’environnement*. It is also important to mention the

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<sup>25</sup> Retrieved from <http://eur-lex.europa.eu>

Article 1 of the Forest Code, *Code forestier*, which takes into consideration the economic, environmental and social functions in plural as a way to suggest separate, but interdependent variables.

The notion of property as an inconstant concept is indispensable to understand the debate (MacPherson, 1978). In the United States, the social dimensions of ownership are expressed by a pragmatic view (*pragmatics*) on the use of law to mitigate the urban impacts and environmental transformation. However, the North-American pragmatism *ex ante* is beneficial for certain powers, classes, and interests since the rapid exploitation of the soil leads to the exhaustion of the natural resources based on a model of life unamicable for the totality of the society. In other words, the symbols of property development, even when they are alleviated by fees and taxes, cannot be led by an exponential feeling of realisation. In the EU, on the contrary, the social function is rooted in *ex post* meanings (*semantics*), which is either logical, with reference to matters, presuppositions, and implications of what already exists, or lexical, regarding whether the analysis of any legal issue is appropriate or not after ownership is consummated as an object of a dispute.

Furthermore, a final observation has to do with the totality of social function as non-subjective matter. As Léon Duguit proposed in his lectures, individuality cannot be realised by an absolute comprehension of what property should be. So, for him, the human egotism expressed by property is an oxymoron, because it is the faith one may have in the spiritual exercise of freedom. The belief in property and capital, even for those who do not have a place to live, is the financial dimension that aggressively dominates the system of property as a transnational topic (Rolnik, 2016; Aalbers, 2008; Marcuse, 1979). For Duguit, the wealth in form of land or industry has a social function, which is to say, ownership must be at our service as society. The rights of the proprietors shall be guaranteed if the owner is committed to productive enterprises and creates benefits for the general interest. The French thinker of law was very much convinced property had to be inserted in what Ferrajoli named syntax of law, or the totality of legal and real human experiences. That sort of pact presupposes that all individuals are interested in working for their own interest, respecting the constitutional, socioeconomic, and political order. We still see some challenges related to property system in the most developed regions of the planet, whether a federation or an inter-state regional organisation.

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