The changing role of property rights: an introduction

Ernst Nordtveit

This book aims to present some fundamental analyses and discussions of significant contemporary developments and trends in property law, including the concept of property rights, the role of property law and property rights in society, and the values they enhance. The aim is not to provide a complete and comprehensive analysis of all issues related to property rights (which would be impossible), but to highlight some significant trends and developments. The main focus will be on the mechanisms that create the influence of property law and property rights on social and economic development and vice versa, and the continuing development and adaptation of property rights to technological development and new social and economic needs. One aspect of this is to reveal the sometimes unexpected or barely visible influence of new property rights on social and economic development.

All societies need to have arrangements for dividing or allocating scarce resources between persons, the State or other public bodies. Modern archaeology has uncovered that different property systems have existed far beyond written history and that earlier theories that property rights emerged with agriculture are not correct. The model chosen for the arrangement of ownership and property rights to economic values or resources with an existence independent of human beings is a fundamental constitutive element of society that significantly influences economic, social and ecological development. In principle, there are three basic models for the management of economic resources: solidarity within a tribe; the command structure of a feudal society or a socialist State; or a private property system that leaves to individuals much of the competence to make decisions over economic resources.¹ Throughout history and between different societies, there have been all kinds of variants and hybrids of these systems. As the content of property rights and the way property is distributed in a society profoundly impact people’s behaviour

¹ See Gunnar Heinson and Otto Steiger, Eigentum, Zins und Geld, Ungelöste Rätsel der Wirtschaftswissenschaft (Siebte Auflage, Metropolis-Verlag 2010) 17.
concerning scarce resources, the different models have different outcomes in culture, social development and economy.

A property right to an object establishes a relationship between the person holding the right to an object, on the one hand, and all other persons interested in the object, on the other, creating certain expectations of how people will act in relation to the object. The legal relationship is between the holder of a property right and other persons, as with contractual or other claims. The legal basis for the right or claim that others will not interfere with the object is, however, not a contract or other individual legal relationship but a general rule embedded in the legal order. A property right can be exercised against all other persons, while a contractual claim will only apply against the person who is responsible for fulfilling the contract. However, the distinction between property rights and contractual claims is not fixed and not always clear. Some will argue that the difference between obligations and property rights does not exist or at least does not have any legal relevance.²

In all Western countries and many countries in other parts of the world, private ownership and other property rights are primary institutions in the organisation of society, and they govern much of the social interaction relating to scarce resources. Property law is a complex system consisting of a vast array of different arrangements developed over a long period to organise people’s private and business affairs. To a significant extent, property concepts, principles and rules have been developed by custom and business practices. Still, increasingly the regulation of property rights and the property market has become a part of public governance. The establishment of institutions to secure property rights and facilitate transactions in property to enhance economic development is a central public task in most societies. Many States have established an extensive infrastructure of real property and securities registries to secure property rights and reduce transaction costs. Due to technological and other development, new property registration forms are emerging.

The State and municipalities are also ‘private’ owners of many assets. Ordinary property rules generally apply to property owned by the State in many jurisdictions, but public ownership, and especially ownership of property intended for public use such as electricity grids, roads and streets, still raises special issues. The State also often sees it as an advantage to be the owner of valuable resources such as minerals, petroleum and waterways as

² This has long been the dominant position among legal scholars in Scandinavian countries since the 1960s, rooted in the Scandinavian legal realism that is to a large extent based on the theories of the Danish legal philosopher Alf Ross. Today the opinion on this matter is, however, more nuanced.
An introduction

a basis for resource management, as an addition to the regulatory power vested in the State.

Property rights and the system for acquiring them play a pivotal role in social, ecological and economic development and impact essential aspects of people’s livelihood, finances and social standing. Decisions made by owners or holders of other property rights will have significant economic, ecological and social impacts. Property rights and freedom of contract are the basis for market transactions such as the sale, lease, licensing or mortgaging of assets and are a cornerstone of society’s legal and economic system. Ownership and property rights form the basis for the division of labour, the credit system and the institutional framework for investments, innovation and society’s overall incentive structure. Property rights, therefore, play a critical role in the development of society and are perhaps the most essential single legal institution in society.

Although property and property rights seem to be a nearly universal phenomenon, deeply embedded in human nature\(^3\) and permeating society and everyday life, ownership and property rights are among the legal realities that are hard to define. Few other legal concepts, if any, have caused such intense and often emotional debate in legal science, political science, economics and philosophy. Legal scholars have not reached a consensus on a definition of property rights or ownership. The definition of ownership used by legal scholars also differs from the definition used by economists and other social scientists. There are also conflicting views on the impact of property rights on social, economic and ecological development. These definitional problems have led some scholars to the conclusion that we could do without the concept of ownership and property rights. However, after the collapse of the Soviet Union and socialism in Eastern Europe, the discussion about the legitimacy of property rights more or less petered out and turned more towards how property rights can be made more effective in relation to social, ecological and economic goals. The emergence of virtual objects for rights due to digitisation has, on the other hand, led to new discussions on what property rights are. The study of ownership and property rights has attracted great interest from legal research and law and economics during recent decades.

Holders of property rights are free to use or dispose of the object based on the content of the right and are protected against interference from others that would conflict with the right. However, the legal protection against interference in property rights is not necessarily absolute. An owner of real estate might, for example, have to accept that the public has freedom to wander on

his land or take water from a stream, based on general rules, local custom or individual rights, but he is still considered its owner.⁴

Roman law largely laid the basis for current concepts and systems, but various legal concepts and arrangements have developed in different jurisdictions based on cultural, natural and other conditions. As feudalism dominated most of the Eurasian continent during most of the medieval age and until the early nineteenth century, modern property law developed based on a reinvention of Roman law stemming from the eighteenth century that arose to meet the contemporary situation. Since the early nineteenth century, private property systems have been the dominant model for the economic organisation of most societies, with the exception of the socialist bloc during part of the twentieth century.

Property law is usually regarded as a stable body of law, with long historical roots dating back to Roman law, based on ancient principles and developing slowly. If this was ever true, it is not so any more. Basic tenets exist, of course, and the development of new forms of property rights is often based on older forms. However, contemporary property law is a dynamic system that changes alongside technological, economic, financial, social and ecological changes to meet new needs, achieve more effective use of resources and conform with the dominant values in society. The development of property rights through legislation is also an essential instrument of governance. Legislators are looking for new property models to create economic growth and solve social or ecological problems, and legal innovation plays a significant role in developing the governance of society. The fact that an owner has the right to all potential functions of the object that are not forbidden by law or transferred to someone else by a legal transaction is a solid incentive for innovation to increase the property’s value. New possibilities of exploiting a resource due to technological or other developments that are constantly taking place will belong to the owner. Ownership thus defines who is entitled to values that do not yet exist. As with any other complex and dynamic system, ownership and property rights are more than the sum of the single functions they contain at any given time, due to the feedback effect from innovation. These attributes of property rights are the primary basis for economic growth and innovation in society.

Even though it is well established in legal and economic theory that property rights are crucial to the functioning and development of society, this is

⁴ In Norway the Saami people has a certain right to reindeer husbandry, which includes running their herd of reindeer over private land and using resources there. This right is based on the use of old age but is also confirmed and regulated by a particular act on the right to reindeer husbandry (Act 15 June 2007, no. 40). The owner is still considered owner even if he has to accept the use of his property that is included in the right to reindeer husbandry. This applies to nearly 40 per cent of the Norwegian mainland.
not always fully understood or recognised, with the result that the effect of changes in property rights often goes unnoticed. A lack of understanding of the impact of property rights is also why social, economic and ecological problems caused by poorly developed property institutions have often been met with administrative command-and-control-style regulation rather than changes to property law.

The object of property rights can be all forms of economic goods, tangible and intangible, that have a separate existence independent of any person, making it possible to transfer the right to the object from one person to another. New forms of economic goods develop as a result of technological, financial and legal developments. Consequently, new objects of property rights also emerge. For example, digital developments, especially blockchain technology, bring new property rights objects.

One significant development in recent decades is the strong growth in intangible values in society, which is an important issue in several of the contributions in this book. The basic structure of property rights has developed around tangible things, mainly focusing on real property. An increasingly large proportion of the economic values in today’s society is intangible due to developments in technology, financial markets and the growth in intellectual property in the form of patents, copyrights and trademarks. Physical assets such as oil and gas and other commodities are transformed into financial assets, such as futures or other derivatives, and traded in the financial markets. For instance, the right to emit greenhouse gases has developed from a system of administrative permits to tradeable emission quotas under different national or regional regimes. An emission right gives the holder a limited right to influence the atmosphere’s composition. If this right is transferable, it must be correct to characterise it as a property right. By introducing tradable emission quotas for greenhouse gases or fishing rights, natural resources that earlier were subject to open access are transformed into property rights. Thereby externalities are integrated to mitigate climate change or the depletion of renewable natural resources. The right to influence the atmosphere’s composition by using it as a recipient for greenhouse gases, or by catching fish in the sea, has become an object of property rights in the form of transferable emissions or fishing quotas. Such quotas or licences to conduct aquaculture or petroleum extraction are traded at high prices. Carbon storage has acquired value as a commodity due to a combination of ecological developments, technological advances and market development.

5 The most prominent example is the European Union Emission Trading Scheme (EU-ETS).
Another significant new challenge for the development of property law is globalisation. While property rights and property law traditionally have been seen as a largely national phenomenon, regulated by domestic rules, the increase in cross-border transactions in property, and of virtual reality without borders, is a challenge to often nationally defined property rights. Globalisation requires a more shared understanding of property as a concept, and practical solutions, such as new rules for transborder property transactions, bankruptcy proceedings, and so on.

Another important aspect of property rights is their effect on liberty and democracy. Private ownership is the basis for the decentralisation of power, and it has been instrumental in developing democracy and the rule of law. Intellectual property rights also have a solid connection to the principle of freedom of expression and the right to information, which is crucial in a democracy.

These and other issues are dealt with, from different angles and perspectives, by outstanding legal scholars in this book.

In Chapter 1, ‘The Plasticity of Property: Legal Transitions Between Property Rights Regimes for Different Resources’, Richard A Epstein presents a fascinating analysis of how new forms of property rights are developed from older ones to ensure more efficient use of resources. He starts with the problem of balancing the risk of over-appropriation of a resource with the holdout problem by choosing between private property, mixed property or common property. Private property is best suited to dealing with the first problem and common or public property to dealing with the last. His advice is to analyse which risk is most serious for a given resource and to choose the rule that best deals with it. Further adjustments will then have to be made. He emphasises that the physical properties of different types of tangible resources often require different property arrangements. He also analyses in depth the mechanisms needed to form new property rights, based on earlier forms, to meet new societal needs. He points out that legal scholars have devoted much more attention to private property than to common property and that a theory linking the two together is needed. Epstein also discusses the general question of distinguishing instruments for the transformation of property in land that triggers compensation from those that do not. This question is a universal problem of great interest to governments looking for measures to mitigate ecological and climate challenges. An in-depth discussion of the particular issues related to water and water rights concludes that it is necessary to establish a mixed regime with private and common rights to ensure the most effective use of the water resources. Epstein emphasises that the value of private properties depends on access to common or public transportation systems.

Fiszbein and Gary D Libecap present a compelling analysis of the long-term effects of the different property systems brought to the Americas by the English in North America and the Spaniards in South America. The property rights systems in the two countries had developed very differently, with the early decline of feudalism in England followed by the gradual development of smallholder agriculture and land ownership. In Spain, the landed nobility held their position much longer. As a result, the land was kept in large estates for generations, and a market for land transfer did not develop. The distribution of land in the New World followed the same pattern, with small individually owned plots in the areas controlled by England and large haciendas owned by a wealthy elite in the areas controlled by Spain. The authors give a thorough account of the English and Spanish systems and their theoretical foundations in property theory. They then compare the development in the US Midwest and the northern regions of the Pampas in South America, to avoid comparing areas where differences in climate and other factors could have influenced development. The authors point out that land markets generate wealth by promoting entry, incorporating new information and adjusting farm sizes and production mixes. An important aspect is that the investment in human capital through education and physical capital was far more significant in the north, as landowners in the south had little incentive to invest in the education of land workers.

In Chapter 3, ‘The Role of Innovation in the Globalisation of Property Law’, Amnon Lehavi undertakes a ground-breaking discussion of the vital need to mitigate the gap between ‘the largely borderless nature of markets, interpersonal networks, and digital technology, and the largely domestic characteristics of legal systems’. Property rights in many countries have been developed ‘top-down’, such as numerus clausus, which has led to significant differences in property rights between jurisdictions. Global law-making and rule enforcement are not realistic options. The centralised design of property rights leaves little room for private solutions, and supranational governance of property does not seem feasible. In Lehavi’s view, the answers lie in technological, institutional and normative innovation. Technological development offers opportunities to create digital systems for up-to-date systems to register property rights and develop new types of property rights, especially by using blockchain technology. Institutional development will have to aim at something other than universal international institutions. Examples such as the European Unified Patent Court and cross-border insolvency proceedings through cooperation between national bankruptcy courts are discussed, as are strategies for normative innovation in the form of soft law, conflict of law, approximation and supra-nationalism.

In Chapter 4, ‘Mediated Property: Money, Corporate Shares, and Property Analogues’, Erich Schanze analyses in depth the problems related to the
The changing role of property law

de-materialisation of property that is taking place due to digitalisation, using money and corporate shares as examples. It is not new that rights that have been converted into different commercial papers are treated as ‘things’ when carrying out transactions. However, digitisation has led to new ways of storing and recording rights and transactions involving such assets, thereby doing away with physical papers and even physical registries. Physical money has become rarer, and share certificates do not exist in most jurisdictions. Schanze emphasises that, while we are witnessing a de-materialisation of property from tangible to intangible assets, a ‘commodification’ of non-material legal positions is also taking place. Virtual money and corporate shares are part of a ‘fictive reality’ and are treated as commodities. At the same time, ‘physical presence’ and ‘exclusiveness’ are replaced by digital registration and storage and a right on the part of the registered ‘owner’ to transfer the assets to another person. Based on separate analyses of money and corporate shares, he concludes that they may be understood as property and argues that they should be treated as property for technical reasons. In future, standardisation of the process of handling different financial instruments, such as equity, debt and derivatives, in the capital market and storing institutions might challenge the distinction between property and obligations. The author also discusses analogues to mediated property, such as covenants, conditional property (sicherungtsübereignung) and agency.

In Chapter 5, ‘Because Property Became Contract: Understanding the American Nonprobate Revolution’, John Langbein analyses the profound transformation of personal wealth from tangible assets into intermediate financial wealth and its effect on the wealth transfer system upon death in the US. This change results from the shift in economic organisation whereby financial intermediaries draw capital from savers and investors to supply enterprises that own the production facilities. He shows how this change has transformed the wealth transfer process upon the death of a person from a publicly operated wealth transfer system to a wealth transfer process operated by mutual fund companies, pension funds and other intermediaries. The wish to avoid the public mandatory probate procedure in the US has motivated people to hold property in ways that make it possible to circumvent the probate procedure. Today, most of the transfer of wealth takes place outside the probate system because most of the wealth is in the form of contractual claims against financial intermediaries. He describes the procedure of beneficiary designation that makes the nonprobate revolution possible and the development of a new sizeable financial industry of wealth management, combined with a change from paper-based to electronic bookkeeping, as an essential prerequisite for this development. The result was also made possible by a significant legal development: the recognition of third-party-beneficiary contracts in US law compared to English law. The chapter analyses the combined effect of economic and
An introduction
technological developments and the perhaps unintended consequences of legal changes combined with technical and financial developments.

In Chapter 6, ‘Digital Ownership of Blockchain Tokens: A Comparative Law Guideline’, Sebastian Omlor discusses some fundamental problems created by digitisation and blockchain technology. The concept of blockchain tokens needs to be addressed from an international, comparative perspective since the phenomenon of digitisation is itself global. Omlor emphasises the need for a transnational definition of tokens as a ‘starting point’ for transnational law and ‘a point of orientation’ for national legislation. In most jurisdictions, the legal definition of the concept has been designed for regulatory purposes that are not suitable for property law purposes. Omlor divides tokens into ‘charged tokens’ containing real-world legal objects, such as claims, ownership or membership rights, and ‘natural tokens’ created for the digital world only, such as Bitcoin and other crypto-currencies. Omlor discusses whether tokens meet the criteria for acceptance as property in the UK, Germany and other European states based on the traditional criteria in case law and legislation. The conclusion is that digital property has not been recognised and is not protected under tort law. Even if the Anglo-American system has greater flexibility than continental European jurisdictions concerning accepting new forms of property, a coherent and comprehensive regulation of tokens is still lacking.

In Chapter 7, Ole-Andreas Rognstad discusses ‘Intellectual Property and the Concept of Property Rights’ from an international and a Scandinavian perspective. The question of whether intellectual property rights are property rights was strongly debated in Scandinavian legal doctrine in the first decades after the Second World War when Scandinavian legal realism peaked under the strong influence of the Danish legal philosopher Alf Ross. The realist critique of legal concepts as a basis for legal reasoning has had a more lasting impact on the view of concepts such as ownership and property rights than in other areas of the legal system. Rognstad takes a somewhat critical approach to the prevailing Scandinavian view and discusses the interface between intellectual property rights and property rights to tangibles from different perspectives, such as the justification for property rights, the structure of the rights and the asset aspect. He emphasises the distinction between objects of rights and rights as objects, which has not always been properly understood. He demonstrates how the notion that intellectual property rights do not have an object has led to a misunderstanding, in the Scandinavian legal doctrine, that the principle of ‘first in time, greater in the right’ does not apply in cases of conflicting transactions. He concludes that there are common traits between intellectual property, especially as assets, but that there are also considerable differences and more detailed regulation, and that one should be very cautious when making analogies from one to the other.
In Chapter 8, ‘Intellectual Property Rights and Democracy’, Eva Inés Obergfell and Katharina Theresia Fink discuss the critical and complicated issue of the advantages and disadvantages of intellectual property rights regarding freedom and democracy, focusing on the contribution of copyright law to democracy. Freedom of expression, communication and information are fundamental elements in a democracy. However, the authors also emphasise artistic freedom as a requirement for a vibrant and stable democracy because it promotes the cultural basis for democracy. They discuss the concept of art based on the German Grundgesetz Article 5(3). Artistic expressions can have a significant impact on the political decision-making process. The authors also emphasise the connection between freedom of art and copyright law, and highlight copyright law as a ‘substructure of freedom of speech’. Finally, the authors focus on threats to copyright and democracy through abuse of copyright by the State. The Afghanistan Papers case, in which the German authorities invoked copyright protection as a reason to stop the publication of leaked information about military operations in Afghanistan, is used as the basis for the analysis. One essential question is whether copyright protection can prevent access to public information and whether fundamental rights such as freedom of expression can be used as limitations of copyright in addition to the regulations in the InfoSoc Directive. The authors claim that the ‘concretisation of freedom of art through copyright makes an often-overlooked contribution to the success of every democratic basic order’ and envisage strengthening the protection of intellectual property rights.

In Chapter 9, ‘Property in Families and the Inheritance Context’, Anatol Dutta carries out what he calls ‘a small survey’ of the relationship between property law in general and particular property questions related to the changing role of property in family relations. The family has changed from a broad economic and organisational unit where wealth belonged to the family and not to individuals, to a situation where family relations are personal relationships and property belongs to individuals. The family no longer has a legal personality and the family property belongs to individuals, although family relations still influence the property of the family members. Dutta analyses the influence of family relations on horizontal relations between spouses, registered partners or cohabitants and vertical or inter-generational relations. The division of property after the owner’s death or the dissolution of a marriage or other forms of partnership varies considerably between jurisdictions. The author presents the differences between the civil and common law systems and the Nordic systems, and discusses the impact on property rights of matrimonial law. The right to make transactions on a property is, for example, limited to protect the family’s economic base. The rules for cross-border relations differ between marital property and other property cases. The EU rules on succession regulation are based on the principle of habitual residence. In contrast, the national
rules that apply to tangible assets are predominantly based on the *lex sitae rei* principle.

In Chapter 10, ‘The Organization of Public Registries: A Comparative Analysis’, Benito Arruñada presents many years of research on different organisational forms of registries. Property rights registries are an essential part of the institutional framework or infrastructure that enhances the economic and social function of property rights. Many societies and international institutions, such as the World Bank, have invested heavily in recent decades in the development of registries to achieve economic growth by reducing transaction costs, making transactions more secure and making economic values visible. Digitisation is driving this development by making the registration process and access to information more effective and creating virtual property rights that need to be registered. A discussion about the best form of organisation for registries has been ongoing for decades. Arruñada bases his discussion on general theory and practical experience of the organisation of public activity when providing public services of economic value for private persons and the specific considerations that apply to the registry of rights. He compares budgetary bureaucracy based on expense centres, internal markets that take payment for services, hybrid solutions with franchised units and privatised public services where the services are transferred to private firms. The discussion also compares the solutions in several countries with different legal regulations of property rights, such as the degree of *numerus clausus* and liability for registration errors. He suggests that market forces could play a better role in organising public registries when they are limited to a few variables, which makes more substantial incentives possible while at the same time reducing the need for extensive planning and supervisory staff.

Chapter 11 by Hans Fredrik Marthinussen, ‘(De-)Constructing Mortgages: Reflections on Accessoriness, Properties of Good Mortgages, and the Development of New Mortgage Legislation for Transition Economies or even a Future Euro-mortgage (“Eurohypothec”)’, deals with the crucial function of property rights as the basis for credit and the financing of investments. Marthinussen discusses the construction of mortgages (he uses the term broadly, covering all forms of security rights *in rem* over real property). The lack of a common foundation for mortgage rules in Roman law has led to a wide variety of legal constructions of mortgage arrangements in Europe and different solutions of great complexity, which are largely the result of the creative use of existing law to meet practical needs. One essential trait is the relationship between a security right and the secured obligatory claim (‘accessoriness’). From a comparative perspective, Marthinussen analyses the current development in several jurisdictions towards more independence between security rights and the underlying claim, before discussing and evaluating possible solutions to the problem. The balance between the advantages and risks
of an independent mortgage raises difficult questions, and Marthinussen discusses possible remedies to address, for example, the risk of double payments. Digital registration systems offer the possibility of new solutions that are more in line with the needs of the financial markets. Marthinussen also discusses the criteria that should govern mortgage reform and a possible pan-European mortgage (Eurohypothec).

In Chapter 12, ‘Ancillary Rights: Servitudes’, Roderick RM Paisley discusses the problem of the extent of limited rights over someone else's property in Scots law. The primary use typically defines the content of a servitude, for example, a way or a cable across a property. The dominant proprietor might need a right to another use of the burdened property to exercise the servitude. The extent of such ancillary rights has not received much attention in legal doctrine. Paisley underlines that an ancillary right is a part of the servitude itself and is governed by the same rules. Paisley nevertheless outlines reasons for making the distinction. One is that the burdened owner might, in some cases, be obliged to take positive action to facilitate an easement. Another is that the *numerus clausus* principle applies to servitudes but not to ancillary rights. Paisley discusses the criteria an ancillary right must fulfil to be recognised.

In the last chapter, ‘Public Property, Economic Efficiency and Fair Competition: A French and EU Law Paradoxical Perspective’, Bertrand du Marais addresses part of a general issue of the utmost importance: publicly owned property regulation. Publicly owned property is an issue that is often not given enough attention in textbooks on property law. Du Marais discusses some central questions that illustrate the conflict between public interests and the requirement for economic efficiency in the management of public resources. In France, public property is governed by a separate act. The chapter mainly focuses on the regulation of property in the public domain, that is, publicly owned assets intended for use in the public interest, which does not necessarily correspond with the economic definition of a public good. The author describes the French regulation of the management of public property and the response to the 2016 *Promoimpresa* decision by the European Court of Justice, which requires an open competitive bidding procedure for the conclusion or renewal of authorisation to operate an economic service using public property. France thereby went from being one of the most protective public property regimes to one of the most pro-competitive regimes in the EU. The author concludes the chapter with some interesting and sharp observations about regulatory design and the dilemmas that arise between economic efficiency, social efficiency and legal certainty, sometimes under political pressure, using examples such as the Olympic and Paralympic Games of 2024 and the reconstruction of Notre Dame.

The chapters in this book demonstrate the complexity and diversity of issues concerning property law and property rights and the profound and lasting
impacts of property institutions on social, economic and ecological development. They also emphasise the effort needed to develop property institutions with the incentives and opportunities to meet future challenges in a robust and sustainable manner.