1 Introduction

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Property Law and Economics is the fifth volume of the second edition of the Encyclopedia of Law and Economics series. The second edition continues the ambitions of the first edition which is to provide a reference work surveying most of the law and economics literature. The Encyclopedia allows the researcher to get efficiently acquainted with the literature on his research topic and look for publications of possible interest. Consulting the Encyclopedia puts the saying ‘standing on the shoulders of the former generation’ in practice and avoids duplicate efforts within the research community.

As with the first edition, the chapters of this volume contain two parts. First a review of the literature on the subject. The review is written by an authority in the field. On average the length of these reviews is 30 pages. Second, a quasi complete bibliography.

In the reviews the authors discuss the basic questions concerning the institutions involved, compare the legal solutions across different legal families (mainly common and civil law) and jurisdictions and provide an outline of the genesis of economic theories concerning the institutions within their focus. In Chapter 12 (‘Security Interests, Creditors’ Priorities, and Bankruptcy’), for instance, Bowers provides us with an outline of the evolution of the economics of bankruptcy law starting from the seminal insights of Jackson and the further directions the literature developed from Jackson’s insights. The bibliography starts from the beginning of the law and economics literature and is updated until the end of 2007. Most listed publications are in English but as English is the ‘lingua franca’ of law and economics many publications, although in English, are of a non-Anglo-Saxon origin. For non-English publications a translation of the title is provided.

Concerning the quotation style the system prevailing in most economic literature was chosen. Within the text of the review the name of the author(s), the year of publication and eventually the page are mentioned while within the bibliographical list the full title of the book or article, the name of the journal, the volume number of the issue, the year of publication and the number of the first and last page are mentioned. Also the court cases, discussed within the reviews, are listed at the end of the bibliography.
Selection of entries and structure

Unlike the first edition in 2000 the volumes of the Encyclopedia are conceived as independent publications covering all the legal topics in one more or less delineated field of the law. Beside the chapters dealing with the law and economics literature on the different legal subjects, entries on the legal history of property rights and comparative property law were also added. The addition of the legal historian chapter allows the reader of this to put some legal subjects, mentioned in the law-and-economics-entries, in a historical perspective which may enrich the multi-disciplinary approach of his study. The addition of the comparative law chapter allows the reader, especially the reader without legal training, to place legal-technical problems, dealt with in the law-and-economics chapters, within the larger framework of the legal tradition. The legal historian and the comparative law chapters may also generate suggestions for further law-and-economics research. In the comparative law chapter (Chapter 3) for instance Van Erp and Akkermans mention several tendencies in modern property law, common to most national jurisdictions. They mention the indirect impacts of European law on property law, the dematerialization of property, the rise of party autonomy and the erosion of the *numerus clausus*-principle. These tendencies could be interesting subjects for further law-and-economic analysis.

As far as the selection of the topics of the chapters is concerned, some difficult choices had to be made. The borderline of property law with other branches of the law is often porous and unclear. This problem, existing in the legal tradition, reflects also on the subdivision of the legal-economic literature.

There are, however, legal chapters whose belonging to the domain of property law is beyond any discussion. On all these chapters a law-and-economics entry was written. These non-discussed property law-subjects are: private and common property rights (Elinor Ostrom and Charlotte Hess); original assignment of private property (Boudewijn Bouckaert); decomposition of property rights (Jeffrey Evans Stake); nuisance (Timothy Swanson and Andreas Kontoleon); adverse possession (Ben Depoorter); title systems and recordation of interests (Boudewijn Bouckaert).

Besides these ‘classics’ we included chapters on three other topics, the belonging to the domain of property law is not so evident at all, especially for classical lawyers.

Consider in the first place Chapter 10 on the economics of slavery, written by Jenny Wahl. Classical lawyers will classify this subject rather within the field of human rights than under property rights. This classification is of course largely influenced by the normative position law, and
especially international law, took on slavery by taking human personality as such out of the field of patrimonial rights and the sphere of commodification by the market. Property rights on human beings and the marketization of human beings were, however, historical realities in the Roman Empire, in Europe from the sixteenth to the eighteenth century and in the American South until 1865. As markets in human beings can be analyzed in the same way as markets in goods and services, the economics of slavery may generate insights into the phenomenon, a mere moral-philosophical approach cannot.

Chapter 11 on ‘New forms of private property: property rights in environmental goods’, written by Daniel Cole, deals mainly with environmental regulations, a subject classical lawyers would classify under the administrative law. As is shown in this chapter, the regulatory framework in this field evolved often towards a property approach, in which the administrative permits were considered as a kind of rights, in many respects similar to classical property rights. These permits can be traded and are considered as an asset, being part of the collateral of the holder. Consequently the inclusion of this chapter in a property volume is largely justified from an evolutionary point of view.

Chapter 12 on ‘Security interests, creditors’ priorities, and bankruptcy’, written by James Bowers, covers at the contrary a set of rights classified, especially by civil lawyers, within the field of property law. Mortgages, pledges, liens and other contractual priority rights are considered to be ‘dependant real rights’ as they are dependant on a debt obligation of which they are a security. This is in contrast to the ‘independent real rights’, aiming at the organisation of an orderly use and transfer of corporeal goods. From a mere conceptual viewpoint these rights are indeed property rights as they have a holder, as there is a certain power of the holder on the concerned asset, as they are tradable and belong to the patrimony of the holder. From a mere functional analysis the classification within the field of property rights can be challenged however. The rationale of these rights is so closely connected with the functioning of credit markets and the functioning of corporations that inclusion into a volume on corporate law could be justified.

Finally there are also some subjects for which there are good reasons to include them into a volume on property rights but which were, also for some good reasons, not included. The subject of takings for instance has many links with property law as it deals with a way of acquisition of real property by the government. Most often classical lawyers will classify this subject under constitutional law (the general principles) and the administrative law (the technical details on the reasons for taking and its procedure). Both classifications are justified. As more elements in the law
on takings rather lean towards public law, an entry on taking will appear in the volume on public law. Also for zoning law there are arguments to include it in a property volume. Zoning law involves limitations on land use through a system of planning and permits. Most often these permits are tied to the land and as a consequence tradable. In this sense they follow the logic of the tradable permits, discussed within Chapter 11 by Daniel Cole. Also here, however, the administrative element seems to be the most important so that a chapter on zoning was not included. In so far as zoning law is related with more classical property rights, the subject is discussed in this volume, as for instance in Chapter 6 by Jeffrey Evans Stake, where zoning law is compared with other legal instruments to order land use like easements and restrictive covenants.